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AYRES v. CITY COUNCIL OF CITY OF LOS ANGELES.

L.A. 20673.

Supreme Court of California, in Bank.

June 14, 1949.

1. Municipal corporations 🔑43

Where there is no specific limitation in a city charter on power of city to impose conditions in approving a subdivision map, and none in the Subdivision Map Act or in city ordinances forbidding the conditions, conditions should be deemed lawful if not inconsistent with the act and ordinances and if reasonably required by the subdivision type and use as related to the character of local and neighborhood planning and traffic conditions. Business and Professions Code, § 11500 et seq.

2. Municipal corporations 🔑43

The word "improvement", as used in provision of the Subdivision Map Act providing that, if there is a local ordinance regulating design and "improvement" of subdivisions, subdivider shall comply with its provisions before map may be approved, refers only to such improvements as are to be installed by the subdivider on the land to be dedicated to those needs. Business and Professions Code, § 11511.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Improvement".

3. Municipal corporations 🔑43

Conditions imposed by city council on proposed subdivision that 10-foot strip abutting on boulevard be dedicated for widening of boulevard, that 10-foot strip along rear of lots be restricted to planting of trees and shrubbery for purpose of preventing direct ingress and egress between lots and boulevard, that extension of street be dedicated to a width of 80 instead of 60 feet, and that area covered by extension of another street be dedicated for street use for purpose of eliminating it as a traffic hazard, were not improper as unauthorized under Subdivision Map Act. Business and Professions Code, § 11500 et seq., 11510, 11511, 11525, 11526, 11538, 11539, 11551, 11552; Gen. Laws Act 5211b; Const. art. 11, § 6.

4. Municipal corporations 🔑43

Fact that fulfillment of conditions imposed by city council on proposed subdivision map for 10-foot strip abutting boulevard for widening of boulevard, 10-foot strip along rear of lots to be restricted to planting of trees and shrubbery, extension of street to a width of 80 instead of 60 feet, and extension of another street for purpose of eliminating traffic hazard, would incidentally also benefit the city as a whole, was no defense to the conditions. Business and Professions Code, § 11500 et seq.

5. Municipal corporations 🔑43

Fact that conditions imposed by city on proposed subdivision map contemplated future as well as more immediate needs was not a valid objection to such conditions. Business and Professions Code, § 11500 et seq.

6. Municipal corporations 🔑43

Fact that uniform plan was lacking, because of some discrepancies in uniformity or delays in enforcement of fulfillment of conditions imposed by city on proposed subdivision map, did not render the conditions invalid. Business and Professions Code, § 11500 et seq.

7. Municipal corporations 🔑43

Conditions imposed by city on proposed subdivision map that 10-foot strip abutting boulevard be dedicated for widening of boulevard, that 10-foot strip along rear of lots be restricted to planting of trees and shrubbery, that extension of street be dedicated to width of 80 instead of 60 feet, and that area covered by an extension of another street be dedicated for street use for purpose of eliminating it as a traffic hazard, were not invalid on ground that use of land for such purposes was contemplated by city in any event, and that conditions were unconstitutional as an exercise of the power of eminent domain. Business and Professions Code, § 11500 et seq.

CARTER and SCHAUER, JJ., dissenting.

◆

Appeal from Superior Court, Los Angeles County; W. Turney Fox, Judge.

Mandamus proceeding by Donald B. Ayres against the City Council of the City of Los Angeles to compel the defendant to approve proposed subdivision map without certain imposed conditions. From a judgment denying relief, the petitioner appeals.

Judgment affirmed.

Prior opinion 191 P.2d 546.

Howlett & Elson and Musick, Burrell & Ingebretsen and Eugene M. Elson, Los Angeles, for appellant.

Ray L. Chesebro, City Attorney, Boruke Jones, Assistant City Attorney, and Lester L. Lev, Deputy City Attorney, Los Angeles, for respondent.

SHENK, Justice.

This appeal is by the petitioner from a judgment denying relief in a mandamus proceeding brought to compel the respondent city council to approve a proposed subdivision map without certain imposed conditions.

A tentative map for the subdivision of thirteen acres owned by the petitioner in what is commonly known as the Westchester District in the city of Los Angeles was submitted in October 1944 to the city planning commission pursuant to the Subdivision Map Act, Stats.1937, p. 1874, as amended, now Sec. 11500 et seq. Business & Professions Code. The planning commission attached four conditions to which the petitioner objected, whereupon he appealed to the city council. The matter was noticed for a hearing before that body, after which an order was made sustaining each of the conditions. The petitioner thereupon commenced the present proceeding in the superior court. Because of the inclusion in the petition of allegations tendering the issue of lack of a full hearing, the court in overruling the demurrer to the petition also ordered that the trial of other factual issues proceed on presentation and consideration of all material and relevant evidence. The trial consumed two weeks in the course of which the trial judge viewed the locality of the proposed subdivision. Findings were made and judgment entered upholding the lawfulness and reasonableness of the imposed conditions. The appeal involves the sufficiency of the evidence to support the findings and judgment.

The area known as Westchester District of which the proposed thirteen acre subdivision forms a part consists of 3023 acres. It is bisected in a northerly and southerly direction by Sepulveda Boulevard, and easterly and westerly by Manchester Boulevard. It extends one mile to the south of Manchester and a mile and a half to the north; and one mile on either side of Sepulveda. Before subdivision the land in the district was owned by Los Angeles Extension Company, Security-First National Bank of Los Angeles, and Superior Oil Company. The petitioner represented the latter as subdivider and selling agent. In 1940 the formation of a general plan of development of the district was commenced. The plan fixed the business area on Sepulveda Boulevard immediately south of Manchester Boulevard and the petitioner was placed in charge of development by the subdividers. The so-called cellular design of residence lot subdivision was employed so that the rear of residential lots abuts the principal thoroughfares, thus prohibiting access to the lots therefrom. Another purpose of this type of subdivision was to minimize the amount of land required for street purposes. This general plan had been followed in the Westchester district. Requirements insuring uniformity were imposed, among which were the dedication of a ten foot strip in the residence areas and a thirteen foot strip on each side in the business section for the widening of Sepulveda Boulevard, and the setting aside of a strip for planting purposes varying in width at the rear of lots in the residence sections bordering the principal thoroughfares.

The petitioner's thirteen acre tract, the last of the subdivisions in the district, is a long narrow triangle. Its northerly boundary is less than 500 feet in length, and the southerly point of the triangle about 2400 feet from the northerly line. Arizona Avenue runs along the westerly line. Sepulveda Boulevard, the principal thoroughfare and heavily trafficked artery, borders the easterly line. These highways converge and form the southerly point of the triangle. Sepulveda Boulevard, from a point a short distance north of the convergence to the north line of the tract, is 100 feet wide but south of that point is 110 feet wide. Seventy-Seventh Street enters Arizona Avenue from the west approximately opposite the center of the tract, and the proposed subdivision map shows the extension of that street through the tract. Seventy-ninth Street enters Arizona Avenue from the west a short distance north of the southerly point of the tract. An extension of that street through the subdivision would leave a triangular tip of land about 12½ feet wide by 75 feet to the southerly point. The proposed subdivision would include ten residence lots north of the Seventy-Seventh Street extension fronting on Arizona Avenue with 80 foot frontages and depths to Sepulveda Boulevard varying from 312 to 462 feet. Entrance to the residence lots would be from Arizona Avenue exclusively. The lot immediately north of and adjoining the Seventy-Seventh Street extension is proposed to be used for business drive-in and the lot south of Seventy-Seventh Street for religious purposes.

The four conditions imposed by the planning commission and approved by the city council and the trial court are:

1. That a ten foot strip abutting Sepulveda Boulevard be dedicated for the widening of that highway.

2. That an additional ten foot strip along the rear of the lots be restricted to the planting of trees and shrubbery for the purpose of preventing direct ingress and egress between the lots and Sepulveda Boulevard.

3. That the extension of Seventy-Seventh Street be dedicated to a width of eighty instead of sixty feet.

4. That the area which would be covered by an extension of Seventy-Ninth Street and south to the point of the triangle be dedicated for street use for the purpose of elminating it as a traffic hazard.

The petitioner objected to the foregoing conditions on the ground that they were not expressly provided for by the Subdivision Map Act nor by city ordinance; that conditions 1, 2 and 4, and condition 3 in so far as it required dedication in excess of 60 feet in width, bear no reasonable relationship to the protection of the public health, safety or general welfare, and amount to a taking of private property for public use without compensation.

Article VIII, Secs. 94 to 99½, of the Los Angeles City Charter deals with the Department of City Planning. By section 94 the department is given all the powers and duties which are granted to or imposed upon city planning commissions or departments by state law, and as provided by city ordinance, subject to Article VIII. Pursuant thereto and to the Planning Act of 1929, Stats.1929, p. 1805, as amended, Gen.Laws, Act 5211b, there is functioning in the City of Los Angeles a planning commission and a director of planning appointed by it who acts as the advisory agency of the commission. Section 95 of the charter requires the director of planning to prepare a master plan for the physical development of the city, and vests in him the powers and calls for discharge of the duties in relation to proposed subdivisions as required by the Subdivision Map Act and as may be imposed by ordinance. By section 96½ the planning commission is required to hold hearings on the master plan or parts thereof and consider and adopt the same.

Section 11525 of the Subdivision Map Act vests control of the design and improvement of subdivisions in the governing bodies of cities and counties, subject to review as to reasonableness by the superior court in and for the county in which the land is situated.

Section 11526 provides that the design, improvement and survey data of subdivisions and related matters, including procedure in securing official approval, are governed by the provisions of the Subdivision Map Act and by the provisions of local ordinances regulating the design and improvement of subdivisions.

Section 11538 makes it unlawful for any person to offer for sale or to sell any subdivision lot until the filing of a final map in compliance with the Act and local ordinances. The conveyance of any part of a subdivision by lot or block number is not permitted until a final map has been recorded. Sec. 11539. Section 11550 declares that the initial action is the preparation of a tentative map with data as specified in the local ordinances and the Map Act.

Section 11551 states that if there is a local ordinance regulating the design and improvement of subdivisions the subdivider shall comply with its provisions before the map may be approved; but if there is no such ordinance the governing body as a condition precedent to approval may require streets and drainage ways properly located and of adequate width but may make no other requirements.

Section 11552 provides that if the subdivider is dissatisfied with the initial action regarding the tentative map he may appeal to the governing body which upon a noticed hearing shall take testimony as to the character of the neighborhood in which the subdivision is to be located, the kinds, nature and extent of improvements, the quality or kinds of development to which the area is best adapted and any other phase of the matter it may desire to inquire into, at the conclusion of which the governing body may make such findings as are not inconsistent with the provisions of the Act or local ordinances.

The words "Design" and "Improvement" as used in the Act are defined. Section 11510 provides that "Design" refers to street alignment, grades and widths, alignment and widths of easements and right of ways for drainage and sanitary sewers and minimum lot area and width. Section 11511 defines "Improvement" as only such street work and utilities to be installed, or agreed to be installed, by the subdivider on the land to be dedicated for streets, highways, etc., as are necessary for the general use of the lot owners in the subdivision and local neighborhood traffic and drainage needs.

Ordinance No. 79,310 of the City of Los Angeles, as amended, prescribes the rules and regulations governing the platting and subdividing of lands and the filing and approval of subdivision maps. The ordinance adopts the definitions for "Design" and "Improvement" as declared in the Subdivision Map Act. Specifically treated are such subjects as Primary and Secondary Streets, which are to conform to the Master Plan of traffic arteries, Alignments, Street Widths, Grades, Curves and Tangents, Intersections, Dead-ends, Rounding Block Corners, Private Streets, Alleys, Size, Frontage and Side Lines of Lots, Blocks, Sewer and Drainage Grades and Facilities, Existing Improvements, Dangerous Areas, Easements, Walkways, and the like. Under "Conditions of Acceptance" it is provided that the city engineer may refuse to accept any final map which does not conform to the provisions of the Subdivision Map Act, the provisions of the ordinance, or the conditions of approval of the tentative map. It is also provided that upon recommendation of the advisory agency or the city engineer such variations may be made as in the exercise of sound, reasonable, judgment may be warranted or required because of the size, use, physical or other conditions of the property, or the type of subdivision, except that no variations may be made as to the requirements of the Subdivision Map Act.

It appears to be the petitioners contention that no condition may be exacted which is not expressly provided for by the Subdivision Map Act or the ordinance provisions not in conflict therewith; that at all events the requirements may deal only with streets to be laid out by the subdivider within the confines of the subdivision to take care of traffic needs therein, and that no dedication may be exacted for additions to existing streets or highways.

[1] It must be obvious at the outset that this effect may not be drawn from the statute or from the city's organic law or ordinances. The foregoing review of those provisions does not indicate that the authority of the city planners is so circumscribed. The status of an autonomous city, Const. Art. XI, sec. 6; West Coast Advertising Co. v. San Francisco, 14 Cal. 2d 516, 95 P.2d 138; City of Oakland v. Williams, 15 Cal.2d 542, 103 P.2d 168, is recognized by express references to city ordinances in the Subdivision Map Act. Where as here no specific restriction or limitation on the city's power is contained in the Charter, and none forbidding the particular conditions is included either in the Subdivision Map Act or the city ordinances, it is proper to conclude that conditions are lawful which are not inconsistent with the Map Act and the ordinances and are reasonably required by the subdivision type and use as related to the character of local and neighborhood planning and traffic conditions.

[2, 3] The petitioner relies on section 11551 of the Act which purports to limit authority to impose conditions in the absence of local ordinances, and on the definition of the word "Improvement" in section 11511. But here the applicable provisions of the ordinances and of the Act do not restrict reasonable conditions to provide streets and highways in relation to the local and neighborhood traffic needs. The word "Improvement" as used in the act refers only to such improvements as are *to be installed by the subdivider* on the land to be dedicated to those needs. Implicit therein is the recognition that reasonable conditions may be imposed for the dedication of land for necessary purposes which is not to be improved by the subdivider. The provisions of the Act do not impose the restrictions or limitations on the land which may be dedicated as invoked by the petitioner, but merely constitute a definition of the word "improvement" as used in the Act. If the dedications for the widening of Sepulveda Boulevard and for the elimination of the southern tip of the triangle are otherwise lawfully required it can be no source of complaint to the petitioner that he is not required to make the improvement as well as the dedication. The trial court correctly determined that the conditions imposed were not precluded by the Act.

The Subdivision Map Act, Sec. 11552, and the city ordinances indicate that the matters for consideration in relation to the reasonableness of imposed conditions contemplate the character of the neighborhood, the kinds, nature and extent of improvements, the quality or kinds of development to which the area is best adapted, the traffic needs, and other phases, including the size, use physical or other conditions of the property, and the type of subdivision.

As to condition 1, that a ten foot widening strip be dedicated, the finding is that the widening of Sepulveda Boulevard had been in contemplation by the authorities whether or not the petitioner intended to subdivide; but that the creation and the proposed uses of the subdivision would give rise to traffic and other conditions necessitating the widening of the boulevard; that the widening was necessary for and would benefit the lot owners, and that the requirement was reasonably related to the protection of the public health, safety and general welfare.

With regard to condition 2, that an additional ten feet be reserved for a planting strip, the court found that such a strip was already in contemplation, but that the creation of the subdivision necessitated the restricted use to confine ingress and egress to and from the lots away from Sepulveda Boulevard; to screen the lot owners from the traffic noises, fumes and views of the fast-moving traffic on the boulevard; to provide safety islands for residents crossing the boulevard on foot and waiting lanes for vehicular traffic, and that the imposition of the condition was reasonably related to the protection of the public health, safety and general welfare.

It was found that the foregoing pattern of subdivision, including the widening and planting strips in the development of Sepulveda Boulevard frontage, was in conformity with neighborhood plan and design, and had been carried out without objection by the petitioner and others in the district until the filing by petitioner of the tentative map for subdivision of his thirteen acres. Variations in some requirements, changes in or abandonment of others, delays in making improvements, incompleteness of the master plans or failure to indicate thereon the precise details, the court found to be minor, not unauthorized, and without adverse bearing on the lawfulness or reasonableness of the conditions imposed.

The finding as to condition 3, respecting the required eighty foot width of the Seventy-Seventh Street extension through the tract, was covered by the trial court's general conclusion that there was no unreasonable application of the Subdivision Map Act as to any of the conditions objected to by the petitioner.

Specifically as to condition 4, the dedication to eliminate the southerly tip of the triangle, it was found that without regard to the subdivision it had been the intention to project Seventy-Ninth Street either across the petitioner's tract or below it; also that the subdivision would give rise to and create traffic conditions and hazards necessitating the elimination of the tip for the proper control of traffic in the locality, would benefit the lot owners in the proposed subdivision, and was reasonably related to the protection of the public health, safety and general welfare.

All intendments must be indulged to sustain the findings and judgment. Consideration alone of the physical facts and conditions, remembering also that the trial judge viewed the locality, indicate sufficient support therefor.

The contentions respecting the required width of the Seventy-Seventh Street extension will not be further discussed except to note that the proposed business and religious uses of the respective abutting lots and the fact that Seventy-Seventh is the only street to transverse the tract between Sepulveda Boulevard and Arizona Avenue, sufficiently support the conclusion that the required width is reasonably related to the potential traffic needs.

The petitioner does not quarrel with the conclusion that the other conditions are desirable and that their fulfillment will accomplish the ends stated. His more specific complaint is that the city contemplated taking the property for the purposes indicated in any event, that the benefit to the lot owners and the tract will be relatively small compared to the beneficial return to the city at large; therefore that the requirements amount to an exercise of the power of eminent domain under the guise of pursuing the authority of subdivision map proceedings, and that the exercise thereof is unconstitutional unless compensation be paid.

In his arguments the petitioner appears to have lost sight of the particular type of lot subdivision and uniformity of neighborhood design and plan theretofore applied in the locality, including the requirement for strip dedication for widening purposes and strip restriction to planting use without dedication. As stated, consideration of these matters is not precluded by the provisions of the Subdivision Map Act, but on the contrary both the statutory provisions and the local law indicate that the subdivision design and use should conform to neighborhood planning and zoning requirements. Here the greater than average depth of the lots minimizes the land loss and street improvement cost. In fact it may be said that the petitioner's position would seem to be greatly improved by this type of subdivision and its related requirements in conformity with neighborhood planning and zoning. The regular design of subdivision, with ingress and egress to and from Sepulveda Boulevard, would have been out of harmony with the neighborhood plan and traffic needs. It would have required dedication and improvement by the petitioner of lateral service roads and lanes for diversion of the local traffic to and from the main artery which the evidence shows would have used more land than for the widening and planting strips, and would have increased the cost of the improvements to be installed by the petitioner. The record indicates that the so-called cellular design was generally adopted because it interfered less with the free flow of traffic, minimized the hazards on the main thoroughfares, and reduced land dedication and improvement expense. The petitioner and the lot owners in the subdivision will participate in these benefits and savings by the selection of and adherence to the particular design. In fact the petitioner makes no objection to that design as such. It is to be assumed that he prefers it with the resulting savings in land and cost. But he seeks in addition compensation for the fulfillment of the conditions which make this type of lot subdivision feasible. Similar observations apply to the dedication of the southerly tip of the triangle. The petitioner could reasonably be required to provide for the dedication and improvement of the extension of Seventy-Ninth Street through the tract to provide safe turning for traffic to and from the subdivision, and incidentally to eliminate as a traffic hazard the practically useless remainder of the tip. He has lost nothing by the requirement for dedication and is benefited by being relieved of the burden of improvement. The conclusion is justifiable that the widening and planting strips and the elimination of the hazardous tip are as much a part of design and improvement within the proposed subdivision as would the lateral and transverse service roads and lanes had the regular or non-cellular design been selected.

[4-6] Questions of reasonableness and necessity depend on matters of fact. They are not abstract ideas or theories. In a growing metropolitan area each additional subdivision adds to the traffic burden. It is no defense to the conditions imposed in a subdivision map proceeding that their fulfillment will incidentally also benefit the city as a whole. Nor is it a valid objection to say that the conditions contemplate future as well as more immediate needs. Potential as well as present population factors affecting the subdivision and the neighborhood generally are appropriate for consideration. Nor does the fact that master plans are incomplete, or that the specific details are not shown thereon, affect the result. It was in evidence that the city had been working toward the formulation of a complete and entire master plan, although all the elements or parts thereof were not as yet in the final stage of completion. The contention that the requirements for a master plan or some over-all plan must be approved and adopted before authority vests in relation to the conditions here imposed is without merit since in any event the charter contemplates that portions thereof may be adopted. It is inconceivable that a master plan including all essential factors for a growing city could be completed in a short period of time. The trial court correctly concluded that delay in the adoption of the final master plan or plans had no material bearing on the controversial issues in this proceeding. The reasonableness of the conditions and the authority to impose them do not necessarily depend upon their inclusion in the official master plan for the district. As noted, subdivision design and improvement obviously include conformance to neighborhood planning and zoning, and it may properly be said that the formulation and acceptance of the uniform conditions in the development of the district constitute the practical adoption of a master plan and zoning requirements therefor. Nor is there merit in the petitioner's contention that a uniform plan is lacking because of some discrepancies in uniformity or delays in enforcement or fulfillment of the conditions. Time, funds and manpower are requisites to execution, and lack of speed in accomplishment, or some changes because of differing circumstances as to use or otherwise, cannot defeat the otherwise uniform and reasonable application of the imposed conditions in a growing community.

[7] The petitioner may not prevail in his contention that, since the use of the land for the purposes stated was contemplated in any event, the dedication and use reservation requirements in this proceeding are unconstitutional as an exercise of the power of eminent domain. A sufficient answer is that the proceeding here involved is not one in eminent domain nor is the city seeking to exercise that power. It is the petitioner who is seeking to acquire the advantages of lot subdivision and upon him rests the duty of compliance with reasonable conditions for design, dedication, improvement and restrictive use of the land so as to conform to the safety and general welfare of the lot owners in the subdivision and of the public. The well-considered observations in Mansfield & Swett v. Town of West Orange, 120 N.J.

L. 145, 198 A. 225, also involving a subdivision proceeding, are pertinent in this connection. The court there recognized the distinction between the exercise of the sovereign power of eminent domain and the non-compensatory nature of reasonable restrictions in respect to private interests when they must yield to the good of the community. That these general principles apply in subdivision map proceedings is also demonstrated in the cases of Ridgefield Land Co. v. City of Detroit, 241 Mich. 468, 217 N.W. 58, and Newton v. American Sec. Co., 201 Ark. 943, 948, 148 S.W.2d 311, where the distinction was made between the exercise of authority in such proceedings and the exercise of the power of eminent domain. In each of those cases it was held that the requirement for the dedication of land to the widening of existing streets was not a compulsory taking for public use; but that where it is a condition reasonably related to increased traffic and other needs of the proposed subdivision it is voluntary in theory and not contrary to constitutional concepts.

In Village of Euclid v. Ambler Realty Co., 1926, 272 U.S. 365 at 387, 47 S.Ct. 114, 71 L.Ed. 303, 54 A.L.R. 1016, it was observed that regulations, the wisdom, necessity and validity of which as applied to existing conditions were so apparent that they are now uniformly sustained, would probably have been rejected as arbitrary and oppressive a century or even a half a century ago; that while the meaning of constitutional guaranties is invariable, the scope of their application must expand or contract to meet the physical changes which are constantly coming within the field of their operation; and that only those regulations must fall which clearly do not meet the constitutional meaning as applied to changing conditions. Similar expressions are found in Miller v. Board of Public Works, 195 Cal. 477, 484–485, 234 P. 381, 38 A.L.R. 1479; Zahn v. Board of Public Works, 195 Cal. 497, 513, 234 P. 388; and Dwyer v. City Council, 1927, 200 Cal. 505, 514, 253 P. 932. These declarations by the Supreme Court of the United States and of this State more than twenty years ago are also pertinent in this case to uphold the conclusions of reasonableness based on the record.

No sufficient reasons have been advanced which would justify this court in overturning the findings of the trial court as to the authority for and the reasonableness of the conditions imposed.

The judgment is affirmed.

GIBSON, C. J., and EDMONDS, TRAYNOR, and SPENCE, JJ., concur.

CARTER, Justice (dissenting).

I dissent.

Inasmuch as it has been concluded by the majority that the conditions here involved were validly imposed under the police power, it becomes necessary to discuss appellant's contention that the conditions imposed (with the exception of condition number 3) constitute an exercise of the power of eminent domain disguised as the police power.

First, I would like to point out that the proposed projection of Seventy-Ninth Street (which would leave an isolated tip or triangle on the proposed subdivision) has been abandoned. It is this triangle which it is proposed that appellant dedicate for street purposes (Condition No. 2). The trial court found that "since the institution of said action, the location and projection of Seventy-Ninth Street in an easterly direction in and to Sepulveda Boulevard has been changed so that at the present time the plan of the City of Los Angeles with regard to the projection of Seventy-Ninth Street is to project said street into Sepulveda Boulevard at a point south of the tip of said tract so that the same will not intersect said tract or any portion thereof; * * *"

If the Subdivision Map Act is construed to mean that the City Planning Commission may require a dedication of land *to improve streets already in existence* from one who proposes to subdivide before his tentative map may be approved and recorded, regardless of the fact that there is no ordinance requiring such dedication, then it is my position that such a procedure is nothing more than a taking of appellant's property without making compensation therefor. It is my position, also, that such a construction flies in the face of the express words of the Statute, Section 11551, Business & Professions Code, and that by so doing, the majority have opened the door to the question of constitutionality. The question then presented is whether the required dedication goes beyond the police power and enters the field of eminent domain.

In House v. Los Angeles County Flood Control Dist., 25 Cal.2d 384, 385, 153 P.2d 950, 952, this Court said: "While the police power is very broad in concept, it is not without restriction in relation to the taking or damaging of property. When it passes beyond proper bounds in its invasion of property rights, it in effect comes within the purview of the law of eminent domain and its exercise requires compensation. Varney & Green v. Williams, 155 Cal. 318, 100 P. 867, 21 L.R.A.,N.S., 741, 132 Am.St.Rep. 88; Pacific Telephone etc. Co. v. Eshleman, 166 Cal. 640, 137 P. 1119, 50 L.R.A.,N.S., 652, Ann.Cas.1915C, 822."

So far as the construction of improvements is concerned, however, even though their purpose be to promote and insure the public safety and convenience, the right of the State to take "private property" without the payment of "just" compensation, has been expressly forbidden by both the eminent domain provision of the State Constitution and the due process clause of the Fourteenth Amendment to the Constitution of the United States. Cal.Const., Art. I, sec. 14; Chicago B. & Q. R. R. Co. v. Chicago, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979. Obviously, under these provisions, if the state (or its subdivisions) appropriates the land itself for a public use, it is exercising its power of eminent domain with a corresponding liability to pay the owner the value of the land.

The majority say that the ten-foot widening strip needed for Sepulveda Boulevard (Condition No. 1) is necessary and reasonably related to the protection of the public health, safety and general welfare. In Mansfield & Swett v. Town of West Orange, 120 N.J.L. 145, 198 A. 225, 234, which is, incidentally, one of the very few cases relating to subdivisions, this theory was expressly exploded: "Nor do we think that increased traffic hazards constitute a valid objection to the development. It is not a sound argument that the subdivision will attract additional dwellers, and thereby increase the volume of traffic and create the need for additional police supervision. These are mere incidents of municipal growth. The proposed developments, if surrounded with reasonable safeguards, will plainly not create abnormal traffic hazards inimical to the public welfare." And in House v. L. A. County Flood Control Dist., supra, Mr. Justice Curtis, speaking for the majority of this Court, said: "Thus there is recognized the incontestable proposition that the exercise of the police power, though an essential attribute of sovereignty for the public welfare and arbitrary in its nature, cannot extend beyond the necessities of the case and be made a cloak to destroy constitutional rights as to the inviolateness of private property."

In Bacich v. Board of Control, 23 Cal.2d 343, at 351, 144 P.2d 818, 823: "* * * it is said that in spite of that so-called policy 'the courts cannot ignore sound and settled principles of law safeguarding the rights and property of individuals. This (improvement) may be of great convenience to the public generally, but the properties of abutting owners ought not be sacrificed in order to secure it'; and, quoting from Sedgwick on Constitutional Law: 'The tendency under our system is too often to sacrifice the individual to the community; and it seems very difficult in reason to show why the State should not pay for property which it destroys or impairs the value, as well as for what it physically takes. * * *' Liddick v. City of Council Bluffs, [232 Iowa 197], 5 N.W.2d 361, 372, 382.

"In some degree those opposed policies are manifested in the conflict between the constitutional mandate that compensation be paid when private property is taken or damaged for a public purpose and the exercise of police power where compensation need not be paid. The line between those two concepts is far from clearly marked. * * * It does not appear that any *compelling emergency or public necessity* required its construction without the payment of compensation for property damaged. Therefore, the State may not escape the payment of compensation under the police power." [Emphasis added.]

The majority say that the petitioner may not prevail in his contention that, since the use of the land for the purposes stated was contemplated in any event, the dedication and use reservation requirements in this proceeding are unconstitutional as an exercise of the power of eminent domain. "A sufficient answer [say the majority] is that the proceeding here involved is not one in eminent domain nor is the city seeking to exercise that power." Why is this a sufficient answer? Is a Court to be precluded from a determination of whether or not Constitutional mandates have been disobeyed because of the *form* a proceeding takes? It would seem that because the conditions imposed were said to have been imposed under the police power should not preclude this Court from determining whether or not such was the case.

The majority rely on the "well-considered" cases of Mansfield & Swett v. Town of West Orange, supra, and Ridgefield Land Co. v. City of Detroit, 214 Mich. 468, 217 N.W. 58; and Newton v. American Sec. Co., 201 Ark. 943, 148 S.W.2d 311. In the Mansfield case, which is not particularly applicable here, there is a great deal said to the effect that city planning is an exercise of the police power. I have no quarrel with that statement. The facts of that case are distinguishable from those here under consideration. There, a proposed subdivision of a 4½ acre lot was under consideration. On this lot was an old manor house which the subdivider proposed to destroy and build in a number of homes. This proposition was disapproved by the planning board for several reasons, among which was the fact that the surrounding property owners did not approve; that it would not conform to existing conditions in the area; that it would increase traffic hazards, fire hazards, and place upon the municipality the burden of additional policing and additional supervision of traffic, and that it would interfere with safety, health and general welfare in the community. The court held that none of these objections were valid in that planning was done as an exercise of the police power and for the benefit of the public.

The Ridgefield Land Company and Newton cases support the view taken by the majority, but the reasoning leaves much to be desired, despite the adjective applied by the majority. In the Ridgefield case, it was said [214 Mich. 468, 217 N.W. 59]: "In theory at least, the owner of a subdivision voluntarily dedicates sufficient land for streets in return for the advantage and privilege of having his plat recorded." As authority for this proposition, the Court cites Ross v. United States ex rel. Goodfellow, 7 App.D.C. 1, to the effect that: "It must be remembered that each owner has the undoubted right to lay off his land in any manner that he pleases, or not to subdivide it at all. He cannot be made to dedicate streets and avenues to the public. If public necessity demands parts of his land for highways, it can be taken only by condemnation and payment of its value. But he has no corresponding right to have his plat of subdivision so made admitted to the records.

"In providing for public record Congress can accompany the privilege with conditions and limitations applicable alike to all persons. In providing for such record in the Act of 1888 (25 Stat. 451) Congress sought to subserve the public interest and convenience by requiring practical conformity in all subdivisions of land into squares, streets and avenues, with the general plan of the city as originally established, and this, regardless of the fact that it might, in instances, practically coerce the dedication of streets to public use which would otherwise have to be paid for."

The word "coerce" is particularly applicable in the case under consideration. Section 11538, Business & Professions Code, provides: "It is unlawful for any person to offer to sell, to contract to sell or to sell any subdivision or any part thereof until a final map or record of survey map thereof in full compliance with the provisions of this chapter and any local ordinance has been duly recorded or filed in the office of the recorder of the county in which any portion of the subdivision is located." Section 11539 provides: "Conveyances of any part of a subdivision shall not be made by lot or block number, initial or other designation, unless and until a final map has been recorded." Section 11541: "Any offer to sell, contract to sell or sale contrary to the provisions of this chapter is a misdemeanor, and any person, firm, or corporation, upon conviction thereof, shall be punishable by a fine of not less than twenty-five dollars ($25) and not more than five hundred dollars ($500), or imprisonment in the county jail for a period of not more than six months, or by both such fine and imprisonment."

In the three cases relied upon by the majority (Mansfield & Swett v. Town of West Orange, supra; Ridgefield Land Co. v. City of Detroit, supra, and Newton v. American Sec. Co., supra), it would seem that the only penalty provided for in the event that the proposed subdivision was not approved was that the plat could not be recorded. These cases do not involve a fine or imprisonment, or both, as contemplated by the Map Act.

The construction placed upon the Subdivision Map Act by the majority has the effect of telling the subdivider that he may dedicate land to the city for the privilege of recording and selling—a matter which is not a privilege, but a *right,* in other situations, or let the land go idle, or sell it and go to jail, pay a fine, or both. This, it appears to me, amounts to a form of duress that is reminiscent of the type of practice which prevailed in another country prior to the last great war.

It is true that in Archer v. City of Los Angeles, 19 Cal.2d 19, 23, 24, 119 P.2d 1, 4, a majority of this Court said: "The state or its subdivisions may take or damage private property without compensation if such action is essential to safeguard public health, safety, or morals. [Citing cases.] In certain circumstances, however, the taking or damaging of private property for such a purpose is not prompted by so great a necessity as to be justified without proper compensation to the owner. [Citing cases.] The liability of the state under article I, section 14 of the California Constitution arises when the taking or damaging of private property is not so essential to the general welfare as to be sanctioned under the 'police power' [citing cases], and the injury is one that would give rise to a cause of action on the part of the owner independently of the constitutional provision." [Citing cases.] This is a doctrine of stateism with which I positively disagree as appears from my dissenting opinion in that case.

Manifestly, the correct test of whether or not the police power has been properly exercised is not and never has been the degree of public necessity. To be appropriate it must be for the public health, safety, morals, or general welfare. We should all agree upon that. But if the degree of public necessity be the test, then the constitutional guarantee of just compensation for property taken for a public use is completely and forever abrogated. If a legislative body finds that public necessity requires the taking of property for highways, for streets, for a water supply, for recreational areas, for hospitals, for schools or other public buildings, or for a myriad of other public purposes, the courts must accept such a finding as conclusive. If such a finding is all that is necessary to warrant the exercise of the police power, there will be no occasion for the state or other public agency ever paying for any private property taken or damaged for a public improvement. Who may say that property for schools, highways, streets, etc., is not absolutely necessary for the proper functioning of the government? Indeed, it is an indispensable factor in the exercise of the power of eminent domain where compensation is payable, that the public convenience and necessity demand the taking or damaging of any private property involved in the public improvement contemplated Thus, under the theory advanced in the majority opinion, in any case that the power of eminent domain may be properly exercised, the police power could also be invoked with the result that no compensation could be recovered. Although it is difficult to charter the dividing line between the exercise of the two powers, it should be said that police power operates in the field of regulation, except possibly in some cases of public emergency, such as a fire, where buildings may be destroyed, rather than in the taking of property for some public improvement. "But the moment the legislature passes beyond mere regulation, and attempts to deprive the individual of his property, or of some substantial interest therein, under pretense of regulation, then the act becomes one of eminent domain, and is subject to the obligations and limitations which attend an exercise of that power * * *. Under the one [police power], the public welfare is prompted [sic] by regulation and restricting the use and enjoyment of property by the owner; under the other [eminent domain], the public welfare is promoted by taking the property from the owner and appropriating it to some particular use." Lewis, Eminent Domain, 3rd Ed., Vol. 1, sec. 6, p. 14.

In Beals v. City of Los Angeles, 23 Cal.2d 381, 387, 144 P.2d 839, 842, Chief Justice Gibson, speaking for the majority of this Court, said: "We agree, however, with plaintiff's contention that the complaint states a cause of action. Closing of the alley results in the taking or damaging of private property for a public use. It is settled that the ascertainment and payment of damages is a condition precedent to the right of a city to do public work which will destroy or damage private property. [Cases cited.] The obligation to make compensation arises from the constitutional provision that 'Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner * * *.' Cal.Const., art. I, sec. 14. In Bigelow v. Ballerino, 111 Cal. 559, 564, 44 P. 307, 309, which also involved the vacation of an alley, it is stated that, 'The constitutional rights of an owner of private property which is sought to be taken or damaged for public use are two: First, the right to compensation; and second, the right to have that compensation made or paid into court before his property is taken or injuriously affected. * * * *the property owner may rest secure in the protection which the constitution affords him that his property shall not be taken or damaged without compensation first made.* It is not incumbent upon him to demand that the authorities shall respect his rights; the duty is theirs to work no unlawful invasion of them.'" [Emphasis added.]

In People v. Ricciardi, 23 Cal.2d 390, 397, 144 P.2d 799, 803, Mr. Justice Shenk, speaking for the majority of this Court, said: "It is also the settled law that: 'An abutting owner has two kinds of rights in a highway, a public right which he enjoys in common with all other citizens, and certain private rights which arise from his ownership of property contiguous to the highway, and which are not common to the public generally; * * *. An abutting landowner on a public highway has a special right of easement and user in the public road for access purposes, and this is a property right which cannot be damaged or taken away from him without due compensation.'"

And yet, this same Court now holds that certain land may be taken from a property owner for improvement of an existing street just because he wishes to subdivide his property adjacent thereto. If he chooses to build a house for himself and live there in solitary splendor, could the City require dedication of land for street widening purposes, or would it be required to pay him just compensation? what if he chooses not to subdivide and the proposed plan for widening Sepulveda Boulevard goes through?

The widening of the space for vehicle traffic in a street or other highway, by adding to the street or highway a strip of land of an abutting property owner, clearly gives the owner a right to compensation. Tulsa v. Hindman, 128 Okl. 169, 261 P. 910, 55 A.L.R. 896; Fulton County v. Amorous 89 Ga. 614, 16 S.E. 201; Terrell County v. York, 127 Ga. 166, 56 S.E. 309; Village of Watkins v. Welch Grape Juice Co., 96 App.Div. 114, 89 N.Y.S. 47; Peckham v. Henderson, 27 Barb. [N.Y.], 207; Quantz v. Concord, 150 N.C. 400, 64 S.E. 433; In re Girard Avenue, [Pa.] 18 Phila. 499; Barnhart v. City of Grand Rapids, 237 Mich. 90, 211 N.W. 96; Dow Arneson Co. v. City of St. Paul, 177 Minn. 164, 225 N.W. 92; Sherlock v. Mobile County, 241 Ala. 247, 2 So.2d 405; City of Raleigh v. Hatcher, 220 N.C. 613, 18 S.E.2d 207. There would appear to be no necessity for citing the numerous cases involving street widening done by the State, or its subdivisions, *under the power of eminent domain.*

I object to the following statement in the majority opinion as unsound and in conflict with settled law: "As noted, subdivision design and improvement obviously include conformance to neighborhood planning and zoning, and it may properly be said that the *formulation and acceptance of the uniform conditions* in the development of the district constitute the *practical adoption* of a master plan and zoning requirements therefor." [Emphasis added.] No authority is cited for this amazing statement which is directly contrary to one made by the same author in the case of Kleiber v. City etc. of San Francisco, 18 Cal.2d 718, 724, 117 P.2d 657, 660: "The act [Housing Authority Law] also prescribed the powers, duties and obligations of the authority and of the city in carrying out its salutary purposes. Every necessary legislative act was completed by the legislature. There was nothing left to do except to administer the law. Governing bodies of cities, counties, or cities and counties perform both legislative and executive or administrative acts. The former is ordinarily performed by ordinance; the latter may be done by resolution. The steps to be taken by the city to gain the advantages afforded by the law are in the ascertainment of facts, and are administrative in character. *To gain those advantages the city must proceed in the manner specified in the act. Furthermore, since the statute is the only authority under which the city may act in the premises, and the subject matter of the action is of more than local concern, the city is bound to proceed in accordance therewith.*" [Emphasis added.]

The Planning Act of 1929 as amended, Stats.1937, ch. 665, p. 1817, 2 Deering's Gen. Laws, 1944 ed., Act 5211b, p. 1768, provides for the adoption by the City of a master plan, or portions thereof. The Charter of the City of Los Angeles provides for the preparation of a master plan or portions thereof by the Director of Planning and the City Planning Commission and for the adoption thereof by the City Council. The Charter, Article III, sec. 21, also provides that "All legislative power of the city except as herein otherwise provided is vested in the Council and shall be exercised by ordinance, subject to the power of veto or approval by the Mayor as herein set forth. Other action of the Council may be by order or resolution, upon motion."

It would seem that the control of streets in a city—laying out, widening, etc.—is a legislative power delegated by the State. 4 McQuillin, Municipal Corporations, p. 73; Kellogg v. Sherrill, 24 Ohio App. 169, 156 N.E. 418. And that any plan proposed by the Planning Commission for such streets must be established by ordinance adopted by the City Council *as provided for by the City Charter.*

McQuillin, speaking of city planning, has this to say: "Manifestly all action on the part of the city in this, as in other respects, must be sanctioned by the law. No power can be exerted by its officers, or citizens however necessary or desirable unless it proceeds from legislative authority consistent with organic legal provisions, national and state. Inasmuch therefore as city planning and zoning involves interference more or less with the rights of persons and of property the path along which the city may safely move in this enterprise should be known, otherwise difficulties and failures are certain. If under the law as it now stands obstacles interpose they may be removed by knowledge of the city's political and legal status, its power and the source and construction thereof, including, of course, judicial decisions relating thereto which point out the purpose of constitutional guarantees and rights of persons and of property as such rights exist at the time of the action, and as they may be restricted in response to insistent reasonable public requirements by the particular community or the part thereof involved." 1 McQuillin, Municipal Corporations, 2nd Ed., p. 354.

The same arguments are applicable to the requirement (Condition No. 4) of a ten-foot strip of land for tree and shrub planting purposes. The Map Act does not contemplate the imposition of such a condition. The Act refers to street alignment, grades, widths, easements, rights of way for drainage and sanitary sewers, minimum lot area and width, street work, utilities, highways and public ways. Assuming that this is a requirement analogous to a setback line and that the Director of Planning may be authorized by ordinance to impose such a condition in the interests of the public health, safety, etc., there is still no *ordinance* so providing, and there is no such provision in the Map Act. As this Court said in the Kleiber case, supra, "the city must proceed in the manner specified in the act. * * *"

I cannot agree with the majority of this Court in the interpretation of the Subdivision Map Act, Business & Professions Code, Section 11500 et seq., or with the interpretation of the only local ordinance which is applicable to the facts at hand. In my opinion, the statutes and the ordinance should be construed in the manner hereinafter set forth.

This case involves the interpretation of portions of the California Subdivision Map Act, Business & Professions Code, sec. 11500 et seq., certain ordinances of the City of Los Angeles, and the validity of the methods employed by respondent City in administering the same.

Appellant, a Los Angeles subdivider, pursuant to the Subdivision Map Act and certain ordinances of the City, submitted to the planning department of the City of Los Angeles a tentative subdivision map of a thirteen acre tract in what is generally referred to as the Westchester district. After investigation, the city council of respondent adopted the recommendation of its planning commission and imposed upon appellant a number of conditions precedent to approval of the map. Appellant sought a writ of mandate in the trial court to require respondent city to approve the map without the imposition of the following four conditions:

(1) That appellant dedicate a strip 10 feet wide along the front of his tract for the widening of Sepulveda Boulevard on which his subdivision abuts;

(2) That appellant dedicate for street purposes the triangular southerly point or tip of his subdivision;

(3) That appellant dedicate a strip 80 rather than 60 feet in width for 77th Street which traverses the subdivision; and

(4) That appellant set aside a strip of land 10 feet in width in addition to the 10 feet needed for widening the boulevard for the planting of trees and shrubbery.

These four conditions were held by the trial court to have been validly imposed as a condition precedent to approval of the subdivision map.

Appellant contends: (1) That the State Planning Act of 1929 as amended, Stats. 1929, p. 1805, 2 Deering's Gen.Laws, Act 5211b, page 1768, is applicable to the City of Los Angeles, and that respondent had neither conformed to its provisions, nor to the provisions of the Los Angeles City Charter requiring a master plan; (2) That the proper construction of the Subdivision Map Act did not permit the imposition of conditions (1), (2), and (4), or if a proper construction did so permit, that the Act is unconstitutional in that the imposition of such conditions constituted an exercise of the power of eminent domain without compensation under the guise of the police power.

Article VIII of the Charter of the City of Los Angeles (providing for a Department of City Planning) provides in section 94½ thereof that the Department shall be under the control and management of a Director of Planning. Section 95g provides that "He [the Director of Planning] shall make investigations and report on the *design and improvement* of all proposed subdivisions of land and shall have such powers and perform such duties *as are required by the Subdivision Map Act of the State of California.*" [Emphasis added.]

The Subdivision Map Act, Business and Professions Code, supra, provides that any person, firm, corporation, partnership or association, causing land to be divided into a subdivision for himself or for others shall comply with certain formalities. Such subdivider must prepare and present to the governing body of the particular city or county a "tentative map" of the proposed subdivision and the existing conditions in and around it. *This map must comply with the provisions of the Act and of any local* *ordinance passed by the governing body of the City or County.* It also provides that it is unlawful for any person to offer to sell, to contract to sell or to sell any subdivision or any part thereof until the proposed subdivision has been approved and a map thereof recorded.

The Business and Professions Code provides: Section 11506: " 'Local ordinance' refers to an ordinance regulating the *design and improvement of subdivisions,* enacted by the governing body of any city or county under the provisions of this chapter or any prior statute, *regulating the design and improvement of subdivisions,* in so far as the provisions of the ordinance are consistent with and not in conflict with the provisions of this chapter."

Section 11510: " 'Design' refers to street alignment, grades and widths, alignment and widths of easements and right of ways for drainage and sanitary sewers and minimum lot area and width."

Section 11511: " 'Improvement' refers to only such street work and utilities to be installed, or agreed to be installed, by the subdivider on the land dedicated or to be dedicated for streets, highways, public ways, and easements as are necessary for the general use of the lot owners in the subdivision and local neighborhood traffic and drainage needs, as a condition precedent to the approval and acceptance of the final map thereof."

Section 11551: "In case there is a local ordinance, the subdivider shall comply with its provisions before the map or maps of a subdivision may be approved. *In case there is no local ordinance, the governing body may, as a condition precedent to the approval of the map or maps of a subdivision, require streets and drainage ways properly located and of adequate width, but may make no other requirements.*"

Ordinance No. 79,310 as amended by Ordinances Nos. 81,815, 83,263 and 85,666 was in effect at the time appellant submitted the map of the proposed subdivision here involved.

There was admitted in evidence a master plan for Primary and Secondary Streets which had been approved by the City Planning Commission. There is no doubt that Sepulveda Boulevard falls within the "primary street" classification. This master plan had not been adopted by the City Council by Ordinance as the following excerpt from the testimony at the trial shows. Mr. Bennett, Director of Planning for the City of Los Angeles since 1941, after testifying that it was the proper procedure for the City Council to adopt by ordinance any zoning map and text, was questioned, and answered as follows:

"Question: And Exhibit Y, which is the proposed master plan of traffic arteries for the city of Los Angeles, has that been adopted by the Council? Answer: No, sir.

"Question: Either by resolution or ordinance? Answer: No, sir."

With respect to the condition (number one, supra) imposed for the purpose of widening Sepulveda Boulevard, concededly a primary street, and upon which appellant's subdivision abuts, the ordinance makes no provision. The applicable section provides that "all streets as far as practicable shall be in alignment with existing adjacent, connecting and surrounding streets." It does not provide that the subdivider must dedicate a portion of his property for the purpose of *widening* an adjacent street. The Subdivision Map Act provides that in case there is *no* local ordinance (and local ordinance refers to "design and improvement"), the governing body may require that streets be *properly located* and of adequate width but "may make *no other requirements.*" [Emphasis added.] Business & Professions Code, sec. 11551. A reasonable construction of this section would appear to be that the governing body may require the subdivider to comply with the conditions as to width and location of streets *within* his subdivision. It makes no provision for the proposed widening of existing adjacent streets. Condition No. 4 deals with a proposed dedication or setting aside of an additional ten-foot strip for tree planting purposes. Again, neither the ordinance here involved, nor the Subdivision Act makes any provision for this. It would therefore appear that conditions 1 and 4 were invalidly imposed under the Subdivision Map Act and the applicable ordinance.

Condition No. 2 involves the proposed dedication of the southerly triangular tip of plaintiff's proposed subdivision for street purposes. It is apparent from the record that at this point or tip two main traffic arteries meet, Arizona Street on the westerly side of appellant's subdivision and Sepulveda Boulevard on the easterly side. Mr. Dorsey, the Traffic Engineer, testified that the elimination of the point was necessary to reduce the traffic hazards at that intersection. He stated that the two fundamentals of traffic engineering involved were the reduction of the points of conflict where the flow of traffic on one street intersects that on the other street, and that the traffic movements should be brought as close to a right angle as possible. But respondents set forth in their brief that the condition was imposed for the purpose of widening either Sepulveda Boulevard or Arizona Street, *or both.* It is difficult to perceive how widening either or both of the streets would eliminate the so-called dangerous point. And, again, neither the ordinance nor the Subdivision Map Act make provision for widening existing adjacent, connecting or surrounding streets.

The majority say that since "no specific restriction or limitation on the city's power is contained in the Charter, and none forbidding the particular conditions is included either in the Subdivision Map Act or the city ordinances, it is proper to conclude that conditions are lawful which are not inconsistent with the Map Act and the ordinances and are reasonably required by the subdivision type and use as related to the character of local and neighborhood planning and traffic conditions." The Charter refers to the "*design and improvement* of all proposed subdivisions." The Subdivision Map Act provides that local ordinances regulating "*design and improvement*" may be enacted by the governing body of any city or county, and the words "design and improvement" are defined by the Act. It is inconceivable how it can be said that the consistent use of these two words in the Act and in the Charter do not place a restriction upon the conditions which may be imposed. It seems very clear that the legislative intent was to provide for uniformity in subdivision planning with respect to streets, ways, drainage facilities, lot size, set-back lines and the like *within* the proposed subdivision, and that it was not contemplated that the City would widen its existing highways at the expense of the property owner. It is no answer to say that the subdivider cannot complain because he is not required to make the improvement as well as dedicate the land. Since the section defining "improvement" is expressly limited to mean the street work and utilities to be installed by the subdivider on land dedicated for such streets as are necessary for the use of the lot owners and local neighborhood traffic, the legislature must have intended that the subdivider was to dedicate land only for streets within his subdivision. It cannot be contended seriously by anyone that the legislature intended the subdivider to improve, at his own expense, a state highway such as Sepulveda Boulevard, and a street such as Arizona.

The Charter provides that the Director of Planning shall have such other duties as are imposed upon him by ordinance. Assuming that the Council could, by ordinance under the Map Act, place upon the Director the duty of requiring dedication of property by subdividers for the purpose of widening existing streets, the fact remains that there is no such ordinance in existence.

The Los Angeles City Charter provides that the Director of Planning shall have such powers and perform such duties as are required by the Subdivision Map Act of the State of California, and in "addition to the foregoing, he shall have such additional powers and duties as may be imposed upon him by ordinance." Section 97 of the Charter provides that no ordinance shall be adopted appertaining to certain matters unless approved by the City Planning Commission. Among those enumerated matters are set forth the following: "The acquisition, establishing, opening, widening, narrowing, straightening * * * of any public street, road, highway * * *." Thus it would seem that although the Planning Commission must approve, it was the clear intent that such matters should be covered by ordinance. It would appear, therefore, that condition number two was invalidly imposed under the applicable laws in force.

With respect to condition number three, that appellant dedicate a strip of land 80 rather than 60 feet in width for the widening of 77th Street which traverses the subdivision, appellant concedes in his brief that it is a street "necessary for the general use of the lot owners in the subdivision and local neighborhood traffic." Business & Professions Code, sec. 11511. From the record it appears that this condition was imposed to bring the proposed extension of 77th Street into alignment with the existing portion of 77th Street on the westerly side of Arizona Street, and thus within the provision of the ordinance as previously set forth, that all streets shall be in alignment with existing, connecting streets, and that it was properly imposed under both the Subdivision Map Act, Business & Professions Code, sec. 11551, and the applicable ordinance. Appellant's only contention with respect to the imposition of this condition is that the width required is "unreasonable." It is without merit. The state and its political subdivisions, acting in the interest of public health, welfare and safety, may make reasonable requirements. It is apparent from the record that the requirement of a width of 80 feet rather than 60 feet for 77th Street which traverses appellant's proposed subdivision is not an unreasonable or arbitrary requirement in the interests of the public safety and welfare. This condition is of the type contemplated by the Subdivision Map Act.

Appellant's contentions that the provisions of the Los Angeles City Charter and the State Planning Act of 1929, as amended, 2 Deering's Gen.Laws, Act 5211b, requiring a master plan had not been complied with in that there was no general, complete, over-all plan are without merit. The Charter, section 96½ provides that a "master plan or *any part thereof*" may be adopted by the State Planning Act (assuming without deciding that it is applicable to the City) that: "The master plan, with the accompanying maps, diagrams, charts, descriptive matter and reports shall include such of the following subjects matter [sic] *or portions thereof* as are appropriate to the city, county or region * * *." Thus it would appear that both legislative bodies did not intend that a plan, in its entirety, was to be necessary at any one particular time. A general plan for a City would include a plan for not only its subdivisions, street systems with their building lines or set-backs, but many other things necessary for a well-developed community. It cannot be seriously contended nor was it intended that a work of such magnitude could be accomplished over night.

I would, therefore reverse the judgment and direct the trial court to issue a writ of mandate directing the approval of the proposed map subject to compliance with Condition No. 3 hereinabove set forth.

SCHAUER, J., concurs.

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33 Cal.2d 908

CITY OF PASADENA v. CITY OF ALHAMBRA et al.

L. A. 19610.

Supreme Court of California, in Bank.
June 3, 1949.

Rehearing Denied June 27, 1949.

1. Dismissal and nonsuit 🔑60(2)

Under the statute requiring dismissal unless action is brought to trial within five years after filing, in computing that period, time during which for all practical purposes going to trial would be impossible whether because of total lack of jurisdiction in strict sense or because proceeding to trial would be both impractical and futile is to be excluded. Code Civ.Proc. § 583.

2. Dismissal and nonsuit 🔑60(2)

Where complaint was filed in September 1937, reference was made in February 1939, and report was filed in July 1943, and thereafter parties proceeded with reasonable dispatch to bring cause to trial, and issues depended to great extent on facts to be ascertained by referee, time consumed by reference was to be excluded, and dismissal was not mandatory because trial was not commenced within five years after filing. Code Civ. Proc. § 583.

3. Constitutional law 🔑80(2)
Waters and water courses 🔑128

Provision of the Water Commission Act authorizing court in action involving conflicting water rights to make reference to State Water Commission does not provide for exercise of judicial power by referee, and does not violate the state constitution providing for separation of powers of executive and judicial branches of government. Gen.Laws, Act 9091, § 24; Const. art. 3, § 1.

4. Statutes 🔑85(4)

Provision of the Water Commission Act authorizing court in action involving conflicting water rights to make reference to Water Commission as referee is not unconstitutional and void as a special law providing for variation from general practice and procedure in the Superior Court. Gen.Laws, Act 9091, § 24; Const. art 4, § 25.

5. Waters and water courses 🔑152(10)

Under the Water Commission Act authorizing court in action involving conflicting water rights to make reference to Water Commission, court could properly refer water rights case to division of water resources or its predecessor, the division of water rights after abolition of the Commission. Gen.Laws, Act 9091, § 24; Water Code, §§ 22, 2000, 2001.

6. Appeal and error 🔑1056(1)

Where some individuals who worked on report of referee in action involving conflicting water rights were not available for cross-examination, but man who prepared report and supervised investigation and others who worked on it testified, and there was no showing that party sought testimony of persons not present, and party was permitted to introduce evidence contrary to facts appearing in report, party could not complain of denial of opportunity to be heard in opposition. Gen.Laws, Act 9091, § 24.

7. Pleading 🔑427

Where answers of party in action involving conflicting water rights did not present claims against other defendants and were not served on them, but court ruled that issues should embrace adjudication of rights of defendants inter se and rights of each party as against every other party, and action was tried on that theory and complaining defendant had ample time to prepare and made no claim it was misled or denied due process of law, scope of proceeding was not improperly enlarged. Gen.Laws, Act 9091, § 24.

8. Waters and water courses 🔑152(5)

Where referee in action involving conflicting water rights recommended that named parties who used fairly substantial amounts be joined, and no request was made by complaining defendant for inclusion of any party who had not been joined, and defendant's interest was not injuriously affected by failure to require joinder of all possible claimants, court could properly order large users brought in over objection, and allocate water without joinder of private users of comparatively small amounts. Gen.Laws, Act 9091, § 24.

9. Eminent domain 🔑266, 279(2)

When public use has attached to production of water, inverse condemnation proceedings may be invoked, and compensation in lieu of prohibitory injunction is preferred because of inconvenience to public if service is interrupted by issuance of injunction.

10. Eminent domain 🔑266
Waters and water courses 🔑152(11)

Where municipality as chief producer of water from underground basin brought action to enjoin overdrafts and prevent depletion, and all parties, public and private, consented to be enjoined except private user whose water was devoted to public use, and monetary loss of other private users was difficult to fix and records failed to indicate public interest would be served by depriving private users of pumping rights and compensating them therefor court could properly issue injunction rather than invoke inverse condemnation proceedings.

11. Waters and water courses 🔑152(8)

Evidence in action to determine conflicting water rights in Raymond Basin area supported finding that ground water in western unit was contained in single storage basin with result that taking by each user affected others, as against claim of user that taking of water could not possibly injure upper claimants since water flowed underground like a stream.

12. Waters and water courses 🔑152(10)

In action involving conflicting water rights in the Raymond Basin area, referee's estimate of safe yield was not objectionable as an understatement.

13. Waters and water courses 🔑107(3), 152(11)

In action to determine conflicting rights to basin of underground water, to enjoin overdraft and prevent depletion, court had authority to limit taking of underground water for purpose of protecting supply and preventing undue lowering of water table.

14. Waters and water courses 🔑100, 101

Generally an "overlying right" analogous to that of riparian owner in a surface stream, is right of owner of land to take water from ground underneath for use on his land within basin or watershed, and right is based on ownership of land and is appurtenant thereto.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Overlying Right".

15. Waters and water courses 🔑127

Term "appropriation" means any taking of water for other than riparian or overlying uses.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Appropriation".

16. Waters and water courses 🔑127

Where a taking of water is wrongful, it may ripen into a prescriptive right.

17. Waters and water courses 🔑100, 101, 116, 127, 132

An overlying owner of any other person having a legal right to surface or underground water may take only such amount as he reasonably needs for beneficial purposes; and public interest requires that there be greatest number of beneficial uses which supply can yield, and water may be appropriated for beneficial uses subject to rights of those who have a lawful priority, any water not needed for such uses of those having prior rights being "excess or surplus water." Const. art. 14, § 3.

18. Waters and water courses 🔑130, 132

Surplus water may rightfully be appropriated on privately owned land for non-overlying uses such as devotion to a public use or exportation beyond basin or watershed.

19. Waters and water courses 🔑107(2), 130

When there is a surplus, whether of surface or underground water, holder of prior rights may not enjoin its appropriation.

20. Waters and water courses 🔑100, 101, 130, 142

Proper overlying use of underground water is paramount, and right of an appropriator, being limited to amount of surplus, must yield to that of overlying owner in event of shortage unless appropriator has gained prescriptive right through taking of non-surplus waters.

21. Waters and water courses 🔑100, 101

As between overlying owners, rights of underground water are correlative and are referred to as belonging to all in common, and each may use only his reasonable share when water is insufficient to meet needs of all.

22. Waters and water courses 🔑140

As between appropriators of underground waters, one first in time is first in right, and prior appropriator is entitled to all water he needs up to amount he has taken in the past before subsequent appropriator may take any. Civ.Code, § 1414.

23. Waters and water courses 🔑146

Prescriptive rights are not acquired by taking of surplus or excess underground water since no injunction may issue against taking; and appropriator may take surplus without giving compensation, although overlying owners and appropriators are entitled to protection against substantial infringement of rights in water which they reasonably and beneficially need; and appropriative taking of water which is not surplus is wrongful and may ripen into a prescriptive right where use is actual, open and notorious, hostile and adverse to original owner, continuous and uninterrupted for statutory period of five years, and under claim of right.

24. Waters and water courses 🔑127, 129, 138

To perfect claim based on prescripton, there must be conduct constituting actual invasion of former water owner's rights so as to entitle him to bring action, and appropriative and prescriptive rights to ground water as well as rights of overlying owner, are subject to loss by adverse user.

25. Waters and water courses 🔑100, 101, 146

Where utility exported three-fourths of water produced by it to customers located outside undergroud basin area and claimed overlying rights as to remaining one-fourth, rights as to exported water could not be overlying in character but were either appropriative or prescriptive.

26. Waters and water courses 🔑107(2)

Where quantity of underground water withdrawn exceeds average annual amount contributed by rainfall, it is proper to limit total use by all consumers to an amount equal as near as may be to average supply and to enjoin takings in such quantities or in such manner as would destroy or endanger underground source.

27. Waters and water courses 🔑107(2), 152(3)

Where there was a taking of water from underground basin in excess of safe yield, operating progressively to endanger source and eventually render supply insufficient to meet needs of rightful owners, owners were injured by additional appropriations made after all surplus waters were taken and were entitled to injunctive relief to terminate takings in excess of surplus.

28. Waters and water courses 🔑107(3), 152(8)

Evidence that water levels in wells which tapped underground supply decreased annually was sufficient to charge well owner with notice of deficiency and that appropriations causing overdraft were invasions of rights of overlying owners and prior appropriators.

29. Waters and water courses 🔑146

Where water level in wells of overlying users and appropriators of underground water became lower annually over period of more than five years, and all water was taken openly and under claim of right, elements of prescription were present as to overdrafts, and five year statute of limitations ran against original lawful holders of water rights to whatever extent their rights were invaded.

30. Waters and water courses 🔑107(2), 152(3)

Where subsequent appropriators of underground water reduced available supply and their acts if continued would have rendered it impossible for holder of prior rights to pump in the future, there was an enjoinable invasion, and either overlying owners or prior appropriators could prevent taking of surplus waters and enjoin additional users beyond point of safe yield.

31. Limitation of actions 🔑104½

Running of five year statute of limitations can be effectively interrupted by self help on part of lawful owner of property right involved.

32. Waters and water courses 🔑146

Where overlying owners, prior appropriators and later appropriators drew on waters in underground basin threatening destruction of source, but original owners did not fail to pump for five year period and had no notice of danger because of lowered water level in wells, but more than five years passed before any acted to protect supply or prevent invasion of rights, prescriptive rights were established against overlying owners and prior appropriators in part, and court could properly limit their production of water to a percentage of the amount each party had taken throughout statutory period.

33. Waters and water courses 🔑151

The statute providing that unused water shall revert to the public when party entitled to use fails beneficially to use all of it for period of three years refers only to water appropriated under a license or permit and does not apply to water in underground basin which is not embraced by licensing system and which does not flow in known definite channels. Gen.Laws, Act 9091, §§ 1, 1d, 11, 15, 16, 20a, 42.

34. Waters and water courses 🔑101

Where user of underground water reduced amount drawn by taking water from another source and thereafter returned to underground basin for total supply, but second user of water was not induced to take any action by reason of first user's decreased use, first user was not barred thereafter by estoppel from taking from the basin more water than maximum amount pumped during period in which it used water from supplementary source when allocation became necessary to conserve underground basin.

35. Waters and water courses 🔑101, 151

Where less than four years before commencement of action to determine conflicting rights to water in underground basin was begun, city decreased its use of underground water and drew on supplementary supply, and after beginning of action ceased taking from supplementary source city was not precluded by laches, in absence of showing of prejudice, from claiming its proportionate share based on more water than maximum amount pumped during period in which city drew on supplementary source.

36. Waters and water courses 🔑107(3), 152(11)

Where limited supply of water in underground basin required allocation to various users, fact that city as user had right to purchase water from metropolitan water district did not require court to compel such purchase so as to afford larger supply to other users of underground basin.

37. Waters and water courses 🔑42, 100, 101, 144, 190

Failure of city to capture and return to underground basin storm waters, street flush water, firefighting water and flow sewage water did not constitute "waste" in violation of the Constitution prohibiting waste of water resources. Const. art. 14, § 3.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Waste".

38. Waters and water courses 🔑152(11)

Where water exchange agreement enforced by judgment allocating water to various users from underground basin provided that city should restrict pumping from certain portion of basin and take remainder elsewhere, basin user who was not a party could not complain of agreement in absence of pumping by city in such quantities in immediate vicinity of user's wells as to render it difficult or impossible to obtain amount of water to which complaining user was entitled.

39. Waters and water courses 🔑152(11)

Where court reserved jurisdiction, in action to enjoin overdrafts of water from underground basin, to modify judgment and require water master to keep monthly recordings of water depth in all wells, court could properly limit various users to fixed number of acre feet of water a year in absence of showing that method would result in undue raising of water table.

40. Waters and water courses 🔑152(10)

Where water user presented no objections before referee in action involving conflicting water rights, court thereafter could properly refuse to admit evidence offered to rebute report of referee with respect to user's water production. Gen. Laws, Act. 9091, § 24.

41. Waters and water courses 🔑152(11)

Where action was brought to enjoin overdraft of water from underground basin, and issue of rights of one user as against parties diverting from streams leading to underground basin was not clearly raised in pleadings, and there was insufficient evidence to enable court to make a determination as to rights or effect of such diversions upon safe yield of basin, court could properly leave open for future determination rights of user as against diversioners.

42. Waters and water courses 🔑152(11)

Retention of jurisdiction by court in action involving conflicting water rights, to meet future problems and changing conditions is an appropriate method of carrying out policy of state to utilize all water available.

43. Waters and water courses 🔑152(11)

Where court in action involving conflicting water rights found it necessary to conserve underground basin and limit takings to safe yield, and made pro-tanto reduction in amount each could pump, court could properly provide that if safe yield increased, permissible takings could be increased proportionately up to amount of present unadjusted right of each party, although court could not impose five year limitation upon its power to review determination of safe yield.

CARTER, J., dissenting.

◆

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by the City of Pasadena, a municipal corporation, against the City of Alhambra, a municipal corporation, the California-Michigan Land & Water Company, a corporation, and others, to determine underground water rights within the Raymond Basin area, and for other relief. The Division of Water Resources, Department of Public Works, State of California, was designated as referee. From an adverse judgment, the California-Michigan Land & Water Company appeals.

Judgment modified and as modified affirmed.

For prior opinion, see 180 P.2d 699.

Goodspeed, McGuire, Harris & Pfaff, Paul Vallee, Richard C. Goodspeed and J. Donald McGuire, Los Angeles, for appellants.

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Martin J. Weil, Wm. J. De Martini, J. A. McNair, J. Arthur Tucker, Los Angeles, W. F. Kiessig, San Francisco, Harrison Guio, L. A. Gibbons, Jerry H. Powell, Douglas C. Gregg, Lawler, Felix & Hall, Los Angeles, and Pillsbury, Madison & Sutro, San Francisco, as amicus curiæ on behalf of respondents.

GIBSON, Chief Justice.

Plaintiff city, the chief producer of water from a forty square mile alluvial-filled basin of ground water[1] known as the Raymond Basin Area, instituted this litigation to determine the ground water rights within the area and to enjoin an alleged annual overdraft in order to prevent eventual depletion of the supply. Pursuant to section 24 of the Water Commission Act, which was then in force, Stats.1913, p. 1012, as amended, Deering's Gen.Laws, 1937, Act 9091; now sections 2000–2050 of the Water Code, the trial court referred the matter to the division of Water Resources of the Department of Public Works for a determination of the facts, and the ensuing report of the division was received in evidence. On the basis of this report all of the non-disclaiming parties, with the exception of the defendant California-Michigan Land & Water Company, a public utility and the sole appellant herein, entered into a stipulation for a judgment allocating the water and restricting total production to the safe annual yield. The court, after hearing evidence presented by appellant in opposition to the report, rendered a judgment substantially enforcing the terms of the stipulation against all parties, including appellant.

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[1] In accordance with the terminology employed by the trial court and the parties, the expression "ground water" will be used to refer to water beneath the surface of the ground.

The principal issues presented on this appeal are whether the trial court properly limited the amount of water that appellant may take from the ground in the Raymond Basin Area, and whether it erred in placing the burden of curtailing the overdraft proportionately on all parties. Before discussing these issues on the merits, we will consider certain contentions involving jurisdiction, procedure and remedy.

Preliminary contentions

[1] The complaint was filed on September 23, 1937, and the trial was not commenced until May 18, 1944. A dismissal is made mandatory by section 583 of the Code of Civil Procedure, except in certain cases, unless the action is brought to trial within five years after the plaintiff has filed his action. It is settled, however, that in computing the five-year period the time during which, "for all practical purposes, going to trial would be impossible, whether this was because of total lack of jurisdiction in the strict sense, or because proceeding to trial would be both impracticable and futile," is to be excluded. Christin v. Superior Court, 9 Cal.2d 526, 533, 71 P.2d 205, 208, 112 A.L.R. 1153 [time consumed by appeal from order granting change of venue]; Pacific Greyhound Lines v. Superior Court, 28 Cal.2d 61, 64, 168 P.2d 665 [time during which one defendant was in military service and stay might have been granted]; Judson v. Superior Court, 21 Cal.2d 11, 14, 129 P.2d 361 [time defendant avoided service of summons by evasion and concealment]; Westphal v. Westphal, 61 Cal.App.2d 544, 143 P.2d 405 [time during which co-plaintiff had an appeal pending].

[2] The order of reference was made on February 8, 1939; the referee's report was filed on July 16, 1943, and, thereafter, respondents proceeded with reasonable dispatch to bring the cause to trial. The issues to be tried were dependent to a great extent upon the facts to be ascertained by the referee, and it would have been impracticable, if not futile, to proceed to trial prior to the completion of the report. It follows that the time consumed by the reference should be excluded in computing the five-year period, and that, therefore, the action was not subject to dismissal under the provisions of section 583.

The "Division of Water Resources, Department of Public Works, State of California," was appointed as referee pursuant to section 24 of the Water Commission Act which provided: "In case suit is brought in any court of competent jurisdiction for determination of rights to water or the use of water * * * the court may, in its discretion, refer such a suit to the state water commission for investigation of and report upon any one or more or all of the physical facts involved, in which event, said commission may, in its discretion, base its report solely upon its own investigation or investigations or in addition thereto may hold a hearing or hearings and take testimony and the report filed by the commission upon such a reference for investigation by it shall be prima facie evidence of the physical facts therein found * * *."

[3, 4] Every recent major water law decision of this court has expressly or impliedly approved the reference procedure provided by section 24 and has recommended, in view of the complexity of the factual issues in water cases and the great public

interests involved, that the trial courts seek the aid of the expert advice and assistance provided for in that section. See Fleming v. Bennett, 18 Cal.2d 518, 522 et seq., 116 P.2d 442; Meridian, Ltd. v. San Francisco, 13 Cal.2d 424, 457, 90 P.2d 537, 91 P.2d 105; Rancho Santa Margarita v. Vail, 11 Cal.2d 501, 558-559, 81 P.2d 533; City of Lodi v. East Bay Municipal Utility Dist., 7 Cal.2d 316, 341, 60 P.2d 439; Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., 3 Cal.2d 489, 575, 45 P.2d 972; Peabody v. City of Vallejo, 2 Cal.2d 351, 373-374, 40 P.2d 486; Wood v. Pendola, 1 Cal.2d 435, 443, 35 P.2d 526.

In sustaining and approving the reference procedure, it was stated in the Fleming case that "all of the pertinent constitutional safeguards were observed by the legislature in enacting the provisions of section 24 * * *." 18 Cal.2d at page 528, 116 P.2d at page 447. The opinion did not mention whether section 24 conflicted with article III, section 1, of the Constitution, which provides for the separation of powers, or discuss whether such an order of reference invalidly subjects an executive branch or division and its officers to the control of the judiciary. It was, however, expressly held, 18 Cal.2d 518, at pages 523-525, 116 P.2d 442, that section 24 does not provide for the exercise of judicial power by the division, and implicit in the decision is the conclusion that the separation of governmental powers is observed. See also Wood v. Pendola, 1 Cal.2d 435, 442, 35 P.2d 526. In effect section 24 provides that the court may appoint the division to act as an investigator and an expert witness, but there is nothing which authorizes the courts to control or regulate, in any particular, the proper functions of the division or the manner in which, pursuant to legislative mandate, it shall proceed in conducting its examination and making its report. The Fleming case also expressly held that section 24 is not unconstitutional and void as a special law providing for a variation from the general practice and procedure in the superior court in violation of article IV, section 25, of the Constitution. 18 Cal.2d 518, at page 528, 116 P.2d 442; cf. Wood v. Pendola, 1 Cal.2d 435, 442, 35 P.2d 526.

[5] There is no merit in the contention that the reference should have been made to the Department of Public Works as the statutory successor of the Water Commission. Since the abolition of the Water Commission in 1921, it has been repeatedly recognized that, under section 24, the court may properly refer a pending water rights case to the Division of Water Resources or its predecessor, the Division of Water Rights.[2] Fleming v. Bennett, 18 Cal.2d 518, 521, 116 P.2d 442; Rancho Santa Margarita v. Vail, 11 Cal.2d 501, 559, 81 P.2d 533; City of Lodi v. East Bay Municipal Utility Dist., 7 Cal.2d 316, 341, 60 P.2d 439; Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., 3 Cal.2d 489, 575, 45 P.2d 972; Peabody v. City of Vallejo, 2 Cal.2d 351, 373, 40 P.2d 486.

[6] The complaint is made that some of the men who worked on the report of the referee were not available for cross-examination at the time of the trial. It appears, however, that the man who prepared the report and supervised the investigation testified at length and that others who worked on the report also testified at the trial. Appellant was afforded ample opportunity to examine these witnesses, and there is no showing that it sought to obtain the testimony of persons who were not present. It was permitted to introduce evidence contrary to the facts appearing in the report, and, under all the circumstances, there was no denial of an opportunity to be heard in opposition to the report.

[7] Appellant claims that the trial court improperly enlarged the scope of the proceedings. In response to a request of the referee for instructions, the court, after a hearing, ruled that the issues should "embrace an adjudication of rights of the defendants inter se and the rights of each and every party as against each and every other party." Although the answers of the respective defendants did not present claims against the other defendants and were not served on them, the action was tried on the theory that these matters were at issue, and the ensuing judgment limiting the amount of water that each could pump was also based on this theory. The trial court has

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[2] Compare Water Code, §§ 22, 2000, 2001.

authority, under section 24, to include, in the matters which are to be submitted to the referee and determined by the judgment, any issues necessary to a proper determination of the controversy. See Fleming v. Bennett, 18 Cal.2d 518, 523, 116 P.2d 442. It was within the discretion of the trial court to determine whether it was necessary to adjudicate inter se the amount of water to which each party was entitled, and the record indicates that it would have been impracticable to decide the matter solely between plaintiff and each defendant. Moreover, appellant had ample time to prepare its case after notice of the scope of the proceedings, and there is no basis for any claim that it was misled to its prejudice or that it was denied due process of law.

[8] The objection is also made that the court erred in allocating water without the joinder of a number of private users who pumped comparatively small amounts. The referee filed a preliminary report which stated that it would be impracticable to attempt to include all such parties. It recommended, however, that certain named parties who used fairly substantial amounts be joined in the action, and the court ordered them brought in over the objections of appellant. No request was made by appellant for the inclusion of any party who had not been joined, and there is no showing that its interest was injuriously affected by the failure to require the joinder of all possible claimants. See Smith v. Cucamonga Water Co., 160 Cal. 611, 617, 117 P. 764. The line must be drawn somewhere in order to bring the proceeding within practical bounds, and it would have been impossible to reach a solution of the problems involved and to render a valid judgment if jurisdiction to make an allocation depended upon the joinder of every person having some actual or potential right to the water in the basin and its sources of supply. The persons not made parties are, of course, not bound by the judgment, nor are they injured by the injunction.

[9, 10] Appellant further contends that it cannot be enjoined since the water which it produces is devoted to a public use. Reliance is placed upon cases holding that when a public use has attached, inverse condemnation proceedings may be invoked and compensation in lieu of a prohibitory injunction is preferred in most circumstances. See Hillside Water Company v. Los Angeles, 10 Cal.2d 677, 688, 76 P.2d 681; Peabody v. City of Vallejo, 2 Cal.2d 351, 377–380, 40 P.2d 486; Newport v. Temescal Water Company, 149 Cal. 531, 538, 87 P. 372, 6 L.R.A.,N.S., 1098. This rule has its foundation chiefly in the inconvenience to the public if service is interrupted by the issuance of an injunction to restrain the use, Miller & Lux v. San Joaquin Light & Power Corp., 8 Cal.2d 427, 436, 65 P.2d 1289; Burr v. Maclay Rancho Water Co., 160 Cal. 268, 280, 116 P. 715, and has no application to the problem which confronts us here. The purpose of this litigation is the protection of the interests of both public and private users by preventing further depletion of the water supply. Excepting appellant, all parties, public as well as private, have consented to be enjoined to effect this purpose. There is nothing in the record to indicate that the public interest would be better served by depriving private users of their pumping rights and compensating them therefor. If this were done they would have to purchase their water from municipalities or public utilities which take water from the same underground area, and the total supply available to the public would not be increased. Morever, it would be exceedingly difficult to fix the monetary loss of each private party and then apportion it among the numerous public users. In these circumstances, the trial court was justified in concluding that the rule against enjoining public utilities was not applicable.

Findings and judgment

The Raymond Basin Area, a field of ground water located at the northwest end of San Gabriel Valley, includes the city of Sierra Madre, almost all of the city of Pasadena, and portions of South Pasadena, San Marino, and Arcadia. The field of ground water contains alluvium consisting of sands, gravels and other porous materials through which water percolates. The northern side is formed by the San Gabriel range of mountains which rise back of the valley to a general elevation of from 5,000 to 6,000 feet. The area comprises 40 square miles and is separated from the rest of the valley along its southern boundary by the Raymond Fault, somtimes known as Raymond Dike, a natural fault in the bedrock constituting a "Barrier in the alluvium * * * which greatly impedes the sub-surface movement of water from the area, although it does not entirely stop it, thus creating a vast underground storage reservoir." There is a pronounced slope to the south from elevations of 1,000 feet above sea level at the mountains to a general elevation of 500 to 700 feet at Raymond Fault.

In this part of the state there is ordinarily a series of wet years followed by a number of dry years, making it necessary during periods of above-normal rainfall to store water for future use. It appears, however, that the ground water storage capacity is adequate to store the excess during wet years for the following dry years.

Natural underground formations divide the area into two practically separate units. The Western Unit, the larger of the two, consists of the Monk Hill Basin, which is to the northwest, and the Pasadena Sub-area. The Eastern Unit, or Santa Anita Sub-area, lies immediately to the east of the Pasadena Sub-area. At the present water table elevations movement of ground water from the Western to the Eastern Unit is so small as to be immaterial but it might be increased by an overdraft in the Eastern Unit. Movement from the Eastern to the Western Unit is almost totally lacking.

Our concern is with the Western Unit where the principal ground water movement is from north and west of Monk Hill to the south and east and across Raymond Fault. The water in this unit is replenished by rainfall, by return water arising from the use of water in the unit, and by the runoff and underflow from the San Gabriel Mountains to the north and from the San Rafael hills to the west. Appellant's wells, from which it obtains all its production, are in the southeastern part of this unit, and the underlying water constitutes one ground water body which is a common source of all parties taking water therefrom. The water pumped from the ground in the Western Unit has exceeded the safe yield thereof in every year since 1913–14 (commencing October 1) except during the years 1934–35 and 1936–37. The safe yield of the unit was found to be 18,000 acre feet per year, but the average annual draft was 24,000 acre feet, resulting in an average annual overdraft of 6,000 feet.

With respect to the water rights acquired by the various parties it was stipulated by all of them, including appellant, that "all of the water taken by each of the parties to this stipulation and agreement, at the time it was taken, was taken openly, notoriously and under a claim of right, which claim of right was continuously and uninterruptedly asserted by it to be and was adverse to any and all claims of each and all of the other parties joining herein."

The findings set forth in terms of acre feet per year "the highest continuous production of water for beneficial use in any five (5) year period prior to the filing of the complaint by each of the parties in each of said units, as to which there has been no cessation of use by it during any subsequent continuous five (5) year period." This was designated, for convenience, the "present unadjusted right" of each party, and the court concluded that each party owned "by prescription" the right to take a certain specified amount of water, and that the rights of the parties were of equal priority. The total of the unadjusted rights for the Western Unit was found to be 25,608 acre feet per year, and water pumped by non-parties to the action was 340 acre feet per year. The court also found that a continued draft in these amounts will result in an unreasonable depletion and the eventual destruction of the ground water as a source of supply; that any increase in the amounts taken in the Eastern Unit will deplete the ground water supply in that unit; that in order to protect the supply it is necessary that the parties in the Western Unit be limited by reducing the "present unadjusted right of each such party in the proportion that the safe yield of said unit, less the water taken therein by non-parties hereto, bears to the aggregate of such rights of parties hereto in said unit, and that each of the parties pumping or otherwise taking water from the ground in the Eastern Unit be limited to the amount of its present unadjusted right." The amount of water limited to each party, designated the "decreed right," was set out in the findings, and this allocation gave each party about two-thirds of the amount it had been pumping.

The court enjoined all pumping in excess of the decreed right and appointed a "Water Master" to enforce the provisions of the judgment. It reserved jurisdiction to modify the judgment or make such further orders as might be necessary for adequate enforcement or for protection of the waters in the Raymond Basin Area from contamination.

Sufficiency of evidence

Appellant takes the position that the ground water in the Western Unit is not contained in a single storage basin or reservoir as found by the court, but, rather, flows in certain defined underground streams from the northwestern portion to the southeastern section in much the same manner as water flows in surface streams, and that these streams, together with a flow of water from the Eastern Unit, converge at the lower level where appellant's wells are located. It argues that its taking of water cannot possibly injure the upper claimants because once the water has reached a lower level it cannot flow back upstream to the wells of the other parties.

The report states that no substantial quantity of water from the Eastern Unit now reaches appellant's wells. It also indicates that the ground water of the Western Unit is analogous to water stored in a large lake or reservoir, through which several currents slowly flow from inlet to outlet. Raymond Fault is similar to a dam in that it impedes the movement of water and backs it up over a considerable area, and pumping tests established that when the water table was lowered in one well, the effect could be measured in wells almost two miles away. These tests were conducted over comparatively short periods of time, the greatest being about three days, and since the water moves very slowly through the alluvium, it could be inferred that the effect would have been much more widespread if the test-pumping had been continued for a longer time.

[11] There is nothing in the record which would compel a finding that the difference in elevation between the Monk Hill Basin and the Pasadena Sub-area is so great that wells in the northwest will be entirely unaffected by long-continued excessive pumping elsewhere in the unit. Moreover, as the referee points out, the serious overdraft is in the area where appellant takes its water, and its pumping directly reduces the supply where water is most needed. The record shows that in view of the smaller overdraft in the Monk Hill Basin the parties situated there suffered a greater ratable cut under the injunction than persons in the Pasadena Sub-area, and that appellant has been helped rather than injured by inclusion of the Monk Hill Basin as part of the underground storage area.

[12] Appellant contends that the safe yield was greatly understated, and that there was little, if any, overdraft. 18,000 acre feet per year was found to be the safe yield in the Western Unit, and this figure was based upon the report of the referee which calculated the amount from changes in the water stored underground and in the water table elevation as compared with the amount of water extracted by pumping. It is asserted that the referee failed to measure and include the underflow from the San Gabriel Mountains and the waters conserved upon the surface by artificial means. All sources of underground water, however, were automatically included by the method of calculation employed by the referee, and it was not necessary to make the specific measurements mentioned by appellant. Moreover, it is obvious from many statements in the report that surface conservation and underflow were given full consideration by the referee.

The main issue

[13] There can be no question that the trial court had authority to limit the taking of ground water for the purpose of protecting the supply and preventing a permanent undue lowering of the water table.

Burr v. Maclay Rancho Water Co., 154 Cal. 428, 438, 98 P. 260; City of San Bernardino v. City of Riverside, 186 Cal. 7, 16, 198 P. 784; cf. Allen v. California Water & Telephone Co., 29 Cal.2d 466, 485–486, 176 P.2d 8. The main problems presented are which of the parties should bear the burden of curtailing the total production of the unit to the safe yield and what proportion, if any, of the pumping by each particular party should be restricted. Since the stipulation made by the other parties as to the reduction in pumping by each is not binding upon appellant, it is necessary to determine appellant's rights in relation to the other producers in the same manner as if there had been no agreement.

[14-16] The question of who shall bear the burden of curtailing the overdraft, and in what proportion, depends upon the legal nature and status of the particular water right held by each party. Rights in water in an underground basin, so far as pertinent here, are classified as overlying, appropriative, and prescriptive. Generally speaking, an overlying right, analogous to that of a riparian owner in a surface stream, is the right of the owner of the land to take water from the ground underneath for use on his land within the basin or watershed; the right is based on ownership of the land and is appurtenant thereto. See Hillside Water Company v. Los Angeles, 10 Cal.2d 677, 686, 76 P.2d 681; Miller v. Bay Cities Water Co., 157 Cal. 256, 279–280, 107 P. 115, 27 L.R.A.,N.S., 772; 26 Cal.Jur. 271–277; 2 Wiel, Water Rights [3d ed., 1911], §§ 1100–1105, pp. 1040–1045. The right of an appropriator depends upon an actual taking of water. See 26 Cal.Jur. 277. The term "appropriation" is said by some authorities to be properly used only with reference to the taking of water from a surface stream on public land for non-riparian purposes. See Wiel, Water Rights [3d ed., 1911] §§ 228, 1107, 1158, 1159, and § 231 in the "reprint ed." of the 3d ed.; Farnham, Waters and Water Rights [1904] § 672a; 56 Am.Jur. 599. The California courts, however, use the term to refer to any taking of water for other than riparian or overlying uses. City of San Bernardino v. City of Riverside, 186 Cal. 7, 13–14, 198 P. 784; Burr v. Maclay Rancho Water Co., 154 Cal. 428, 436, 98 P. 260; Katz v. Walkinshaw, 141 Cal. 116, 135, 70 P. 663, 74 P. 766, 64 L.R.A. 236, 99 Am.St.Rep. 35; see 26 Cal.Jur. 273–274. Where a taking is wrongful, it may ripen into a prescriptive right.

[17, 18] Although the law at one time was otherwise, it is now clear that an overlying owner or any other person having a legal right to surface or ground water may take only such amount as he reasonably needs for beneficial purposes. Katz v. Walkinshaw, 141 Cal. 116, 70 P. 663, 74 P. 766, 64 L.R.A. 236, 99 Am.St.Rep. 35; Peabody v. City of Vallejo, 2 Cal.2d 351, 40 P.2d 486; Cal.Const., art. XIV, § 3. Public interest requires that there be the greatest number of beneficial uses which the supply can yield, and water may be appropriated for beneficial uses subject to the rights of those who have a lawful priority. Peabody v. City of Vallejo, 2 Cal.2d 351, 368, 40 P.2d 486. Any water not needed for the reasonable beneficial uses of those having prior rights is excess or surplus water. In California surplus water may rightfully be appropriated on privately owned land for nonoverlying uses, such as devotion to a public use or exportation beyond the basin or watershed. Peabody v. City of Vallejo, 2 Cal.2d 351, 368–369, 40 P.2d 486; City of San Bernardino v. City of Riverside, 186 Cal. 7, 29, 30, 198 P. 784; Burr v. Maclay Rancho Water Co., 154 Cal. 428, 436, 98 P. 260; Katz v. Walkinshaw, 141 Cal. 116, 135, 70 P. 663, 74 P. 766, 64 L.R.A. 236, 99 Am.St.Rep. 35; see 26 Cal.Jur. 32 et seq., 273–274.

[19–22] It is the policy of the state to foster the beneficial use of water and discourage waste, and when there is a surplus, whether of surface or ground water, the holder of prior rights may not enjoin its appropriation. Peabody v. City of Vallejo, 2 Cal.2d 351, 368–369, 372, 40 P.2d 486; see 26 Cal.Jur. 277. Proper overlying use, however, is paramount, and the right of an appropriator, being limited to the amount of the surplus, must yield to that of the overlying owner in the event of a shortage, unless the appropriator has gained prescriptive rights through the taking of non-surplus waters. As between overlying owners, the rights, like those of riparians, are correlative and are referred to as belonging to all in common; each may use only his reasonable share when water is insufficient to meet the needs of all. Katz v. Walkinshaw, 141 Cal. 116, 70 P. 663, 74 P. 766, 64 L.R.A. 236, 99 Am.Rep.St. 35; see 26 Cal.Jur. 269–273, 276; cf. 25 Cal. Jur. 1063–1067. As between appropriators, however, the one first in time is the first in right, and a prior appropriator is entitled to all the water he needs, up to the amount that he has taken in the past, before a subsequent appropriator may take any. City of San Bernardino v. City of Riverside, 186 Cal. 7, 26–28, 198 P. 784; cf. Civ.Code, § 1414.

[23, 24] Prescriptive rights are not acquired by the taking of surplus or excess water, since no injunction may issue against the taking and the appropriator may take the surplus without giving compensation; however, both overlying owners and appropriators are entitled to the protection of the courts against any substantial infringement of their rights in water which they reasonably and beneficially need. Peabody v. City of Vallejo, 2 Cal.2d 351, 368–369, 374, 40 P.2d 486. Accordingly, an appropriative taking of water which is not surplus is wrongful and may ripen into a prescriptive right where the use is actual, open and notorious, hostile and adverse to the original owner, continuous and uninterrupted for the statutory period of five years, and under claim of right. City of San Bernardino v. City of Riverside, 186 Cal. 7, 22–23, 198 P. 784; Katz v. Walkinshaw, 141 Cal. 116, 115, 70 P. 663, 74 P. 766, 64 L.R.A. 236, 99 Am.St.Rep. 35; 25 Cal. Jur. 1178, 1157–1158; 1 Cal.Jur. 585; 26 Cal.Jur. 278–279; cf. Wutchumna Water Co. v. Ragle, 148 Cal. 759, 764–765, 84 P. 162. To perfect a claim based upon prescription there must, of course, be conduct which constitutes an actual invasion of the former owner's rights so as to entitle him to bring an action. City of Los Angeles v. City of Glendale, 23 Cal.2d 68, 79, 142 P. 2d 289. Appropriative and prescriptive rights to ground water, as well as the rights of an overlying owner, are subject to loss by adverse user. This is in accord with the rule announced in cases dealing with water in a surface stream. See Yankee Jim's Union Water Co. v. Crary, 25 Cal. 504, 508–509, 85 Am.Dec. 145; Big Rock Mutual Water Co. v. Valyermo Ranch Co., 78 Cal. App. 266, 273, 248 P. 264; Peabody v. City of Vallejo, 2 Cal.2d 351, 374, 40 P.2d 486; Duckworth v. Watsonville Water & Light Co., 150 Cal. 520, 529–532, 89 P. 338; Davis v. Gale, 32 Cal. 26, 35, 91 Am.Dec. 554; 3 Farnham, Waters and Water Rights [1904] § 680a, p. 2106; 1 Wiel, Water Rights [3d ed., 1911], § 580, pp. 625–626; 56 Am. Jur. 773.

[25] In the present case some of the parties, including owners of ranches, golf clubs, and cemeteries, have pumped water solely for use on their own land, and their rights at the outset were overlying. The principal takers of water, however, are public utility corporations and municipalities which have either exported water or have used it within the Western Unit for municipal purposes or for sale to the public, and their taking, when commenced, was entirely appropriative. City of San Bernardino v. City of Riverside, 186 Cal. 7, 29, 198 P. 784; Eden Township Water Dist. v. Hayward, 218 Cal. 634, 640, 24 P.2d 492. Appellant exports about three-fourths of the water produced by it to customers located outside the area, and it claims overlying rights as to the other one-fourth which it takes. As to the exported water it is clear that its rights could not be overlying in character, but are either appropriative or prescriptive.

It follows from the foregoing that, if no prescriptive rights had been acquired, the rights of the overlying owners would be paramount, and the rights of the appropriators would depend on priority of acquisition under the rule that the first appropriator in time is the first in right. The latest in time of the appropriations would then be the first to be curtailed in limiting total production of the area to the safe yield. If such were the case, the overdraft could be eliminated simply by enjoining a part of the latest appropriations, since the record shows that there is ample water to satisfy the needs of all the overlying users and most of the appropriators, and appellant's appropriative rights would depend primarily upon evidence of priority in time of acquisition.

The principal dispute between appellant and respondents, however, concerns whether any water rights in the Western Unit have become prescriptive and, if so, to what extent. Respondents assert that the rights of all the parties, including both overlying users and appropriators, have become mutually prescriptive against all the other parties and, accordingly, that all rights are of equal standing, with none prior or paramount. Appellant, on the other hand, contends that in reality no prescriptive rights have been acquired, and that there has been no actionable invasion or injury of the right of any party using water because each party has been able to take all the water it needed and no party has in any manner prevented a taking of water by any other party. It would follow, under appellant's theory, than not even an overlying owner could have obtained an injunction against a subsequent taking.

We must look, therefore, to see if the disputed elements for a prescriptive right are shown by the record. Most of the factors are covered by the stipulation in which all the parties, including appellant, joined, namely, that "all of the water taken by each of the parties to this stipulation and agreement was, at the time it was taken, taken openly, notoriously, and under a claim of right, which claim of right was continuously and uninterruptedly asserted by it to be and was adverse to any and all claims of each and all of the other parties joining herein." Two necessary elements are omitted: The length of the period over which the adverse user continued and the nature and extent of actual adverse user, if any.

The evidence clearly supports the finding which designates in terms of acre feet per year "the highest continuous production of water for beneficial use in any five (5) year period prior to the filing of the complaint by each of the parties in each of said units, as to which there has been no cessation of use by it during any subsequent continuous five (5) year period."

The record shows that there has been an actual adverse user of water in the Western Unit. There was an invasion, to some extent at least, of the rights of both overlying owners and appropriators commencing in the year 1913–1914, when the overdraft first occurred. Each taking of water in excess of the safe yield, whether by subsequent appropriators or by increased use by prior appropriators, was wrongful and was in injury to the then existing owners of water rights, because the overdraft, from its very beginning, operated progressively to reduce the total available supply. Although no owner was immediately prevented from taking the water he needed, the report demonstrates that a continuation of the overdraft would eventually result in such a depletion of the supply stored in the underground basin that it would become inadequate. The injury thus did not involve an immediate disability to obtain water, but, rather, it consisted of the continual lowering of the level and graudual reducing of the total amount of stored water, the accumulated effect of which, after a period of years, would be to render the supply insufficient to meet the needs of the rightful owners.

[26, 27] The proper time to act in preserving the supply is when the overdraft commences, and the aid of the courts would come too late and be entirely inadequate if, as appellant seems to suggest, those who possess water rights could not commence legal proceedings until the supply was so greatly depleted that it actually became difficult or impossible to obtain water. Where the quantity withdrawn exceeds the average annual amount contributed by rainfall, it is manifest that the underground store will be gradually depleted and eventually exhausted, and, accordingly, in order to prevent such a catastrophe, it has been held proper to limit the total use by all consumers to an amount equal, as near as may be, to the average supply and to enjoin takings in such quantities or in such a manner as would destroy or endanger the underground source of water. City of San Bernardino v. City of Riverside, 186 Cal. 7, 15–16, 198 P. 784; Burr v. Maclay Rancho Water Co., 154 Cal. 428, 438, 98 P. 260. There is, therefore, no merit to the contention that the owners of water rights were not injured by the additional appropriations made after all surplus waters were taken, and they clearly were

entitled to obtain injunctive relief to terminate all takings in excess of the surplus as soon as it became apparent from the lowering of the well levels that the underground basin would be depleted if the excessive pumping were continued.

The lowering of the water table resulting from the overdraft was plainly observable in the wells of the parties, and the records of water levels in appellant's own wells afford an excellent example of the yearly changes from about 1919 to 1937, when the complaint herein was filed. Using figures taken at about the same time each year to minimize the effect of seasonal variations, it appears that the surface of the water in appellant's well No. 1 was at an elevation of 559 feet above sea level in August, 1920, as compared with 485 feet in August, 1937, amounting to a drop of 74 feet. Appellant's well No. 4 was measured at the 570-foot level in August, 1920, and at 499 feet in September, 1937, a drop of 71 feet. Appellant's well No. 5 was at 553.1 feet in August, 1928, and at 514 feet in August, 1947, a drop of 39.1 feet in the shorter period of nine years. Well No. 6 was at the 542-foot level in August, 1919, at 568.2 feet in November, 1924, and at 515 feet in August, 1937, a net drop of 27 feet. Appellant's well No. 7 was at 565.2 feet in October, 1924, and at 484 feet in August, 1937, a drop of 81.2 feet. Well No. 8 has records only for 1937 and 1938, and there are no records for two other wells, Nos. 2 and 3, which appellant has apparently abandoned.

[28, 29] This evidence is clearly sufficient to justify charging appellant with notice that there was a deficiency rather than a surplus and that the appropriations causing the overdraft were invasions of the rights of overlying owners and prior appropriators. The elements of prescription being present in the record, the statute of limitations ran against the original lawful holders of water rights to whatever extent their rights were invaded.

[30] It must next be determined whether the rights of all of the prior owners were invaded and whether all or only a part of the right of any particular owner was damaged. It has been established that the rights of appropriators as well as of overlying owners will be protected by the courts and that an invasion of either type of right will start the running of the statute. Where, as here, subsequent appropriators reduce the available supply and their acts, if continued, will render it impossible for the holder of a prior right to pump in the future, there is an enjoinable invasion. In this respect there is no difference between an overlying owner and an appropriator. Although neither may prevent a taking of surplus waters, either may institute legal proceedings to safeguard the supply once a surplus ceases to exist and may enjoin any additional user beyond the point of safe yield.

Cases are cited for the proposition that an appropriator's rights are not invaded if he continues to receive the quantity of water to which he is entitled. These cases, however, do not deal with the problem of gradual depletion of water stored in a basin or lake, but, rather, with surface streams or ditches in which water flows but is not retained for future use. The type of injury there considered would immediately deprive the owner of water, and the language in the opinions does not apply to an invasion of rights in a stored supply of water to be used only in future years. See Faulkner v. Rondoni, 104 Cal. 140, 147, 37 P. 883; Peck v. Howard, 73 Cal.App.2d 308, 328, 167 P.2d 753; City of San Diego v. Cuyamaca Water Co., 209 Cal. 105, 133, 287 P. 475.

[31] Neither the overlying owners nor the appropriators took steps to obtain the aid of the courts to protect their rights until the present action was instituted, many years after the commencement of the overdraft, and at first glance it would seem to follow that the parties who wrongfully appropriated water for a period of five years would acquire prior prescriptive rights to the full amount so taken. The running of the statute, however, can effectively be interrupted by self help on the part of the lawful owner of the property right involved. Unlike the situation with respect to a surface stream where a wrongful taking by an appropriator has the immediate effect of preventing the riparian owner from receiving water in the amount taken by the wrong-

doer, the owners of water rights in the present case were not immediately prevented from taking water, and they in fact continued to pump whatever they needed. As we have seen, the Raymond Basin area is similar to a large lake or reservoir, and water would be available until exhaustion of the supply. The owners were injured only with respect to their rights to continue to pump at some future date. The invasion was thus only a partial one, since it did not completely oust the original owners of water rights, and for the entire period both the original owners and the wrongdoers continued to pump all the water they needed.

The pumping by each group, however, actually interfered with the other group in that it produced an overdraft which would operate to make it impossible for all to continue at the same rate in the future. If the original owners of water rights had been ousted completely or had failed to pump for a five-year period, then there would have been no interference whatsoever on the part of the owners with the use by the wrongdoers, and the wrongdoers would have perfected prior prescriptive rights to the full amount which they pumped. As we have seen, however, such was not the case, and, although the pumping of each party to this action continued without interruption, it necessarily interfered with the future possibility of pumping by each of the other parties by lowering the water level. The original owners by their own acts, although not by judicial assistance, thus retained or acquired a right to continue to take some water in the future. The wrongdoers also acquired prescriptive rights to continue to take water, but their rights were limited to the extent that the original owners retained or acquired rights by their pumping.

A partial analogy may be found in Smith v. Hampshire, 4 Cal.App. 8, 87 P. 224, where the appellant had constructed a ditch across the respondents' land and used it adversely for ten years, but the respondents, for six years, had used a portion of the ditch jointly with but adversely to appellant. It was held that both had acquired rights in the ditch and that respondents' acts, being hostile to appellant's asserted claim of exclusive right, operated to conserve respondents' right to use the ditch. The court said 4 Cal.App. at page 11, 87 P. at page 225: "While respondents could not acquire a prescriptive right to a right of way over their own land, they could destroy appellant's claim of exclusive right by open, peaceable, notorious, and continuous adverse use, and thus establish their right (as against his asserted, exclusive claim) to use the ditch themselves for a limited purpose and commingle their water with his in so doing."

We need not determine whether the overlying owners involved here retained simply a part of their original overlying rights or whether they obtained new prescriptive rights to use water. See Glatts v. Henson, 31 Cal.2d 368, 370-372, 188 P.2d 745. The question might become important in order to ascertain the rights of the parties in the event of possible future contingencies, but these may never happen.

[32] Adoption of appellant's position that the water must be allocated, at least as between the municipalities and public utility companies, strictly on the basis of priority in time of appropriation would not only ignore the fundamental principle that the statute of limitations runs against persons who fail to act when their rights are invaded, but it would result in an unequal sharing of the burden of curtailing the overdraft in that all pumping conducted under authority of certain of the later appropriations would be completely eliminated, whereas no restriction in amount would be imposed upon pumping based on earlier appropriations. Such a result does not appear to be justified where all of the parties have been producing water from the underground basin for many years, and none of them have acted to protect the supply or prevent invasion of their rights until this proceeding was instituted. Moreover, it seems probable that the solution adopted by the trial court will promote the best interests of the public, because a pro tanto reduction of the amount of water devoted to each present use would normally be less disruptive than total elimination of some of the uses.

We hold, therefore, that prescriptive rights were established by appropriations made in the Western Unit subsequent to the commencement of the overdraft, that such rights were acquired against both overlying owners and prior appropriators, that the overlying owners and prior appropriators also obtained, or preserved, rights by reason of the water which they pumped, and that the trial court properly concluded that the production of water in the unit should be limited by a proportionate reduction in the amount which each party had taken throughout the statutory period.

Other contentions

[33] The water allowed each party by the trial court was measured by the amount taken over a five year period as to which there had been no cessation of use during any subsequent five year period. Appellant argues that, in determining whether there had been a loss of rights, the court should have applied the shorter three year limitation prescribed by section 20a of the Water Commission Act, which was in effect prior to 1943. Deering's Gen. Laws, Act 9091, § 20a, now § 1241 of the Water Code. This section provided: "When the party entitled to the use of water fails to beneficially use all or any part of the water claimed by him, for which a right of use has vested, for the purpose for which it was appropriated or adjudicated, for a period of three years, such unused water shall revert to the public, and shall be regarded as unappropriated public water." This section, however, is not applicable here. The primary purpose of the act was to create a system for issuing licenses and permits for appropriation of surplus water, see §§ 1, 1d, 11, 15, 16, Deering's Gen. Laws, Act 9091, and it is reasonably clear that section 20a was intended to refer only to water which had been appropriated under such a license or permit. Water in an underground basin is not embraced by the licensing system, because section 42 of the act provides that the term "water," as used in sections of the act relating to permits or licenses, "shall be interpreted to refer only to surface water, and to subterranean streams flowing through known and definite channels." Deering's Gen. Laws, Act 9091, § 42. There is no claim that any of the rights to water involved in the present case were obtained under such a permit or license, and the ground water in the Raymond Basin Area does not flow in known and definite channels within the meaning of section 42.

[34, 35] In 1934, less than four years before the commencement of this action, the city of Pasadena began to take a quantity of water from the San Gabriel River, which is not a source of supply to the Raymond Basin Area. This diversion was terminated in 1941 as part of the settlement of litigation brought by users of water from the river. Appellant contends that when the city imported water from the San Gabriel River, it reduced the amount which it took from the underground basin and, therefore, that it is now barred by estoppel and laches from taking out of the basin more water than the maximum amount pumped during the period in which it used water from the river. The trial court found, however, that appellant was not induced to take any action by reason of the importation and that the city was not estopped. The finding is supported by the record and, accordingly, is conclusive on this appeal. The claim of laches is sufficiently answered by the failure to show prejudice and the fact that the time involved was less than five years prior to commencement of the action.

[36] There is no merit to the assertion that, because of considerations of public policy, the city of Pasadena should be compelled to purchase some of its water from the Metropolitan Water District of Southern California instead of exercising its right to take water from the underground basin. Although the city has the right to purchase water from the district, it does not follow that the city should be compelled to do so in order to afford a larger supply to other parties.

[37] The failure of the city of Pasadena to capture and return to the underground basin storm waters and waters used to flush streets, fight fires, and flow sewage does not, as claimed by appellant, constitute waste in violation of section 3 of article XIV of the California Constitution. Storm drains used for flood control carried some water outside the area, but this does not mean it was wasted, and there is no evidence that there was any waste in

connection with the use of water in ordinary and necessary municipal activities.

[38] A water exchange agreement, enforced by the judgment but not signed by appellant, provided that the city of Pasadena should restrict its pumping in the Monk Hill Basin and take the remainder of its share of water from elsewhere in the Western Unit. Appellant cannot properly complain of this provision unless it is injured thereby, and it could not be damaged unless the city pumped water in such quantities in the immediate vicinity of appellant's wells as to render it difficult or impossible for appellant to obtain the amount of water to which it is entitled. No reasonable likelihood of such an occurrence is shown, but, in the event that such a local shortage should take place, appellant may obtain relief under that portion of the judgment reserving jurisdiction to make such modifications as may become necessary.

[39] It is next argued that the injunction should not have limited appellant to a fixed number of acre feet of water a year but, rather, that unrestricted pumping should be allowed so long as the water in the wells is above some specified level. Although this might be a proper method of safeguarding the supply of water in the underground basin, there is nothing in the record which compels a finding that the method of conservation adopted by the trial court is improper or that it would result in an undue raising of the water table. Moreover, ample protection against such a danger is afforded by the provisions of the decree reserving jurisdiction in the trial court to modify the judgment and requiring the Water Master to keep monthly recordings of the depth of water in all wells.

[40] The court did not err in refusing to admit evidence offered to rebut the report of the referee with respect to appellant's water production from 1931 to the end of 1938. Section 24 of the Water Commission Act provides that "No exception shall be considered except in the court's discretion, or for good cause shown, unless it shall appear that the matter of the exception had theretofore been presented to the commission in the form of an objection." Cf. Water Code, §§ 2017–2019. Appellant did not comply with this requirement and showed no good reason why it did not do so.

[41] All parties except appellant stipulated that each of them who had diverted water from streams leading to the underground basin should be restricted to an amount measured by the maximum capacity of its diversion works "as the same existed at any time within five (5) years prior to October 1, 1937," which was approximately one week after commencement of the action. Pursuant to this stipulation the court concluded that each of these diverters had the right to take this amount as against all parties other than appellant, but enjoined any increase in the amount to be taken and expressly stated that it was making no determination as to the existence of such rights as against appellant. It is argued that, before any injunction was issued, the court should have determined appellant's rights as against the parties diverting from streams leading to the underground basin. The issue, however, was not clearly raised in the pleadings, and there was not sufficient evidence in the record to enable the court to make a determination as to the priority of rights or as to the effect of these diversions upon the safe yield in the basin. In view of the necessity of securing a present solution for the critical situation in the basin area, the court was justified in leaving open for future determination the rights of appellant as against all such diversioners, some of whom were not made parties to the action.

The court reserved jurisdiction, among other things, to review its determination of the safe yield of the Raymond Basin Area and the rights of all the parties as affected by the abandonment or forfeiture of any right. The reservation specifies that "in the event material change be found or any such abandonment or forfeiture be established" the court can "adjudicate that the decreed right of each party to pump or otherwise take water from the ground in the Raymond Basin Area shall be changed proportionately in the same manner as originally fixed herein.

* * *" Review of the safe yield was to be had "not more frequently than at five (5) year intervals." Appellant concedes that the court would have power to retain jurisdiction to readjust the rights of the parties in accordance with the law and the facts as they may be at the time, but it asserts that the court went beyond its authority and decreed as to rights which may be attained in the future insofar as it reserved jurisdiction to pass upon abandoned or forfeited waters and provided that the right of each party should be altered proportionately in the event of any material change or abandonment. The five year limitation upon redetermination of the safe yield is also challenged by appellant.

[42] The retention of jurisdiction to meet future problems and changing conditions is recognized as an appropriate method of carrying out the policy of the state to utilize all water available. Allen v. California Water & Telephone Co., 29 Cal.2d 466, 488, 176 P.2d 8; City of Los Angeles v. City of Glendale, 23 Cal.2d 68, 81, 142 P.2d 289.

[43] In the present case, the trial court concluded that each party owned "by prescription" its "present unadjusted right," that is, the amount which it had been actually pumping. The effect of the judgment is to decree that, while the parties have this present right, it is necessary, in order to conserve the basin and preserve the rights of all parties, to limit the takings to the amount of the safe yield and therefore to make a pro-tanto or proportionate reduction in the amount which each can be permitted to pump until such time as conditions warrant an increase. This solution of the problem recognizes that the original owners have some rights to continue to pump in the future, that at the same time certain prescriptive rights have ripened on the basis of appropriations made after the overdraft commenced, and that the rights of each of the parties are measured by the amounts of the respective takings. Under such circumstances, it is proper to provide that, if the amount of the safe yield is increased, the permissible takings shall be increased proportionately up to the amount of the "present unadjusted right" of each party. The adjudication thus applies to existing rights, and there is no declaration as to future rights in water to which a party has no present right. Accordingly, the action of the court is not in conflict with the statement in City of San Bernardino v. City of Riverside, 186 Cal. 7, at pages 30-31, 198 P. 784, to the effect that a court should not undertake to make a declaration as to future rights.

We are of the opinion, however, that the five year limitation upon the power to review the determination of safe yield tends to defeat the purpose of the rule giving the trial court continual supervisory powers in water rights cases, and that the judgment should be modified to preserve a broad retention of jurisdiction in the trial court to change its decree and orders, after notice and hearing, as the occasion may require. Paragraph XXI of the judgment is, therefore, modified by striking therefrom the following provision: "and that the review of its determination of the safe yield of either or both of said units of the Raymond Basin Area shall be had not more frequently than at five (5) year intervals after the date hereof."

As so modified, the judgment is affirmed; respondents to recover costs on appeal.

SHENK, EDMONDS, TRAYNOR, and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

While the issues in this case are limited to the rights of overlying land owners and appropriators of underground percolating waters, the majority opinion purports to cover a much wider range in its pronouncements in the field of water law. Any student in this branch of our law must be impressed with the hodge-podge of conflicting rules and principles enunciated in the various decisions of this Court and the District Courts of Appeal, particularly during the past two or three decades, and the majority opinion in this case simply adds to the confused state of affairs. Having had a somewhat limited experience in the trial of cases involving principles of water law, I have had the urge for some time to prepare a symposium of the decisions of our courts in recent years, which, to my mind, leaves this branch of our law in a state of hopeless confusion. However, I do not consider this case a proper vehicle in which to undertake this work and I shall await a more propitious occasion.

In view of the limited issues here involved, all discussion relating to water rights in surface streams and lakes have no relevancy to the problems here involved. At the beginning of the majority opinion, the issues here presented are correctly stated as follows: "The principal issues presented on this appeal are whether the trial court properly limited the amount of water that appellant may take from the ground in the Raymond Basin Area, and whether it erred in placing the burden of curtailing the overdraft proportionately on all parties." Then follows a discussion of "Preliminary Contentions" relative to dismissal of the action and reference to the Division of Water Resources. I am disposed to agree that if the case were properly referred to the Division, appellant was not entitled to have the case dismissed. However, if this were a case of first impression, I would be disposed to agree with the appellant's contention that the scope and effect of the reference here made was a violation of the judicial process. But it is apparent from the recent decisions of this Court that virtual abdication of the judicial process of the courts in favor of the administrative process of the Division has not only been sanctioned, but has been imposed by this Court upon the trial courts in cases of this character. Of the wisdom of such imposition I have grave doubt. I can see no objection, however, to a trial court availing itself of the investigating facilities of the Division and making use of the data thus obtained in the solution of problems of this character, but I am unqualifiedly opposed to the view expressed in some of the decisions of this Court relative to the infallibility of the Division, and the necessity that trial courts refer every case involving problems relating to water rights to the Division and accept its determination of all questions of both fact and law. I am convinced from an examination of the record in this case that that is just what the trial court did in determining the rights of the parties to this action. It is obvious that principles of water law were disregarded, that the Division made a determination based upon the quantity of water available and the requirements of the respective parties, and divided the water accordingly, regardless of prior appropriations, prescriptive rights, or rights of overlying owners. They accomplish this unique result by evolving a new and novel theory of each user acquiring a right against the other by prescription or adverse use, thus destroying all priorities and placing each user upon an equal footing with the other, regardless of the time of origin or bases of his right. This is certainly a "new look" in the field of water law. We have indeed come a long way from the rugged individualism of the riparian right "rocking chair" doctrine as expounded in Lux v. Haggin, 69 Cal. 255, 4 P. 919, 10 P. 674; Alta Land & Water Co. v. Hancock, 85 Cal. 219, 24 P. 645, 20 Am. St.Rep. 217; Southern California Inv. Co. v. Wilshire, 144 Cal. 68, 77 P. 767; Montecito Valley Water Co. v. Santa Barbara, 144 Cal. 578, 77 P. 1113; Anaheim Union Water Co. v. Fuller, 150 Cal. 327, 88 P. 978, 11 L.R.A.,N.S., 1062; Huffner v. Sawday, 153 Cal. 86, 94 P. 424; San Joaquin & Kings River Canal and Irr. Co. v. Fresno Flume & Irr. Co., 158 Cal. 626, 112 P. 182, 35 L.R.A., N.S., 832; Miller & Lux Inc., v. J. G. James Co., 179 Cal. 689, 178 P. 716; Oliver v. Robnett, 190 Cal. 51, 210 P. 408; Pabst v. Finmand, 190 Cal. 124, 211 P. 11; Herminghaus v. Southern California Edison Co., 200 Cal. 81, 252 P. 607; Fall River Valley Irrigation Dist. v. Mt. Shasta Power Corp., 202 Cal. 56, 259 P. 444, 56 A.L.R. 264; Miller & Lux Inc., v. Enterprise Canal & Land Co., 169 Cal. 415, 147 P. 567; Morgan v. Walker, 217 Cal. 607, 20 P.2d 660; Moore v. California Oregon Power Co., 22 Cal.2d 725, 140 P.2d 798; Skelly v. Cowell, 37 Cal.App. 215, 173 P. 609; Stepp v. Williams, 52 Cal.App. 237, 198 P. 661; Mt. Shasta Power Corp. v. McArthur, 109 Cal. App. 171, 292 P. 549; California Pastoral & Agricultural Co. v. Enterprise Canal & Land Co., C.C., 127 F. 741, and other cases; and the doctrine of prior appropriation, as expounded in Osgood v. El Dorado Water & Deep Gravel Min. Co., 56 Cal. 571; Burrows v. Burrows, 82 Cal. 564, 23 P. 146; De Necochea v. Curtis, 80 Cal. 397, 20 P. 563, 22 P. 198; Duckworth v. Watsonville Water & Light Co., 158 Cal. 206, 110 P. 927; Haight v. Costanich, 184 Cal. 426, 194 P. 26; Joerger v. Pacific Gas & Electric Co., 207 Cal. 8, 276 P. 1017; Jennison v. Kirk, 98 U.S. 453, 25 L.Ed. 240; Telluride Power Transmission Co. v. Rio Grande WR Co., 175 U.S. 639, 20 S.Ct. 245, 44 L.Ed. 305; and also the doctrine of prescriptive rights, as expounded in Alta Land & Water Co., v. Hancock, 85 Cal. 219, 24 P. 645, 20 Am.St. Rep. 217; Southern California Inv. Co. v. Wilshire, 144 Cal. 68, 77 P. 767; Anaheim Union Water Co. v. Fuller, 150 Cal. 327, 88 P. 978, 11 L.R.A.,N.S., 1062; Oliver v. Robnett, 190 Cal. 51, 210 P. 408; Pabst v. Finmand, 190 Cal. 124, 211 P. 11; Morgan v. Walker, 217 Cal. 607, 20 P.2d 660; Moore v. California Oregon Power Co., 22 Cal.2d 725, 140 P.2d 798; Skelly v. Cowell, 37 Cal. App. 215, 173 P. 609; Stepp v. Williams, 52 Cal.App. 237, 198 P. 661; Mt. Shasta Power Corp. v. McArthur, 109 Cal.App. 171, 292 P. 549. If it may be said that the doctrine of those cases was based upon a philosophy of "rugged individualism", I would say that the doctrine laid down in the majority opinion in the case at bar is based upon the philosophy of bureaucratic communism. Under this latter doctrine, long established, and what was thought to be, a prior, vested right to divert and use a given quantity of water is not only placed upon a parity with later acquired rights, but an administrative agency of the state steps in and administers the distribution of such water at the expense of the users. This may not be the type of obnoxious stateism which exists in many other countries, but it is certainly a very definite step in that direction. As one who believes in the concept embraced within both the federal and state constitutions that an owner of private property has the right to exercise ownership and control over it and make such use of it as he may see fit so long as he causes no injury to others thereby, I am opposed to state supervision and control of privately owned water rights, as well as other privately owned property. I know of no reason, and none has been suggested, why parties engaged in water litigation may not prepare and present evidence in support of their rights with as much probative value as that obtained by the Division of Water Resources.

The record discloses that in 1911, appellant purchased 171 acres immediately north of Raymond Fault. Appellant retains only a few parcels (about 10%) of the original 171 acres. In every conveyance made, appellant reserved all water rights. One-fourth of appellant's production has been used for beneficial uses on the 171 acres of overlying land in Raymond Basin area and three-fourths has been exported for use outside of this area on non-overlying lands. By the end of the 1918-19 season, appellant's minimum annual extractions, extending over a period of five consecutive years, amounted to 370 acre feet of water. Before that, its production was 337 acre feet. Three-fourths of its maintained extraction, or 284.25 acre feet, represent prescriptive rights; that is, water diverted from the Basin and used on non-overlying lands. The remainder of the water produced was used on its overlying lands in the Basin. During the 1923-24 season, appellant produced on its lands 403 acre feet and exported three-fourths of this quantity. Between the last mentioned season and the 1928-29 season, appellant produced 521 acre feet per annum, of which 118 acre feet was new production which had matured since 1919. Of this new production, 29.50 acre feet was used on overlying lands and 88.50 acre feet represent a new prescriptive right acquired during this period. Appellant claims, and the evidence appears to sustain its position, that by the 1933-34 season, it had acquired a prescriptive right to divert and use from its lands overlying Raymond Basin 390.75 acre feet, and 130.25 acre feet for overlying uses on said land, or a total of 521 acre feet per annum. Appellant's production from said land since the filing of the complaint is as follows: 1938—613.12 acre feet; 1939—618.73 acre feet; 1940—626.06 acre feet; 1941—578.88 acre feet; 1942—701.30 acre feet; 1943—866.60 acre feet. By the decree in this action, appellant's production from said land for all purposes was determined to be 521 acre feet per annum which quantity was classified as appellant's unadjusted right. The decree, however, limited appellant's total diversion to 359 acre feet per annum for all purposes. In arriving at the foregoing conclusion, the trial court determined as a matter of law that all of the rights of the parties are of equal priority and of the same legal force and effect; that each of the parties had acquired a prescriptive right against the other for the quantity of water which the court determined that each of said parties was entitled to divert and use, and no distinction was made between the rights of overlying owners and rights acquired by appropriation or prescription.

I am disposed to agree with counsel for appellant that "One would search the books a long, long time before any law could be found that overlying owners' rights can be put into a hopper and come out appropriative or prescriptive rights, or that appropriative or prescriptive rights are co-equal with overlying owners' rights." I am sure that no cases can be found, even in the confused and muddled state of our water law which gives support to such an absurd pronouncement.

In California, one may acquire rights in underground water by appropriation or prescription. Such right, when established, is paramount to that of the overlying owner. Burr v. Maclay Rancho Water Co., 154 Cal. 428, 98 P. 260; Katz v. Walkinshaw, 141 Cal. 116, 70 P. 663, 74 P. 766, 64 L.R.A. 236, 99 Am.St.Rep. 35; City of San Bernardino v. City of Riverside, 186 Cal. 7, 198 P. 784; Peabody v. City of Vallejo, 2 Cal.2d 351, 40 P.2d 486.

There are, in this case, two types of water rights involved—those of the overlying owners, and those of the non-overlying owners. While I think the term "appropriator" is correctly used only with respect to those persons who acquired water rights prior to the time the lands of other overlying owners were granted by the United States Government, in the interest of promoting an understanding of this dissent, in conjunction with the majority opinion, I shall use the term as meaning a non-overlying owner—in other words, one who has acquired water rights for use other than on land overlying the underground water supply.

Inherent in the opinion as set forth in Katz v. Walkinshaw, 141 Cal. 116, 70 P. 663, 74 P. 766, 64 L.R.A. 236, 99 Am.St. Rep. 35, is the doctrine of correlative rights. It appears that this doctrine seeks to assimilate the law of streams—the analogy of riparian rights—to that of underground waters when used on overlying lands; as to non-overlying use, the analogy of rights by appropriation is in operation.

In 1928 a new section, Sec. 3 of Art. XIV, was added to our Constitution. This section was designed to prevent waste of the waters of our state, and was added in the interests of the public welfare. The section reads in part as follows: "The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, *or of depriving any appropriator of water to which he is lawfully entitled.* This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained." [Emphasis added.]

Evidently the first time the above quoted constitutional provision was considered by this Court was in the case of Gin S. Chow v. City of Santa Barbara, 217 Cal. 673, 22 P.2d 5. That case involved the Santa Barbara River, and decided that stream waters not being put to a beneficial use by a riparian owner could be appropriated, and the old law of vested riparian rights was supposedly overruled and obliterated by the 1928 Constitutional Amendment. In the light of certain language contained in said Amendment, such a construction appears to me to be unwarranted. Those words are these: "Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, *or may be made adaptable,* in view of such reasonable and beneficial uses; * * * provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, *or of depriving any appropriator of water to which he is lawfully entitled.*"

There is nothing in the above quoted constitutional provision which should be construed as preventing an appropriator from acquiring a prescriptive right to the water he has used beneficially for the prescriptive period. If the appropriator is using water which the riparian may need in the future to irrigate his land, then the riparian should be required to ask for a declaratory judgment in order that such water may be available to him when he does need it. This would prevent waste, and would be in line with the language contained in the constitutional amendment. It would also have the added advantage of letting the appropriator know where he stands and what he may expect. Under the present rule, an appropriator may use water, incur obligations, etc., and then, later, when the riparian owner desires to use water, have his rights taken from him. Such a state of affairs would bring on far more chaos than the "old rocking chair" doctrine was capable of doing.

The majority purport to expound rules relative to surplus or excess water, but admittedly there is no water answering such a classification in this case. The majority opinion states: "Prescriptive rights are not acquired by the taking of surplus or excess water, since no injunction may issue against the taking and the appropriator may take the surplus without giving compensation * * *." What the majority mean by the phrase "surplus or excess water" is not clear. If it is meant that so long as there is water available for those who desire to use it, any additional water is "surplus or excess water", then the above pronouncement is directly contrary to the following cases: Butte Canal & Ditch Co. v. Vaughn, 11 Cal. 143, 70 Am. Dec. 769; Ortman v. Dixon, 13 Cal. 33; Kidd v. Laird, 15 Cal. 161, 76 Am.Dec. 472; Stein Canal Co. v. Kern Island Irr. Canal Co., 53 Cal. 563; Lux v. Haggin, 69 Cal. 255, 4 P. 919, 10 P. 674; Alta Land & Water Co. v. Hancock, 85 Cal. 219, 24 P. 645, 20 Am.St.Rep. 217; Southern California Inv. Co. v. Wilshire, 144 Cal. 68, 77 P. 767; Montecito Valley Water Co. v. Santa Barbara, 144 Cal. 578, 77 P. 1113; Anaheim Union Water Co. v. Fuller, 150 Cal. 327, 88 P. 978, 11 L.R.A.,N.S., 1062; Duckworth v. Watsonville Water & Light Co., 150 Cal. 520, 89 P. 338; Wutchumna Water Co. v. Pogue, 151 Cal. 105, 90 P. 362; Huffner v. Sawday, 153 Cal. 86, 94 P. 424; Miller v. Bay Cities Water Co., 157 Cal. 256, 107 P. 115, 27 L.R.A.,N.S., 772; Walnut Irrigation Dist. v. Burke, 158 Cal. 165, 110 P. 517; San Joaquin & Kings River Canal and Irr. Co. v. Fresno Flume & Irr. Co., 158 Cal. 626, 112 P. 182, 35 L.R.A.,N.S., 832; Miller & Lux Inc., v. Enterprise Canal & Land Co., 169 Cal. 415, 147 P. 567; Miller & Lux Inc., v. J. G. James Co., 179 Cal. 689, 178 P. 716; City of San Bernardino v. City of Riverside, 186 Cal. 7, 198 P. 784; Antioch v. Williams Irr. Dist., 188 Cal. 451, 205 P. 688; Oliver v. Robnett, 190 Cal. 51, 210 P. 408; Pabst v. Finmand, 190 Cal. 124, 211 P. 11; Herminghaus v. Southern California Edison Co., 200 Cal. 81, 252 P. 607, Fall River Valley Irrigation Dist. v. Mt. Shasta Power Corp., 202 Cal. 56, 259 P. 444, 56 A.L.R. 264; Joerger v. Pacific Gas & Electric Co., 207 Cal. 8, 276 P. 1017; Morgan v. Walker, 217 Cal. 607, 20 P.2d 660; Miller & Lux Inc., v. Tulare Lake Basin Water Storage Dist., 219 Cal. 41, 25 P.2d 451; Peabody v. City of Vallejo, 2 Cal.2d 351, 40 P.2d 486; Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., 3 Cal.2d 489, 45 P.2d 972; Meridian, Ltd. v. San Francisco, 13 Cal.2d 424, 90 P.2d 537, 91 P.2d 105; Moore v. California

Oregon Power Co., 22 Cal.2d 725, 140 P. 2d 798; Skelly v. Cowell, 37 Cal.App. 215, 173 P. 609; Stepp v. Williams, 52 Cal.App. 237, 198 P. 661; Mt. Shasta Power Corp. v. McArthur, 109 Cal.App. 171, 292 P. 549; California Pastoral & Agricultural Co. v. Enterprise Canal & Land Co., C.C., 127 F. 741. This Court has never stated forthrightly that the above cases are overruled. There are expressions in some decisions to the effect that the doctrine of those cases is out of harmony with the concept embraced in the 1928 Constitutional Amendment, but the confusion resulting from such interpretation of this Amendment was probably not envisioned by the members of this Court who participated in the decisions in which this Amendment was interpreted. Under this interpretation, one who diverts water for a non-riparian use can never acquire a right to the water diverted and beneficially used by him as against a riparian owner who does not see fit to use his share of the water of a stream to which his land is riparian. This means that many of the most valuable water rights in this state could not now be acquired. For example, A diverts water from a stream for a non-riparian use for the prescriptive period. During all this period there is water flowing past the lands of the riparian owners down stream who are not cultivating their land, and, therefore, have no present need for water. But after A has fully developed his non-riparian land by the use of water from the stream for the prescriptive period, the downstream riparian owners decide to develop their lands and need the water. Under the doctrine of the Gin Chow and Peabody cases, the downstream riparian owners are entitled to all of the water if they need it to the exclusion and detriment of the non-riparian owner who has made a beneficial use of it for the prescriptive period. This was not the law before these decisions.

I am convinced that the doctrine of Lux v. Haggin, supra, did not establish a wise policy for the development of the water resources of California, and had I been a member of this Court when that case was decided, I would have joined with the dissenters. However, there were many salutary principles of water law which were engrafted onto that doctrine, under which valuable rights were established, and those principles should not be swept away by a stroke of the pen because the majority of this Court believe that the 1928 Constitutional Amendment has modified the riparian right doctrine by limiting the right to the quantity of water reasonably necessary for the beneficial use of the riparian owner. This modification should not operate to prevent a non-riparian owner from acquiring the same character of right he could have acquired under the superseded doctrine. I take the position, therefore, that a prescriptive right may be acquired to so-called "surplus or excess water" and that a holding to the contrary fails to recognize fundamental and well settled principles of water law which were not abrogated by the 1928 Constitutional Amendment.

In this case we have overlying owners who are analogous to the riparian owners, and we have many different appropriators. These different persons have all been using the water for their various purposes for a great many years—far more years than is legally necessary to acquire a prescriptive right against any one. The majority say they have been using adversely to each other, and have acquired prescriptive rights against each other. This is a statement with which I am not in accord. In order that one may gain a prescriptive right there must be an adverse user for the prescribed period of five years under such circumstances that the person against whom the use is adverse has knowledge, either actual or constructive. The majority charge the various appropriators with such knowledge because the water level in the wells was lowered. This is absurd. The level in these wells was, due to the very nature of the source of supply, subject to change. The duration and severity of the winter season, the length and intensity of the rainy season, the humidity or lack of humidity with its attendant lack of evaporation or evaporation would all have an effect on the supply of water available in the wells. The mere user of the water for the prescriptive period is not sufficient of itself to confer prescriptive title; the use must be adverse. Otherwise it can never ripen into a prescriptive title, no matter how long continued. And before a use can be adverse in the sense of this rule, it must be an invasion of the rights of the party against whom it is set up, of such a character as to afford him grounds of action; that is, it is the fact that the claimant has been exposed to an action which the opposite party has neglected to bring, that is seized on as the ground for presuming a grant in favor of long continued possession and enjoyment. The theory being that this adverse state of things would not have been submitted to if there had not been a grant. A general principle which has been applied is that a use of the water of a stream or lake by a common proprietor, although excessive, is not to be regarded as adverse, so as to ripen into a prescriptive right, however long continued, so long as it is the common use, and so long as other common owners are not injured thereby or prevented or excluded from making such use as of common right belong to them. 56 Am.Jur., Waters, pp. 766-768.

In this case we have both overlying owners and appropriators using the water, and apparently all the water any of them had had need for. Yet we are asked to believe that each and every one of them has, in some way, gained a prescriptive right against each and every one of the others because the water level in the wells has been lowered. It appears from the report of the Water Commission that the underground supply has been withdrawn to a greater extent than is consistent with water conservation measures. It appears to me that the only question involved is that of priority in time of appropriation.

With respect to appropriators, the Civil Code provides that one prior in time is prior in right. Section 1414. This rule seems to be agreed upon by the text writers and a great number of cases. To state the general rule affirmatively, an appropriator of water is entitled, as against all subsequent claimants, to the exclusive use of the water to the exent of his appropriation, without diminution or material alteration in quantity or quality. The residue after a prior appropriation may be appropriated by others out of the water of the same stream, *if there is no interference with the prior appropriation.* When a senior appropriator does not need all or some portion of the water, a junior appropriator may, at such times, use such unused waters, although the rights of the senior appropriators, when fully exercised, consume the entire flow.

It is the very essence of the doctrine of prior appropriation that as between persons claiming water by appropriation, he has the best right who is first in time; in other words, the prior appropriator is entitled to it to the extent appropriated to the exclusion of any subsequent appropriator for the same or any other use. But where both rights can be enjoyed without interference with or material impairment of each other, the enjoyment of both is allowed. 56 Am.Jur., Waters, pp. 758-9; Weil, Water Rights in the Western States, p. 307 et seq.; Wishon v. Globe Light & Power Co., 158 Cal. 137, 110 P. 290; Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., 3 Cal.2d 489, 45 P.2d 972; United States v. 4.105 Acres of Land, D.C., 68 F.Supp. 279; State ex rel. Crowley v. District Court, 108 Mont. 89, 88 P.2d 23, 121 A.L.R. 1031, 1044; Farnham, Waters and Water Rights, p. 2089; City of Lodi v. East Bay Municipal Utility Dist., 7 Cal.2d 316, 60 P.2d 439; Larsen v. Apollonio, 5 Cal.2d 440, 55 P.2d 196; Meridian, Ltd., v. San Francisco, 13 Cal.2d 424, 90 P.2d 537, 91 P.2d 105.

As a solution to the problem, the majority opinion affirms the trial court and in so doing holds that the appropriators, including appellant, shall have allocated among them the water shortage. This is to be done by a proportionate reduction of the amount each appropriator has heretofore been pumping. The majority cite no authority for this proposition. It is submitted that this is not, and should not be the law. In times of natural or other deficiency, also, unless otherwise provided by statute, the prior appropriator may still claim his full amount; the loss must fall on the later appropriators. Weil, Water Rights, supra, page 311, and cases cited therein. This follows naturally from the rule that prior in time is prior in right, and *this* rule is found in section 1414 of the Civil Code.

In City of Lodi v. East Bay Municipal Utility Dis., 7 Cal.2d 316, 341, 60 P.2d 439, 450, this Court said: "The city is a prior appropriator, and as such cannot be compelled to incur any material expense in order to accommodate the subsequent appropriator. Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., supra, 3 Cal.2d 489, at page 574, 45 P.2d 972. Although the prior appropriator may be required to make minor changes in its method of appropriation in order to render available water for subsequent appropriators, *it cannot be compelled to make major changes* or to incur substantial expense. Peabody v. City of Vallejo, supra, 2 Cal.2d 351, at page 376, 40 P.2d 486." [Emphasis added.] It was also said 7 Cal.2d at page 339, 60 P.2d at page 449, "Under such circumstances the 1928 constitutional amendment, as applied by this court in the cases cited, compels the trial courts, before issuing a decree entailing such waste of water, to ascertain whether there exists a physical solution of the problem presented that will avoid the waste, and that will at the same time *not unreasonably and adversely affect the prior appropriator's vested property right.*" [Emphasis added.]

The majority of this Court, in holding that the prior appropriator's rights should be diminished proportionately with those of subsequent appropriators, is, in so doing, interfering with a vested property right, and comes squarely within the limitation on the police power of the state as set forth in the Fourteenth Amendment to the Constitution of the United States. The subsequent appropriators are charged with knowledge of the rights in the water acquired at a time prior to the time their rights were acquired, and it is they, rather than those who were first in time, whose rights should be subject to the exercise of the police power in the interests of the public in water conservation.

It is difficult to see how prescriptive rights can be said to have been gained by subsequent appropriators against prior appropriators without a determination of the extent of such rights. It seems that the scattered operations conducted by respondents should not have been lumped together to constitute one prescriptive right, but that there should have been a determination of each prescriptive right, if any, that respondent had acquired as against the appellant. Appellant sought, by its demurrer to the complaint, to have the court below require respondent to plead the exact quantities and locations of water rights which it claimed. Its demurrer was overruled. It sought to ascertain the same thing by a Demand for a Bill of Particulars. The demand was denied.

The right to water acquired by prescription extends only to the quantity actually taken at the time the right matured and does not include the taking of an additional quantity in the future. Burris v. People's Ditch Co., 104 Cal. 248, 252, 37 P. 922; North Fork Water Co., v. Edwards, 121 Cal. 662, 665, 54 P. 69; Southern California Inv. Co. v. Wilshire, 144 Cal. 68, 72, 77 P. 767; Wutchumna Water Co., v. Ragle, 148 Cal. 759, 765, 84 P. 162; Pabst v. Finmand, 190 Cal. 124, 132, 211 P. 11; City of San Bernardino v. City of Riverside, 186 Cal. 7, 25, 198 P. 784; Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., 3 Cal.2d 489, 45 P.2d 972; Elliott v. Bertsch, 59 Cal.App.2d 543, 547, 139 P.2d 332.

The majority opinion states that the trial court concluded that each party owned "by prescription" its "present unadjusted right", that is, the amount which it had been actually pumping. To reach this result is to say that one may acquire a prescriptive right merely by *using* the water. As I have pointed out previously, the use must be adverse, and the persons against whom the right is gained must have knowledge, either actual or constructive. City of San Diego v. Cuyamaca Water Co., 209 Cal. 105, 134, 287 P. 475. Adverse use of water involves the invasion of the usufructuary right of another in a water supply common to both. Appropriative or prescriptive rights may be invaded only by interference by another resulting in actual diminution of the amount of water covered by such right. Faulkner v. Rondoni, 104 Cal. 140, 147, 37 P. 883; E.

Clemens Horst Co. v. Tarr Mining Co., 174 Cal. 430, 440, 163 P. 492.

Conceding that a restriction of the water supply was necessary, *and assuming for the purpose of argument only,* that the rules as to appropriation should not be applied, the restriction should have been based upon the elevations at appellant's wells rather than limiting it to a specific number of acre feet per year regardless of the status of the water tables.

Professor C. F. Tolman, Professor of Economic Geology at Stanford University, the leading authority on ground water, in his work "Ground Water" says: "It must not be concluded that a considerable lowering of the water table is serious or is detrimental to the water supply. Just as a surface reservoir must be drawn down in order to catch and preserve flood flow, so the subsurface-reservoir level (water table) must be lowered sufficiently to prevent loss by effluent seepage. A decrease in the area of effluent seepage increases the area of influent seepage (absorptive area) and in turn increases the rate of ground-water recharge. A depleted reservoir at the end of the dry season or cycle of dry years is necessary if the water is to be salvaged in the following wet season or cycle. In legal controversies an unreasonable view has been taken in the past in regard to the necessity of maintaining the water table at the 'natural level'." (page 469). And at page 487: "Many of the underground reservoirs are so large that they have capacity to carry over great quantities of water not only from a wet season to the following dry season but also from a period of wet years to a period of dry years. However, to utilize these reservoirs fully it is necessary to pump enough water out of them to make room for all the inflow during the wettest seasons and during the periods of successive years of heavy precipitation. This was well illustrated by some of the underground reservoirs of Southern California, whose water tables, under heavy pumping for irrigation, went down a little lower each summer than they had risen in the previous winter, until it appeared that excessive depletion must inevitably compel reduction in irrigation. Then came a period of wet winters when recharge occurred to a remarkable extent and the water levels rose beyond all expectations."

The language used by this Court in City of Lodi v. East Bay Municipal Utility Dist., 7 Cal.2d 316, 344, 60 P.2d 439, 452, is applicable to the contention made by appellants: "In our opinion the cause should be sent back to the trial court to permit it to take evidence as to the levels to which plaintiff's wells may be lowered without substantial danger to the city's water supply. In fixing this danger level, an adequate safety factor in favor of the city should be allowed. There is no necessity for a retrial of the case on the issues of fact as to which the court has made extensive findings, as above noted. The facts as thus found may be considered in connection with the further evidence taken to fix the danger level of Lodi's wells. The decree should then be reframed to provide that the duty rests upon the District to maintain the levels of the plaintiff's wells above the danger level so fixed by the trial court; that in the event the levels of the wells reach the danger point, the duty be cast upon the District to supply water to the city, or to raise the levels of the wells above the danger mark; and, if the District does not comply with this order within a reasonable time, then the injunction decree already framed, or upon a proper showing as modified by the court under its continuing jurisdiction, shall go into effect. The trial court should by its judgment preserve its continuing jurisdiction to change or modify its orders and decree as occasion may require.

"Such a decree would adequately meet the requirements of the Constitution by preventing an unreasonable waste of the waters of the stream, and at the same time would adequately protect the prior rights of the City of Lodi. It would afford to the city a continuance of its water supply, the same, for all practical purposes, as if natural conditions were required to persist. If its wells go down to the danger level, it would immediately obtain water from the District at the latter's expense, or the injunction decree by means of which the underground levels will be artificially maintained would go into effect. It would accord to the District the right, and place upon it the duty, of working out a physical solution *unhampered by a rigid decree which, with changing conditions and new methods of conservation constantly being developed, may not only operate inequitably but might actually encourage waste.* It would place upon the District the duty at its expense to maintain the underground water levels, and, if the District fails to do so, or fails to supply water directly to the City of Lodi, the decree provides for compulsory releases so as to maintain natural conditions. Such a decree would say to the District: You should maintain the water levels so as not to cause substantial damage to the city, and you may do this in any way best suited to your needs, or, if you do not maintain those levels, you should supplement the city's supply to the extent of the deficiency caused by your operations by the furnishing of water by artificial means and at your expense. If you do not do these things, you are subject to an injunction compelling releases to maintain natural conditions. Such a decree would undoubtedly prevent a multiplicity of suits. It would fix the rights of the prior appropriator and would determine the effect of the subsequent appropriator's diversions. Since there is no immediate danger to the prior appropriator, it would fix the danger levels of the prior appropriator's wells and when that level is reached, upon a showing to that effect, it would require the subsequent appropriator either by direct delivery of water or by compulsory releases to supply the prior appropriator's needs.

"Such a decree would permit the full use of all available waters, guarantee to the prior appropriator full protection, and would do this without unduly restraining the operations of the subsequent appropriator."

To accomplish the restriction by requiring appellant to maintain a certain level in its wells is a far more equitable solution than that proposed by the majority. In the first instance, during wet years he may, without court action, pump as much water as he has need for; in dry years, he will know exactly where he stands and that he may not go beyond the danger line. To place the restriction on the water-level basis will save time, money and expense.

The respondent seeks to answer appellant's contention as to the water-level basis of restriction with the argument that the decree was responsive to the pleadings "in that each claimed a certain amount of water and not that certain water levels should be maintained. As the Western Unit herein considered is an underground reservoir, the abstraction of an acre foot of water by one party is to that extent detrimental to the rights of every other party in the Unit." Of course the parties claimed a certain amount of water; appellant claimed, and introduced evidence to support the claim, that, in accordance with the law, *a prior appropriator had a prior right,* but the decree is certainly *not* consistent with that claim.

In summary, the majority opinion seems to hold that "surplus or excess water", without defining it, may be appropriated, but no prescriptive right may be acquired thereto; that a subsequent appropriator may acquire a prescriptive right against a prior appropriator of percolating water even though the prior appropriator has continued to divert and use his full appropriative right and has never been deprived of any portion of the quantity of water so appropriated by him; that an overlying owner may acquire a prescriptive right against another overlying owner who is using water from the same underground basin even though each has diverted and used the full quantity of water he could put to a beneficial use; that an overlying owner may acquire a right by prescription against a prior or subsequent appropriator and that the latter may acquire such a right against the former even though each has diverted and used the full quantity of water that he could reasonably put to beneficial use. Obviously, the effect of this holding is to place upon an equal footing users who have diverted and used a given quantity of water from an underground basin for a continuous period of five years regardless of the origin or period of time during which the diversions were made. This holding does not find support in a single authority or decision of any court in any common law jurisdiction since court decisions have been published. On the other hand, it is contrary to every decision which has ever been rendered by the courts of this state and every other jurisidction which has considered the subject. Viewed in relation to the practical aspect of the case and the physical situation which must exist in every case of this character, the effect of this holding is to overrule every decision which has been rendered by this court in cases where similar factual situations existed. We must assume that, in a state of nature, the underground basin here involved was full of water in normal years of precipitation and run-off; that is, the water would be up to the top of the rim which confined it to the basin area. If all users from such a basin were overlying land owners, then under the settled rules of law as announced by this court, the rights of such users would be equal and correlative, and no user would have a prior or superior right to the other. City of San Bernardino v. City of Riverside, 186 Cal. 7, 198 P. 784; Burr v. Maclay Rancho Water Co., 154 Cal. 428, 439, 98 P. 260; Katz v. Walkinshaw, 141 Cal. 116, 70 P. 663, 74 P. 766, 64 L.R.A. 236, 99 Am.St.Rep. 35. Then an appropriator comes into the picture. I mean by "appropriator", one who diverts and uses water on non-overlying land. Obviously, the same rule does not apply to him as to an overlying owner because his use is clearly adverse to the latter, unless there is surplus or excess water in the basin, and this presents a most complex problem—one which it may take years to solve. Its solution depends upon many factors, such as topography, the area and depth of the basin, the quantity and source of supply, the outflow, if any, the character of use by the overlying owners, the type of crops raised, and various other factors which may not be immediately apparent. This Court has held, and in my opinion correctly, that any appropriation made subsequent to the vesting of title in an overlying owner is adverse to such overlying owner and gives rise to an immediate cause of action on his behalf. City of San Bernardino v. City of Riverside, 186 Cal. 7, 198 P. 784; Burr v. Maclay Rancho Water Co., 154 Cal. 428, 439, 98 P. 260; Katz v. Walkinshaw, 141 Cal. 116, 70 P. 663, 74 P. 766, 64 L.R.A. 236, 99 Am.St.Rep. 35; Miller v. Bay Cities Water Co., 157 Cal. 256, 107 P. 115, 27 L.R.A., N.S., 772; McClintock v. Hudson, 141 Cal. 275, 281, 74 P. 849; Cohen v. La Canada Land & Water Co., 142 Cal. 437, 76 P. 47; Montecito Valley Water Co. v. Santa Barbara, 144 Cal. 578, 584, 77 P. 1113; Verdugo Canon Water Co. v. Verdugo, 152 Cal. 655, 93 P. 1021; Hudson v. Dailey, 156 Cal. 617, 105 P. 748; because such use will necessarily ripen into a right by prescription against such overlying owner in five years. This is not true as between appropriators, as the rule always has been, as declared in section 1414 of the Civil Code, that "As between appropriators, the one first in time is the first in right." Wishon v. Globe Light & Power Co., 158 Cal. 137, 110 P. 290; City of San Bernardino v. City of Riverside, 186 Cal. 7, 198 P. 784; Meridian, Ltd. v. San Francisco, 13 Cal.2d 424, 90 P.2d 537, 91 P.2d 105; Sherwood v. Wood, 38 Cal.App. 745, 177 P. 491; Jones v. Pleasant Valley Canal Co., 44 Cal.App.2d 798, 113 P.2d 289. Not only is the above cited section of the Civil Code completely abrogated and nullified, but all of the above cited cases are, in effect, overruled by the majority decision in this case.

The effect of the majority decision is to say to the overlying owners of land situated on an underground basin filled with percolating waters, that: "You have no cause of action against an appropriator of water for a non-overlying use unless you can show that he is taking other than excess or surplus water, but if you do not commence an action to restrain such diversion, such an appropriator may obtain a prescriptive right against you if it should later be determined that he is taking water to which you and other overlying land owners may be entitled." Anyone who has the slightest knowledge of situations of this character should realize that this would place an impossible burden upon the overlying land owner and greatly jeopardize his rights. His difficulty would be multiplied if there were a number of overlying owners taking water from the same basin. Obviously, the overlying land owner should have an immediate cause of action against the appropriator, and the burden should be on the latter to show that he is taking only surplus or excess water or cease his diversion. So far as subsequent appropriators are concerned, the prior appropriator should have the right to rely upon section 1414 of the Civil Code and the above-cited authorities which should vouchsafe to him a prior and superior right based upon his prior appropriation.

Since the decision of the trial court, which is affirmed by the majority decision of this court, is completely out of harmony with every statute, principle and rule of law which as heretofore been enacted and promulgated, I would reverse the judgment and remand the cause for a new trial in accordance with what should be the settled law of this state.

Rehearing denied; CARTER and SCHAUER, JJ., dissenting.

33 Cal.2d 956

CITY OF PASADENA v. CITY OF ALHAMBRA et al.

L. A. 19186.

Supreme Court of California, in Bank.
June 3, 1949.

Rehearing Denied June 27, 1949.

Waters and water courses 🔑152(10)

Where municipality brought action to determine ground water rights to Raymond Basin area and to enjoin overdraft court could properly appoint division of water resources, department of public works, as referee and fix and allocate expenses of reference among parties to the action.

◆

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by the city of Pasadena, a municipal corporation, against the city of Alhambra, a municipal corporation, the California-Michigan Land and Water Company, a corporation, and others, to determine ground water rights within the Raymond Basin area, and for other relief. The division of water resources, department of public works, state of California was designated as referee. From two orders fixing and allocating expenses of the reference among parties to the action, the California-Michigan Land and Water Company, and others, appeal.

Orders affirmed.

For prior opinion, see 180 P.2d 699.

Goodspeed, McGuire, Harris & Pfaff, Paul Vallee, Richard C. Goodspeed and J. Donald McGuire, Los Angeles, for appellants.

A. E. Chandler, Special Counsel, San Francisco, Harold P. Huls and H. Burton Noble, City Attorneys Pasadena, C. C. Carleton, Spencer Burroughs, Henry Holsinger, Sacramento, James C. Bone and T. Guy Cornyn, City Attorneys Arcadia, Gerald E. Kerrin, Robert E. Moore, Jr., Los Angeles, Hahn & Hahn, Edwin F. Hahn, Pasadena, Potter & Potter, Bernard Potter, Sr., Los Angeles, Merriam, Rinehart & Merriam, Ralph T. Merriam, Pasadena, Laurence B. Martin, Los Angeles, Frederick G. Stoehr, Pasadena, Emmett A. Tompkins, City Attorney Alhambra, Kenneth K. Wright, Special Counsel, Los Angeles, Paul F. Garber, City Attorney Monrovia, Walter F. Dunn, Monrovia, and Thomas Reynolds, City Attorney Los Angeles Sierra Madre, Anderson & Anderson, Trent G. Anderson, John C. Packard, Los Angeles, Bacigalupi, Elkus & Sallinger, Claude Rosenberg, San Francisco, Derthick, Cusack & Ganahl, W. J. Cussack, Los Angeles, Wilton W. Webster, Pasadena, Dunn & Sturgeon, Walter F. Dunn, Monrovia, Chandler & Wright, Howard Wright, Bailie, Turner & Lake, Norman A. Bailie, Los Angeles, Cruickshank, Brooke & Dunlap, Boyle & Holmes, John W. Holmes, Pasadena, Frank P. Doherty, Gibson, Dunn & Crutcher, Ira C. Powers, Harold W. Kennedy, County Counsel, S. V. O. Prichard, Assistant County Counsel, Los Angeles, for respondents.

Martin J. Weil, Wm. J. De Martini, J. A. McNair, J. Arthur Tucker, Los Angeles, W. F. Kiessig, San Francisco, Harrison Guio, L. A. Gibbons, Jerry H. Powell, Douglas C. Gregg, Lawler, Felix & Hall, Los Angeles, and Pillsbury, Madison &

Sutro, San Francisco, as amicus curiae on behalf of respondents.

BY THE COURT.

The Division of Water Resources of the Department of Public Works was appointed as referee in an action to determine ground water rights, and defendant California-Michigan Land & Water Company has appealed from two orders which fixed and allocated the expenses of the reference among the parties to the action. No objection is raised as to the method or amounts of the allocation, but it is contended that the reference procedure was improper and invalid for a number of reasons. The same contentions were made in the companion case of City of Pasadena v. City of Alhambra, Cal.Sup., 207 P.2d 17, and were determined adversely to appellant.

The orders appealed from are affirmed.

Rehearing denied; CARTER and SCHAUER, JJ., dissenting.

34 Cal.2d 87

PERRY v. JORDAN.

S. F. 17975.

Supreme Court of California, in Bank.

June 22, 1949.

Rehearing Denied July 21, 1949.

1. Mandamus 🔑5

A writ of mandamus may be denied if a similar application between same parties on same matter is already pending before another court, but pendency of another action is no defense unless it is between same parties for same cause.

2. Abatement and revival 🔑4

A plea in abatement because of another action pending is dilatory in nature and not favored by courts.

3. Courts 🔑207(4)

Supreme Court would not refuse to entertain original petition for mandamus to compel Secretary of State to take steps required to prepare for submission to electorate at next appropriate election, a measure to repeal constitutional provision for pensions for needy aged and blind, because of pendency in Superior Court of mandamus proceeding presenting same issues. Const. art. 25.

4. Statutes 🔑225¾.4

When scope and meaning of words or phrases in a statute have been repeatedly interpreted by courts, there is some indication that use of them in a subsequent statute in a similar setting carries with it a like construction.

5. Constitutional law 🔑9(1)

Constitutional provision requiring every constitutional amendment or statute proposed by initiative to relate to but one subject would be construed as having been adopted pursuant to purposes underlying prior constitutional provision requiring every act to embrace but one subject, which subject shall be expressed in its title. Const. art. 4, §§ 1c, 24.

6. Constitutional law 🔑48

Title and summary of chief purposes and points of proposed repeal measure prepared by Attorney General is presumed sufficient, and doubts are to be resolved in favor of its sufficiency. Const. art. 4, § 1.

7. Constitutional law 🔑9(1)

Title and summary of chief purposes and points of proposed repeal measure prepared by Attorney General pursuant to constitutional requirement need not contain a summary or index of provisions of the measure or auxiliary and subsidiary matters. Const. art. 4, § 1.

8. Constitutional law 🔑9(1)

Title and summary of proposed measure to repeal constitutional provision for pensions for needy, aged and blind as prepared by Attorney General was sufficient to comply with constitutional requirement, especially in light of very recent enactment of measure sought to be repealed. Const. art. 4, §§ 1, 1c; art. 25.

◆

Original proceeding in mandamus by Newel Perry against Frank M. Jordan, as

Secretary of State of State of California, to compel respondent to take the various steps required of him by law to prepare for submission to electorate at next appropriate election a measure to repeal article 25 of Constitution which was added at general election in November of 1948.

Pre-emptory writ issued.

Stanley A. Weigel, Ben C. Duniway, San Francisco, and Grover W. Bedeau, Sacramento, for petitioner.

O'Melveny & Myers, Pierce Works and Louis W. Myers, Los Angeles, amici curiæ on behalf of petitioner.

Fred N. Howser, Attorney General, E. G. Benard, Assistant Attorney General, and Leonard M. Friedman, Deputy Attorney General for respondent.

Robert W. Kenny, Los Angeles, E. Vayne Miller, George W. Artz, Jr., Sacramento, Sheridan Downey, Jr., Clifton Hildebrand, Oakland, and Edward Raiden, Los Angeles, for real parties in interest.

CARTER, Justice.

This is a proceeding in mandamus in which petitioner seeks to compel respondent, Secretary of State, to take the various steps required of him by law to prepare for submission to the electorate at the next appropriate election a measure to repeal Article XXV of the Constitution which was added at the general election in November of 1948. Article XXV provides for pensions for the needy aged and blind, and as will hereafter more fully appear, is commonly referred to as Proposition 4, that being its position on the election ballot in 1948. Compliance has been had with all the steps necessary for the repeal measure concerning petitions for an initiative constitutional amendment. Petitioner is the official proponent of the repealing measure. Heretofore, the present opponents of the repeal measure and the former proponents of Article XXV commenced a proceeding in the superior court of Sacramento County to obtain a writ of mandate ordering respondent here to refrain from submitting the repeal measure to the voters on the ground that it violates section 1c, Article IV of the Constitution of California, and other grounds.

The opponents of the repeal measure, although not formally parties, appear here resisting the issuance of the writ as the parties "beneficially interested" and raise the same grounds as those upon which their proceeding is based in the superior court. The proponent of the repeal measure, though not a party in the latter proceeding, is actively participating therein. The same issues are thus presented in the proceeding here that are involved in the superior court action. The latter court issued an alternative writ of mandate in the proceeding before it, ordering respondent not to submit the repeal measure to the voters, or show cause why he has not so refrained, and that is the present status of the latter proceeding, the superior court not having as yet made its decision on the issuance of a peremptory writ.

[1–3] It is claimed that this court should not entertain this proceeding because of the pendency of the above mentioned proceeding in the superior court, although the two courts have concurrent jurisdiction in mandamus proceedings. The rule is stated in W. R. Grace & Co. v. California Emp. Com., 24 Cal.2d 720, 727, 151 P.2d 215, 219: "The writ [mandate] is therefore denied if a similar application between the same parties on the same matter is already pending before another court. Goytino v. McAleer, [4 Cal.App. 655, 88 P. 991], supra; McMullen v. Glenn-Colusa Irr. Dist., 17 Cal.App.2d 696, 701–702, 62 P.2d 108. The pendency of another action, however, is no defense unless it is 'between the same parties for the same cause.'" See also Goytino v. McAleer, 4 Cal.App. 655, 88 P. 991; McMullen v. Glenn-Colusa Irr. Dist., 17 Cal.App.2d 696, 62 P.2d 1083; Millott v. Mare Island Emp. Assn., 44 Cal.App. 271, 186 P. 378; Patterson v. City of Lynwood, 72 Cal.App. 212, 236 P. 933. Assuming that the various technical requisites are present for a plea in abatement because of another action pending, it should be observed that such plea is dilatory in nature and not favored by the courts, Lincoln v. Superior Court, 22 Cal.2d 304, 139 P.2d 13; Lord v. Garland, 27 Cal.2d 840, 168 P.2d 5; 1 Cal. Jur. 24, and in the instant case there are circumstances which we believe require this court to make a determination in this proceeding, to deny the plea in abatement, and to call for the exercise by this court of its original jurisdiction. The measure presented is an initiative constitutional amendment. "The right of initiative is precious to the people and is one which the courts are zealous to preserve to the fullest tenable measure of spirit as well as letter." McFadden v. Jordan, 32 Cal.2d 330, 332, 196 P.2d 787, 788. To preserve the full spirit of the initiative the submission of issues to the voters should not become bogged down by lengthy litigation in the courts, especially where there is a strong temptation to commence proceedings in the superior court by the opponents of a measure to delay its presentation to the electorate. The measure requires a statewide election. That the issues involved under Article XXV, and consequently the proposed repeal thereof, are of vital consequence in the state is manifest. They directly affect every taxpayer of the state, which, in effect, means practically every resident of the state. They are of prime concern to the aged needy and blind. Whether the repeal measure will go on the ballot in November, 1950, the next general election, or at a special election prior thereto rests with the Governor California Constitution, Art. IV, sec. 1. The exercise by the chief executive of his discretion is obstructed by pending litigation. Until the litigation is settled, he is not in a position to freely exercise his discretion and this court should clear the way for action or non-action by him. For all these reasons and under all these circumstances, proper public policy demands that this court entertain these proceedings. Similarly, we do not believe such cases as Patterson v. City of Lynwood, 72 Cal.App. 212, 236 P. 933; Keyston v. Banta-Carbona Irr. Dist., 19 Cal.App.2d 384, 65 P.2d 371; McMullen v. Glenn-Colusa Irr. Dist., 17 Cal.App.2d 696, 62 P.2d 1083; Millott v. Mare Island Emp. Ass'n, 44 Cal.App. 271, 186 P. 378; Baines v. Zemansky, 176 Cal. 369, 168 P. 565, and Brown v. Jernigan, 74 Cal.App. 524, 241 P. 108, should be controlling. Moreover, it should be observed that in all of those cases, except the Zemansky case, local or private, as distinguished from state-wide, elections or affairs were involved. The end result in the Zemansky case was the issuance of the writ.

Turning to the merits of the case, it appears that the opponents of the repeal assert that the repealing measure is invalid for two reasons: (1) It embraces more than one subject inasmuch as it repeals Article XXV of the Constitution, which, in turn, it is claimed, embraces more than one subject in violation of section 1c of Article IV of the Constitution; and (2) The title is defective.

Section 1c reads: "Every constitutional amendment or statute proposed by the initiative shall relate to but one subject. No such amendment or statute shall hereafter be submitted to the electors if it embraces more than one subject, nor shall any such amendment or statute embracing more than one subject, hereafter submitted to or approved by the electors, become effective for any purpose." Before discussing the application of that provision in the instant case, it should be mentioned that probably a "one subject" requirement would not be passed upon by the court ordinarily in connection with a simple repeal measure for the reason that it might present a moot question. If the repeal measure was held bad for multitudinous subjects, the act it repealed would necessarily be faulty and would be nullified, for it would be subject to the same condemnation. If the repeal measure contained only one subject, then it would operate to nullify the repealed proposition. Thus, whichever way the court decided, the enactment sought to be repealed would be destroyed. Here we do not have the ordinary case, for the "one subject" requirement as to initiatives was placed in the Constitution at the same time Article XXV, the measure sought to be repealed, was adopted. We are assuming here, therefore, that the "one subject" limitation is applicable to the repeal measure here involved.

[4, 5] The problem of whether more than one subject is embraced within one legislative act is not new in this state. Although section 1c has been newly added extending the requirement to initiative con-

stitutional amendments, the Constitution for many years has required that "Every Act shall embrace but one subject, which subject shall be expressed in its title." Cal.Const. art. IV, sec. 24. The proper scope and application of that provision as to singleness of subject was elucidated, as the latest word on the subject, by this Court in Evans v. Superior Court, 215 Cal. 58, 62, 8 P.2d 467, 469, upholding the adoption of the Probate Code in a single enactment:

"* * * we are of the view that the provision is not to receive a narrow or technical construction in all cases, but is to be construed liberally to uphold proper legislation, all parts of which are reasonably germane. Heron v. Riley, 209 Cal. 507, 510, 289 P. 160. The provision was not enacted to provide means for the overthrow of legitimate legislation. McClure v. Riley, 198 Cal. 23, 26, 243 P. 429. * * *

"Numerous provisions, having one general object, if fairly indicated in the title, may be united in one act. Provisions governing projects so related and interdependent as to constitute a single scheme may be properly included within a single act. Barber v. Galloway, 195 Cal. 1, 3, 231 P. 34. The Legislature may insert in a single act all legislation germane to the general subject as expressed in its title and within the field of legislation suggested thereby. Treat v. Los Angeles Gas Corp., 82 Cal.App. 610, 256 P. 447. Provisions which are logically germane to the title of the act and are included within its scope may be united. The general purpose of a statute being declared, the details provided for its accomplishment will be regarded as necessary incidents. Estate of Wellings' Estate, 192 Cal. 506, 519, 221 P. 628; Buelke v. Levenstadt, 190 Cal. 684, 687, 214 P. 42; and cases cited. The language of this court in Robinson v. Kerrigan, 151 Cal. 40, 51, 90 P. 129, 121 Am.St. Rep. 90, 12 Ann.Cas. 829, is especially applicable to this case at this point. A provision which conduces to the act, or which is auxiliary to and promotive of its main purpose, or has a necessary and natural connection with such purpose, is germane within the rule. * * * Our conclusion, therefore, is that the newly enacted Probate Code does not embrace more than one subject. Its numerous provisions have one general object. The classification of these provisions, made by the Code Commission, and carried into the title of the act, is a 'reasonably intelligent reference to the subject to which the legislation of the act is to be addressed,' which is all that is requisite." See also cases collected in 223 Cal.Jur. 646-650; 50 Am.Jur., Statutes, secs. 196–199. When the scope and meaning of words or phrases in a statute have been repeatedly interpreted by the courts, there is some indication that the use of them in a subsequent statute in a similar setting carries with it a like construction. City of Long Beach v. Payne, 3 Cal.2d 184, 44 P. 2d 305. There is nothing in the argument to the voters when section 1c of Article IV was adopted contrary to such construction or the purposes underlying the "one subject" limitation.

It is manifest that the general subject of Article XXV which it is proposed to repeal is aid to the needy aged and blind. That article sets forth the pension payments to be made, the requirements to be met by a prospective recipient, the officer selected by name to administer the act, and the like, all aimed at the machinery to carry out the main subject and wholly incidental to it. Opponents of the repeal measure refer to four different purposes and incidentally claim eighteen in all, such as that the repeal of Article XXV will result in giving the legislature power to reduce the pension payments provided for in such article, giving the administration thereof to the counties instead of the state, imposing liability on relatives and raising the minimum age qualification. All those things obviously pertain to any plan—single subject—of aid to the needy aged and blind. They are merely administive details.

[6, 7] Said opponents further object, really repeating the argument with respect to subject, that the title and summary of the repeal measure prepared by the Attorney General is faulty. The Con-

stitution imposes upon the Attorney General the duty of preparing "* * * a title, and summary of the chief purpose and points of said proposed measure * * *." Cal.Const. art. IV, sec. 1. The proper application and scope of that provision has likewise been settled by this court. A title so prepared is presumed sufficient, and doubts are to be resolved in favor of its sufficiency; a substantial compliance is sufficient and it need not contain a summary or index of the provisions of the measure or auxiliary and subsidiary matters. California Teachers Ass'n v. Collins, 1 Cal.2d 202, 34 P.2d 134; Epperson v. Jordan, 12 Cal.2d 61, 82 P.2d 445; Brown v. Jordan, 12 Cal.2d 75, 82 P.2d 450; Vandeleur v. Jordan, 12 Cal.2d 71, 82 P.2d 455.

[8] The title prepared for the repeal measure reads: "Aged and Blind Aid, Initiative Constitutional Amendment. Adds Article XXVII, repeals Article XXV, State Constitution. Reinstates plan of Old Age Security and Aid to Blind, and method of administration thereof, in existence prior to adoption of Article XXV, except that maximum aid payments are retained at present level of $75 per month for aged persons and $85 per month for blind persons, with participation by the State and the counties. Authorizes Legislature to increase or decrease amount of payments to aged and to blind, and otherwise to amend or repeal existing laws." It is clearly sufficient, especially in the light of the very recent enactment of the measure sought to be repealed. Among the things in the repeal measure which are claimed not to be embraced in the title are that it recalls a director of social welfare named by Article XXV, abolishes the welfare board thereby created, state administration of pensions, changes method of raising money to meet payments and amount of payments, and similar things. Obviously the repeal measure in the main goes back to the law as it existed prior to the adoption of Article XXV, the chief feature of which is that the authority in the field of needy aged and blind relief is returned to the legislature. The title adequately covers these subjects. It states that the measure repeals Article XXV, which dealt with and which deals with "Old Age Security and Aid to the Blind, and the administration thereof." It states specifically that the legislature is vested with authority in the field. We believe it adequately advised the signers of the petition of the general nature of the measure.

For the foregoing reasons, it is ordered that a peremptory writ of mandate issue as prayed for.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

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34 Cal.2d 72

PEOPLE v. TUBBY.

Cr. 4969.

Supreme Court of California, in Bank.
June 15, 1949.

1. Criminal law 🔑748, 993, 1184

Generally determination of degree of crime committed is left to discretion of jury, but under statute, trial courts and reviewing courts can modify the judgment and fix a lesser degree of crime where on appraisal of all evidence there is found to be lacking any substantial evidence of elements required to constitute degree of crime as fixed by jury. Pen.Code, § 1181.

2. Homicide 🔑22(1)

Under statute providing that killing is murder in first degree if perpetrated by "torture" it is not enough that severe pain may have been inflicted on victim in course of killing, but there must be intent that such pain may be caused, and for purpose of punishment, revenge, persuasion, extortion, or the like which intent may be manifested by nature of the act and circumstances surrounding killing. Pen.Code, § 189.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Torture".

3. Homicide ⚷282, 347

Evidence did not as a matter of law justify conviction of first degree murder on theory that murder which occurred when defendant first struck his stepfather with his fist in yard near house and then dragged stepfather by the hair into house and continued to strike stepfather with his fists, was perpetrated by torture or was willful, deliberate, and premeditated, and degree of crime would be reduced on appeal to murder of second degree. Pen. Code, § 189.

4. Homicide ⚷156(1), 161

In determining whether killing was accompanied by a deliberate and premeditated intention to take life, so as to constitute murder of the first degree, previous relations between defendant and victim, the actions of defendant, before as well as at time of the killing, and the means by which killing is accomplished, are important. Pen. Code, § 189.

5. Homicide ⚷145

Inference that after defendant struck his stepfather with his fist, defendant dragged stepfather by the hair into house to continue the assault unmolested by neighbors, would not warrant the further inference that with a pre-existing intent, defendant set about to kill his stepfather, so as to sustain conviction for murder of the first degree. Pen.Code, § 189.

6. Criminal law ⚷1171(1)

In murder prosecution, statement of district attorney in closing argument that defendant went "blood crazy" when defendant made up his mind to commit the murder, was not prejudicial error.

7. Criminal law ⚷1170½(1)

In murder prosecution, where for impeachment purposes district attorney asked defendant on cross-examination whether defendant had been previously convicted of a felony, and nature of the felony, and then, over objection, where defendant was convicted, additional question was not prejudicial in view of fact that prosecution could have proved the felony conviction by record of the judgment. Code Civ.Proc. § 2051.

8. Criminal law ⚷829(3)

In murder prosecution, refusal to give defendant's offered instruction on motive was not reversible error where the subject of motive was fully covered by a given instruction.

SPENCE and EDMONDS, JJ., dissenting in part.

◆

Appeal from Superior Court, Glenn County; W. T. Belieu, Judge.

Thomas E. Tubby was convicted of murder and he appeals from judgment imposing death penalty and from orders denying his motion for a new trial and to modify judgment by reducing the degree of crime to second degree murder.

Order denying motion for a new trial affirmed and judgment affirmed as modified by reducing the degree of crime to murder of the second degree, and cause remanded with directions.

Frank K. Richardson, Sacramento, James William Morgan, Chico, and James O. Kibby, Orland, for appellant.

Fred N. Howser, Attorney General, Doris H. Maier, Deputy Attorney General, and Clyde H. Larimer, District Attorney (Glenn), Willows, for respondent.

SHENK, Justice.

The defendant was charged by the grand jury of Glenn County with the murder of his stepfather Robert A. Fleenor. He pleaded not guilty and not guilty by reason of insanity. On the first plea the jury returned a verdict of guilty without recommendation. On the trial of the insanity plea the jury found that the defendant was sane at the time the offense was committed. A motion for a new trial and a motion to modify the judgment by reducing the degree of the crime to second degree murder were denied. The appeals are from the judgment imposing the death penalty and from the orders denying the motions.

On the appeal the defendant admits that he unlawfully killed the deceased. His contentions are that the evidence does not support a conviction of murder in the first degree; that the district attorney was guilty of prejudicial misconduct in his argument to the jury and in the cross-examination of a witness, and that the court committed prejudicial error in refusing to give a requested instruction on motive.

The facts are undisputed. The defendant is a 29 year old uneducated agricultural worker of part Cherokee-Choctaw extraction. He is six feet tall and weighs 175 pounds. In the past few years he resided intermittently with his mother, Mrs. Louelle Fleenor, and his stepfather, the deceased, in the Fleenor home one mile east of the city of Orland, Glenn County. At the time of his death, Fleenor was a feeble man 82 years of age and weighing less than 100 pounds. During the early fall of 1948, the defendant was employed near Orland as a ranch hand and almond knocker. On the morning of September 13, 1948, he was taken to work by his mother. He and three coworkers, a couple named Martin and a man named Smith, began working at about 8 o'clock, then stopped a half-hour later to drink a quart of sherry which the Martins had brought. About 10 o'clock Smith drove to Orland where he purchased a gallon of sherry of which a half-gallon was consumed. The defendant drank about two quarts in all. At about 2:30, the Martins and Smith, believing that the defendant was getting drunk and fearing that he might fall from a tree on which he was working, decided to take him home in Smith's car. Each testified that the defendant was drunk but that he walked straight and talked without thickness of tongue. On arriving at the Fleenor home at about 3:30 the defendant found his mother was not there. He went into the yard where he saw the deceased. Two men working on a house across the street observed the defendant strike the deceased with his fist. They shouted at him but he claimed not to have heard them. He was then seen dragging the deceased into the house. One of the workers asked a neighbor to call the police and then, standing in front of the Fleenor home, heard thumping noises from within which continued for a period of several minutes.

In a signed statement given on September 15th, the defendant stated that he walked toward the deceased in the yard and when he came close "just hauled off and let fly with my fist"; that there had been no argument; that not a word was spoken prior to the attack; that he wasn't "mad at" the deceased at the time, and that the only argument he had had with Mr. Fleenor occurred two or three months before over the trimming of a hedge; that after striking the deceased once, he "began thinking of what I had done and I thought I better take him into the house"; that he then dragged the deceased into the house; that he remembered "something about him [the deceased] scuffling around the stove"; that he "may have hit him two or three times" but that he did not hit him with anything but his fist; that Mr. Fleenor ran in circles in a futile attempt to escape but did not speak; that the deceased "came over by the side of me and looked at me and when he did I hit him again and then I see he was laying on the floor and blood was coming out of his nose * * *"; that with the final blow, he "felt something snap and I knew I had done something, and I come to myself, but before that I was in a drunken stupor and didn't seem to know what I was doing"; that he then pushed the deceased with his foot in an attempt to make him get up; that he guessed he wanted to revive the deceased so dragged him through the house wondering what to do; that he did not remember seating the deceased in a rocking chair where he was found when the officers arrived. The defendant stated he was so drunk he did not know what he was doing.

At the trial on the first plea the defendant contradicted his voluntary statement of September 15th in some particulars, but on the trial of the insanity plea he retracted his denials and gave a version of the killing which accorded substantially with his prior statement.

When the police arrived about fifteen minutes after the first assault the defendant was seen walking rapidly from the house. He stopped when ordered to do so and came back to meet the officers. He then offered to fight one of them and called him a profane name, but was subdued when the officer struck him. An examination of the defendant's right hand disclosed it to be swollen and moderately contused. The arresting officer testified that the defendant showed no sign of intoxication.

The deceased was found to be in a semi-comatose condition when a physician arrived. He was removed to a hospital and died the same day. Cause of death was stated to be basal skull fractures and intercranial hemorrhage.

[1] Generally the determination of the degree of the crime is left to the discretion of the jury. People v. Eggers, 30 Cal.2d 676, 685, 185 P.2d 1; People v. Wells, 10 Cal.2d 610, 76 P.2d 493; People v. Mahatch, 148 Cal. 200, 203, 82 P. 779. But the jury's discretion is not absolute. Since the amendment of section 1181 of the Penal Code in 1927 trial courts and reviewing courts are authorized to modify the judgment and fix a lesser degree of the crime in those instances where on an appraisal of all the evidence there is found to be lacking any substantial evidence of the elements required to constitute the degree of the crime as fixed by the jury. People v. Kelley, 208 Cal. 387, 281 P. 609; People v. Holt, 25 Cal.2d 59, 90, 153 P.2d 21; People v. Bender, 27 Cal.2d 164, 186, 163 P.2d 8.

In support of the verdict the attorney general asserts that the infliction of multiple injuries as a result of continued beating of an aged victim, frail and unarmed, indicates an intention on the part of the defendant to inflict pain and suffering which may reasonably be said to constitute torture within the meaning of section 189 of the Penal Code, and therefore to result in murder of the first degree by statutory declaration. It is argued that the defendant's primary intention must have been to inflict pain for purposes of punishment or deep-seated revenge.

[2, 3] Torture has been defined as the "Act or process of inflicting severe pain, esp. as a punishment in order to extort confession, or in revenge." Webster's New Int. Dict., 2d Ed. The dictionary definition was appropriately enlarged upon by this court in its original opinion in People v. Heslen, 163 P.2d 21, 27, in the following words: "Implicit in that definition is the requirement of an intent to cause pain and suffering in addition to death. That is, the killer is not satisfied with killing alone. He wishes to punish, execute vengeance on, or extort something from his victim, and in the course, or as the result of inflicting pain and suffering, the victim dies. That intent may be manifested by the nature of the acts and circumstances surrounding the homicide." See disposition of that case on rehearing, 27 Cal.2d 520, 165 P.2d 250. The Colorado Supreme Court has declared in similar terms that as an essential of torture physical pain must be inflicted as a means of persuasion, punishment or in revenge. Townsend v. People, 107 Colo. 258, 265, 111 P.2d 236. In holding that a murder by strangulation was not necessarily murder by torture this court has stated: "The killer who, heedless of the suffering of his victim, in hot anger and with the specific intent of killing, inflicts the severe pain which may be assumed to attend strangulation, has not in contemplation of the law the same intent as one who strangles with the intention that his victim shall suffer." People v. Bender, 27 Cal.2d 164, 177, 163 P.2d 8, 16.

In determining whether the murder was perpetrated by means of torture the solution must rest upon whether the assailant's intent was to cause cruel suffering on the part of the object of the attack, either for the purpose of revenge, extortion, persuasion, or to satisfy some other untoward propensity. The test cannot be whether the victim merely suffered severe pain since presumably in most murders severe pain precedes death.

In this case the record is devoid of any explanation of why the defendant might have desired his stepfather to suffer. The only testimony concerning the relationship between the two men was that the deceased and the defendant were on amicable terms prior to the attack. Mrs. Fleenor, the defendant's mother, stated that the defendant "is all right when he isn't drinking * * *." She testified further that the defendant "never used intoxicating liquor until 1938 when he got drunk that time and got into that trouble." (Probably referring to a previous conviction of manslaughter.) When asked how the defendant acts when drunk, she replied: "Acts like any other crazy drunk." An indication that the defendant was in a "fighting mood", inclined to fight almost anyone and not primarily interested in causing the ultimate victim to suffer, is the fact that he offered to fight the arresting officer and had to be subdued by force. It is too apparent to admit of serious doubt that the unprovoked assault was an act of animal fury produced when inhibitions were removed by alcohol. The record dispels any hypothesis that the primary purpose of the attack was to cause the deceased to suffer. When death results under the circumstances here shown the homicide cannot be said to constitute murder by torture in the popular, dictionary, or legal sense. The evidence is therefore insufficient as a matter of law to support the verdict on the theory that the homicide was murder by torture.

The second basis on which the attorney general rests his contention that this was first degree murder is that the killing was willful, deliberate and premeditated. Again the evidence is inadequate to support the contention. The facts on which the attorney general relies as supporting his claim that Mr. Fleenor was killed by means of torture are also referred to as disclosing deliberation. It is argued that deliberation and premeditation are manifest in the circumstance that the defendant dragged Mr. Fleenor into the house after striking him, away from the view of and interference by neighbors, and in the brutality and duration of the beating.

[4, 5] In determining whether the killing was accompanied by a deliberate and premeditated intention to take life such circumstances as the previous relations between defendant and the victim, the actions of the defendant before as well as at the time of the killing, and the means by which the homicide is accomplished, are important. The only evidence in the record as to the relationship between the defendant and his stepfather is the testimony of Mrs. Fleenor and the statement of the defendant himself. When asked whether Mr. Fleenor and the defendant "got along" Mrs. Fleenor answered: "Mr. Fleenor never said anything about him [the defendant] or to him except in a friendly way." The defendant stated he wasn't "mad at" the deceased. At no time while in the company of the Martins and Smith in the hours preceding the crime did the defendant suggest that he contemplated attacking the deceased or even mention him. Even if we disbelieve entirely, as the jury might, the defendant's assertion that he was so drunk that he did not know what he was doing, it is clear that his drinking affords the sole explanation for his atrocious conduct. It is perhaps a reasonable inference that the defendant dragged the deceased inside the house to continue his assault unmolested by neighbors, but that in itself would not warrant the further inference that with a pre-existing intent he set about to kill his stepfather. The cumulative effect of all the circumstances seems to negative any possibility that the defendant on reflection formed a design to produce death before or at any stage of the incident.

[6] Contentions of the defendant that he is entitled to a new trial because of alleged misconduct of the district attorney at the trial are without substance. In the course of his closing argument to the jury the district attorney stated of the defendant: "He went blood crazy once he made up his mind to commit the act, he completed it and then he used his fist." Counsel for the defendant states that the prosecution was thus enabled to argue before the same jury which tried the issues of guilt and insanity, that "the defendant was sane for some purposes but insane for others", to the defendant's prejudice. The phrase "blood crazy" is a colloquialism which perhaps described the defendant's condition. It would be absurd to say that its use so prejudiced the defendant's case as to require a new trial.

[7] For impeachment purposes the district attorney asked the defendant on cross-examination whether he had been previously convicted of a felony, the nature of the felony, and then, over the objection

of the defendant's counsel, where he was convicted. It is impossible to believe that the defendant was prejudiced in any way by the single additional question as to where the defendant was convicted. Had the prosecution chosen, it could have proved the felony conviction by the record of the judgment, Code Civ.Proc. sec. 2051, which would have disclosed the place of conviction.

[8] As to the charge that the trial court erred in refusing to give the defendant's offered instruction on motive it appears from the record that the subject of motive was fully covered by an instruction which was given.

The evidence is insufficient to support the verdict of conviction for murder in the first degree, but it is unquestionably sufficient to support a conviction of second degree murder, and the trial court should have granted the motion to modify the judgment. However it is unnecessary to reverse the order denying that motion for the reason that this court has the power on this appeal, under section 1181 of the Penal Code, to accomplish the proper result by modifying the judgment and affirming it as modified.

Accordingly: The order denying the motion for a new trial is affirmed. The judgment is modified by reducing the degree of the crime to murder of the second degree and as so modified the judgment is affirmed. The cause is remanded to the trial court with directions to sentence the defendant to imprisonment for the time prescribed by law for murder of the second degree.

GIBSON, C. J., and CARTER, SCHAUER, and TRAYNOR, JJ., concur.

SPENCE, Justice (concurring and dissenting).

While I agree with certain conclusions reached in the majority opinion, I cannot agree with the conclusion that the evidence is insufficient to support the conviction of first degree murder.

The majority concede that the evidence is "unquestionably sufficient to support a conviction of second degree murder." In other words, it is conceded that there is ample evidence to sustain the charge that defendant unlawfully killed the deceased with malice aforethought. Pen.Code, sec. 187. But the majority conclude that the evidence is insufficient to support the conviction of murder of the first degree because, it is asserted, there is neither evidence of torture nor of deliberation and premeditation. Pen.Code, sec. 189. It is from this last-mentioned conclusion that I must dissent, as well as from the decision which modifies the judgment of the trial court by reducing the degree of the crime to murder of the second degree.

It would serve no useful purpose to set forth the evidence in elaborate detail. A brief summarization and a statement of a few salient facts should suffice.

Defendant, who was a strong, young man of 29 years, weighing 175 pounds, and who had previously been convicted of the crime of manslaughter, administered a brutal, fatal beating upon his victim, who was a frail, elderly man of 82 years, weighing 95 pounds. The attack was unprovoked and continued over a period of about 15 minutes. It was in two distinct phases. Defendant administered the first blow upon his victim in the yard behind the house. When the neighbors shouted at defendant, he then, according to his statement to the police and to his own sworn testimony, "drug him (the deceased) * * * by the hair of his head" from the yard into the house. The various rooms of the house were the scenes of the second phase of the attack, which lasted until the officers arrived after being summoned by the neighbors. There were no eye-witnesses to this phase of the attack but a neighbor testified that he heard bumping and thumping noises inside the house for 10 or 15 minutes. Defendant gave varying accounts of the occurrences within the house, telling different stories: first, to the officers following his arrest; second, upon the trial of the main issue; and third, upon the trial of the insanity plea. When confronted with these discrepancies upon the trial of the insanity plea, he was asked, "What is the reason for changing your story?"; to which he answered, "It may benefit me."

The evidence clearly indicates that defendant chased his victim about the house inflicting terrific punishment upon him. There was blood on the porch, and on the walls and floor of practically every room in the house. The stove and stove-pipe had been knocked out of place and some of the furniture had been broken during the affray. When the officers arrived, they found deceased had been beaten "practically beyond recognition." Physical examination showed that deceased's nose "was crushed almost flat"; that his eyes were swollen shut; that there was a fracture of the lower jaw and a complete fracture of the upper jaw; that there were several fractures of the skull; that the brain had been "split completely open" and "was literally pulverized over the back portion of the two frontal sinuses." Other injuries were described by the doctors, including abdominal injuries, but the foregoing recital sufficiently shows the nature and severity of the resulting damage. The doctors further testified that this damage was far more extensive than is found as the result of a fall.

Defendant does not question the finding of the jury that he was sane when he committed this fiendish attack, and the only extenuating circumstance upon which he now relies is his claim that he was drunk at the time. The vice of the majority opinion rests in the fact that it accepts as true practically all of the evidence of defendant's witnesses regarding the extent of defendant's drinking and ignores the direct conflict in the evidence relating to his condition at the time in question. The arresting officers and the officers who talked with defendant immediately following his arrest testified that he was not drunk, and that he did not show any sign of intoxication. This testimony of the officers finds corroboration in defendant's ability to relate, when he saw fit to do so, the details of the struggle, and also in some of the evidence given by defendant's own witnesses. All conceded that defendant walked straight and that he talked without thickness of tongue. On cross-examination one of defendant's witnesses admitted that defendant "was not yet drunk" when he was taken home. Another admitted that she couldn't say that defendant was "drunk." The jury was therefore entirely justified in disbelieving the testimony of defendant's witnesses regarding the amount of drinking which defendant had done, and in concluding that defendant was not drunk when the crime was committed. Under these circumstances, it is not the province of a reviewing court to weigh the conflicting evidence and to accept as true the defendant's evidence which has been rejected by the jury.

Assuming then that the jury was justified in concluding that defendant was neither insane nor drunk and that he was therefore responsible for his acts at the time that he committed the murder, I am of the opinion that the jury was further justified in concluding that defendant was guilty of murder of the first degree. The evidence appears ample to show both that the murder was committed by torture, and that it was deliberate and premeditated. This was not a situation in which death was caused by a single act, such as strangulation, which the majority states is "not necessarily murder by torture," but it was a situation in which there was a prolonged attack involving numerous, merciless blows, which attack was broken into two phases by the interval during which defendant dragged the deceased by the hair of his head from the yard into the house. Accepting the tests set forth in the majority opinion, the jury was justified here in concluding that there was "an intent to cause pain and suffering in addition to death"; that "the killer [was] not satisfied with killing alone"; that "the assailant's intent was to cause cruel suffering on the part of the object of the attack." If the dragging of a person by the hair of the head for a considerable distance during the progress of a prolonged beating, such as that inflicted by defendant upon his victim, is insufficient to sustain a finding of the necessary intent to torture (that is, to cause cruel pain and suffering in addition to death), it is difficult to determine where the majority would draw the line. Furthermore, the jury was likewise justified in finding from all the evidence that the interval between the first blow delivered in the yard and the remaining blows delivered in the house gave ample time for deliberation and premeditation, and that defendant thereafter proceeded to kill his victim, not alone "with malice aforethought," Pen.Code, sec. 187, but also with that deliberation and premeditation which characterizes the crime as murder of the first degree. Pen.Code, sec. 189.

In my opinion, both the judgment of conviction and the order denying the motion for a new trial should be affirmed.

EDMONDS, J., concurs.

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92 Cal.App.2d 623

PEOPLE v. BAKER.

Cr. 722.

District Court of Appeal, Fourth District, California.

June 27, 1949.

1. Criminal law 🔑997

A writ of error coram nobis cannot be employed to secure what amounts to a second opportunity for a review of matters which could have been raised and reviewed on motion for new trial or on appeal.

2. Criminal law 🔑997

Generally, a writ of error coram nobis will not be granted on ground of newly discovered evidence going to the merits of the issues tried.

3. Criminal law 🔑997

A showing of diligence is necessary in order to make available a writ of error coram nobis on ground of newly discovered evidence.

4. Criminal law 🔑997

Denial of motion for writ of error coram nobis, on ground of newly discovered evidence, was proper, where witnesses from whom the newly discovered evidence was obtained had been consulted by defendant prior to trial.

5. Criminal law 🔑997

Trial court did not abuse its discretion in denying defendant a personal hearing on motion for writ of error coram nobis, where there was nothing in the record which suggested error or prejudice in refusal of trial court to order defendant brought into court on hearing of motion.

6. Criminal law 🔑997

Where nothing appeared on motion of defendant for writ of error coram nobis, other than, or different from, matters usually presented on a motion for a new trial or on an appeal, and which were reviewable in the ordinary manner, writ of error coram nobis was properly denied.

◆

Appeal from Superior Court, San Diego County, William A. Glen, Judge.

Vance Baker was convicted of forgery of endorsement, and from an order denying the motion of defendant for writ of error coram nobis, the defendant appeals.

Order affirmed.

Vance Baker, in pro. per.

Fred N. Howser, Atty. Gen. and Dan Kaufmann, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged with the crime of "Forgery of Endorsement" in violation of section 470 of the Penal Code, it being alleged that he had with fraudulent intent forged the name of one Keister upon the back of a certain check and had uttered and passed this check thus forged with the intent to cheat and defraud certain individuals and corporations. A prior conviction of forgery was also charged.

At the trial on November 29, 1943, ample evidence of guilt was presented. The appellant, who was represented by counsel, admitted the prior conviction and introduced the testimony of three witnesses, including himself. Counsel argued the case and a verdict of guilty was returned by the jury.

On December 3, 1943, the matter came on for judgment and the defendant appeared with his counsel. When the defendant insisted that he had not signed the name of Keister to this check the court called for the exhibits and remarked: "Very surely a resemblance from my inspection of these two signatures. They surely look alike to me, but of course I am no handwriting expert." Counsel for defendant stated that a handwriting expert, Mr. Sellers, had made an examination of this check and specimens of the defendant's handwriting and stated that he could not say "whether it was or was not Mr. Baker's writing." Defendant confirmed this, and further stated that "a fellow by the name of Harris looked at the handwriting and said it wasn't me." The judge then stated that since the defendant was not eligible for probation he wanted to be fair and give him every "break" possible, and that he was going to ask a man from the police department to examine the exhibits. The matter was continued until December 6, 1943, when the man from the police department appeared and testified at length as to the similarities between the questioned writing and specimens of the defendant's handwriting. After remarking that he was satisfied that the defendant had thus cashed the check the judge proceeded to pronounce judgment. No motion for a new trial was made and no appeal was taken.

Five years later, on December 13, 1948, the defendant filed a petition in the superior court for a writ of error coram nobis, stating as grounds therefor that he had discovered new evidence which could not with reasonable diligence have been produced at the trial; that he was convicted on inconsistent testimony; and that "said judgment is void on its face for uncertainty in the conviction, of forgery of endorsement." From an order denying this motion the defendant has appealed.

The appellant here contends that (1) the crime with which he was charged was not proven at his trial; (2) that he was convicted on the testimony of a witness which was untrue and on testimony which was inconsistent; (3) that his attorney, who was appointed by the court, was negligent and failed to properly defend him because he allowed a jury to be picked in 55 minutes and because he refused to use all of appellant's witnesses who were present at the trial; (4) that he has discovered new evidence to prove his innocence; and (5) that he was denied a personal hearing on his motion in the trial court for a writ of error coram nobis.

[1] There is nothing in the record before us which would tend to support any one of the first three of these points. Moreover, these were all matters which could have been raised and reviewed on a motion for a new trial or on an appeal. It is well settled that the writ here relied upon cannot be employed for the purpose of securing what amounts to a second opportunity for a review, under such circumstances. People v. Mooney, 178 Cal. 525, 174 P. 325; People v. Egan, 73 Cal.App.2d 894, 167 P.2d 766; People v. Tate, 78 Cal.App.2d 894, 178 P.2d 470.

[2-4] Appellant's main contention seems to be that he has now discovered new evidence which would prove his innocence. It is contended that testimony could now be secured from Mr. Harris and from Mr. Sellers, experts on handwriting, to sustain appellant's contention that he did not write the name of Keister on this check. Not only is it a general rule that this writ will not be granted on the ground of newly discovered evidence going to the merits of the issues tried, People v. Tuthill, 32 Cal.2d 819, 198 P.2d 505, but it appears from the record that these two proposed witnesses had been consulted prior to December 3, 1943, when the matter first came on for judgment and before the time had expired for filing a motion for a new trial or for filing a notice of appeal. No reason for this long delay appears and it is well settled that a showing of diligence is necessary in order to make available the relief here sought. People v. Shorts, 32 Cal.2d 502, 197 P.2d 330.

[5] As to the fifth point raised, there is nothing in the record which in any way suggests error or prejudice in the refusal of the trial court to order the appellant brought into court on the hearing of the motion which resulted in the order appealed from. Aside from any other con-

sideration, the grounds alleged in the petition for a writ were insufficient to justify or support an order granting the motion, and no abuse of the discretion resting in the trial court appears.

[6] Nothing appears in this entire proceeding other than, or different from, the matters which are usually presented on a motion for a new trial or on an appeal and which are reviewable in the ordinary manner. Under such circumstances, the rules of law authorizing the issuance of this extraordinary writ are not applicable.

The order appealed from is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

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92 Cal.App.2d 523

MONDO et ux. v. SCHWARTZ et al.

Civ. 7698.

District Court of Appeal, Third District, California.

June 21, 1949.

Appeal and error 🔑787, 805

Where notice of appeal was filed but no arrangements were made for preparation of record and no transcript was prepared or filed and no opposition filed to motion to dismiss and appellants made no appearance on day of hearing of motion, appeal was abandoned and would be dismissed. Rules on Appeal, rule 41(c).

Appeal from Superior Court, Merced County; R. R. Sischo, Judge.

Action by Gene Mondo and Margaret Aloysius Mondo, husband and wife, against Benjamin Schwartz, doing business as Benjamin Schwartz Company, and others, wherein defendants appealed.

Appeal dismissed.

C. Ray Robinson, Merced, for appellants.

Griswold, Winton, & Mayes, Merced, for respondents.

ADAMS, Presiding Justice.

A notice of motion to dismiss the appeal in this action was filed by respondents on April 15, 1949, same being supported by a certificate of the clerk of the trial court which shows that notice of appeal was filed August 13, 1948, but no arrangements were thereafter made for preparation of the record on appeal as provided by the Rules on Appeal; and that on the date of the certificate, to wit, February 23, 1949, no transcript had been prepared or filed in that court.

Notice of the motion was duly served on counsel for appellants but they filed no opposition thereto nor any request to be relieved from default. No record has been filed in this court, and on June 2, 1949, the day set for hearing of said motion, there was no appearance for appellants.

Counsel for appellants has, however, advised the court that his clients have failed to furnish funds for payment of costs on appeal, though often requested so to do, and have failed to answer letters written to them by said counsel; and that counsel therefore assumes that appellants have abandoned their appeal.

Rule 41(c) of the Rules on Appeal provides that failure of an appellant to appear and oppose a motion to dismiss an appeal, after due notice of motion, or to file a written opposition to the motion, may be deemed an abandonment of such appeal, authorizing a dismissal.

We deem that this appeal has been abandoned, and it is dismissed accordingly.

SCHOTTKY, J. pro tem., and THOMPSON, J., concur.

92 Cal.App.2d 481

Application of HANCOCK and three other cases.

Civ. 3909, 3908.

District Court of Appeal, Fourth District, California.

June 17, 1949.

1. Appeal and error 🔑82(3)

When an express provision is made for an order to vacate a judgment, an order denying such motion is regarded as a "special order" made after judgment and is appealable under statute providing that an appeal may be taken from any special order made after final judgment. Code Civ. Proc. § 963.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Special Order".

2. Newspapers 🔑3(2)

An order denying a motion to set aside a decree establishing that a newspaper was of general circulation was appealable. Government Code, § 6026; Code Civ.Proc. § 963; Pol.Code, § 4460.

3. Newspapers 🔑3(2)

A judgment determining that a newspaper as then published was a newspaper of general circulation is final and matters there passed on which appear on face of judgment are not open to inquiry in action to vacate such judgment.

4. Newspapers 🔑3(2)

Suits may be filed to annul orders declaring newspapers to be of general circulation but to be successful it must be on proof supporting an issue not determined in the original action and it must be shown that the newspaper has ceased to be one of general circulation.

5. Newspapers 🔑3(2)

In proceeding to vacate an order declaring a newspaper to be one of general circulation, entire subject may be reopened on condition that ultimate facts are shown to have changed materially subsequent to the original order and burden on such issue is upon petitioner.

6. Newspapers 🔑3(2)

In a proceeding to vacate an order declaring a newspaper to be one of general circulation, contestant has not sustained burden of proof required of him to show that a paper has ceased to be one of general circulation because he has proved that some one of the elements involved has changed, but it must be shown that difference is of such a nature as to bring about an altered relativity of conditions as contrasted with that which existed when original judgment declaring the paper to be one of general circulation was entered.

7. Newspapers 🔑3(2)

Evidence was sufficient to warrant implied finding that publisher of newspaper was complying with statute as to newspaper's having a bona fide subscription list of paying subscribers and that it was being published at regular intervals and to defeat motion to vacate prior order declaring newspaper to be one of general circulation. Government Code, § 6000; Pol.Code, § 4460.

8. Newspapers 🔑3(3)

Where mechanical work of printing a newspaper was not done in town where paper was circulated as required by statute because of war conditions, statute providing that status of a newspaper of general circulation would remain unchanged in event publication was discontinued by reason of economic conditions induced by war if publication was renewed within one year after date on which hostilities officially terminated, was applicable. Pol.Code, § 4460; Government Code, §§ 6000 et seq., 6003, 6004, 6005, 6007, 6024; Proclamation No. 2714, 50 U.S.C.A.Appendix, § 601 note.

9. Newspapers 🔑3(2)

Evidence justified finding that party moving to have order declaring newspaper to be one of general circulation set aside did not sustain burden to show that newspaper had ceased to be one of general circulation. Pol.Code, § 4460; Government Code, §§ 6000 et seq., 6003, 6004, 6005, 6007, 6024; Proclamation No. 2714, 50 U.S.C.A.Appendix, § 601 note.

* * *

Appeal from Superior Court, Imperial County; Pat R. Parker, Judge.

Separate proceedings in the matter of the applications of T. M. Hancock, and F. W. Greer, respectively, for decrees establishing the Westmorland Mail and the Imperial Valley Democrat as newspapers of general circulation. From judgments denying its motions to set aside former judgments establishing the newspapers as newspapers of general circulation, the California Newspaper Publishers' Association, Inc., a corporation, appeals.

Affirmed.

Lloyd S. Nix and Robert F. Tyler, Los Angeles, for appellant.

Whitelaw, Whitelaw & Yeager, El Centro, for respondents.

GRIFFIN, Justice.

Separate motions and applications were filed in the two separate proceedings which were consolidated for the purpose of hearing and on appeal.

On October 14, 1927, the trial court, based upon the application of T. M. Hancock, entered its decree establishing the "Westmorland Mail" as a newspaper of general circulation under Section 4460 of the Political Code and the amendments thereto. A hearing thereon was duly noticed and was uncontested.

On March 14, 1935, respondent F. W. Greer, who purchased the "Westmorland Mail", filed a similar proceeding respecting the "Imperial Valley Democrat". On March 25, 1935, without contest, the trial court made its order establishing it as a newspaper of general circulation.

In May, 1947, objector, California Newspaper Publishers' Association, Inc., filed a notice of motion to vacate the decision and judgment in each proceeding, alleging that the paper had ceased to be a newspaper of general circulation as required by secs. 6000 and 6004 of the Government Code. In October, 1947, respondent Greer answered for both papers and denied generally the allegations of the petition and denied that there had been any material change in the facts upon which the original decrees were entered; that the circulation and newsprint supply had been curtailed for reasons of war conditions during the period about which objectors complained. Evidence was produced and thereafter the trial court, in October, 1947, entered its separate order denying objector's motion to set aside the former decrees and judgments. From these orders objector appeals.

Respondents previously argued, on a motion to dismiss the appeals, that the orders involved are not appealable orders under sec. 6026 of the Government Code. It was there contended and is again here contended that this section permits an appeal only from a final order "vacating, modifying or setting aside a decision or judgment previously entered," but under that section and the rule of expressio unius est exclusio alterius no appeal lies from an order denying such relief. The motion to dismiss the appeal was heretofore denied. Since respondents again present the question under the theory that it directly affects the objector's right to an appeal and bears on the question of the jurisdiction of this court to entertain these appeals, we are called upon to determine that question before proceeding further with the other points presented.

It is apparent that sec. 6026 of the Government Code prescribes no direct authority for an appeal from an order denying a motion to vacate, set aside or modify the decree previously entered. Respondents contend that the legislative intent is clearly expressed by the preceding sections, 6020–6023, Government Code, and its intent was to give the newspaper the right of appeal but withhold or inferentially deny such right to any contestant; that the fact that express words of denial were not used in sec. 6026, supra, is not a valid objection because the intent to deny such right otherwise clearly appears.

While it is sometimes difficult to divine the legislative intent in enacting a particular statute, we do not construe the act as denying to such an objector the right to appeal from such an order as here involved. In re Herman, 1920, 183 Cal. 153, 191 P. 934, 935, involved an appeal from an original decree declaring a newspaper to be one of general circulation under sec. 4462 et seq. of the Political Code. As it then existed, there was no provision contained therein giving any right of appeal from such a decree or judgment. The right to an appeal therefrom was put in issue and it was held that such a proceeding was "a special proceeding", and that an appeal lies from a judgment in such a proceeding. Under Article VI, Section 4b of the Constitution, the district courts of appeal are given appellate jurisdiction in such "special proceedings as may be provided by law".

[1] In re Simpson, 62 Cal.App. 549, 217 P. 789, decided in June, 1923, involved an appeal from an order denying and dismissing a similar petition as here involved, under section 4462 of the Political Code. The objector appealed from the order. As of that date there was no statutory provision in the Political Code as to whether an appeal did lie from such an order. The appeal from that order was sustained. Sec. 963 of the Code of Civil Procedure provides that an appeal may be taken from a final judgment entered in a special proceeding or from any special order made after final judgment. It has been repeatedly held that when express provision is made for an order to vacate, an order denying such motion is regarded as a special order made after final judgment and therefore appealable under sec. 963, subdivision 2 of the Code of Civil Procedure. Winslow v. Harold G. Ferguson Corp., 25 Cal.2d 274, 282, 153 P.2d 714; California Delta Farms v. Chinese American Farms, 201 Cal. 201, 255 P. 1097; Westervelt v. McCullough, 64 Cal.App. 362, 221 P. 661; Andreoli v. Hodge, 71 Cal.App. 762, 236 P. 333. It is clear, therefore, that there was a right of appeal from such an order prior to the enactment of sec. 4464 of the Political Code, which was added by Statutes of 1923, p. 512, Chap. 258, sec. 2, and which provided for an appeal from a final judgment or from any final order vacating, modifying or setting aside the previous judgment. The language of that section was carried into section 6026 of the Government Code.

[2] In Westervelt v. McCullough, supra, 64 Cal.App. at page 363, 221 P. at page 661, the court held that "An order denying a motion made under section 663 is unquestionably a special order made after final judgment, and as such is appealable under section 963—unless there be some good reason for holding otherwise." The same question was there raised as to the appealability of such an order and it was contended that because in section 663a the legislature expressly provided that an order granting such a motion may be reviewed on appeal in the same manner as a special order made after final judgment, that under the familiar rule of construction, expressio unius est exclusio alterius, it should be held that the lawmakers did not intend that there should be a right of appeal from an order denying the motion. The court in that case rejected this contention.

Under the circumstances here related, where the hearings on the motions to vacate are essentially de novo, it would hardly seem consistent to allow one of the parties the right of an appeal from an adverse judgment and deny that same right to the other party. The attack on the original decree is not based on the facts as they existed at the time the original decree was entered. It is based on the facts existing subsequent to the entry of such original decree. Thus, of necessity new evidence is adduced and new issues are formed and an entirely new hearing is had, separate and distinct from the hearing on the original adjudication. Newspapers are subject to fluctuation and change throughout the years. They are subject to change in subscribers, in name, in ownership, in management, and might even cease to exist. It is unreasonable to assume that after 20 or 30 years the question of whether or not a newspaper is any longer one of general circulation is not subject to review by the appellate court because of an order adverse to the moving party in the court below. We will therefore proceed to the determination of the points presented by the objector.

[3-6] The general rule as to the nature of this proceeding and the burden of proof is clearly set forth in In re Simpson, supra, and 19 Cal.Jur. p. 1079, sec. 14, i. e., that after a judgment determining the character

of a newspaper becomes final, the matters passed upon and which appear upon the face of the judgment are not open to inquiry in an action to vacate it. A petitioner can succeed only upon proof supporting an issue not determined in the original action, and, particularly, it must be shown that the newspaper has "ceased" to be one of general circulation. The statute permits the entire subject to be reopened upon condition, however, that the ultimate facts are shown to have materially changed subsequent to the original order having been made. The burden of proof as to this issue is obviously upon the petitioner. It is said that it does not necessarily follow that the contestant has sustained the burden of proof required of him to show that a paper has ceased to be one of general circulation because he has proved that some of the elements involved has changed. The difference must be of such a nature as to bring about an altered relativity of conditions as contrasted with that which existed when the original judgment was entered.

It is objector's contention that the trial court erred, as a matter of law, in denying its objections upon the showing made. Sections 6000 et seq. of the Government Code define a "newspaper of general circulation" as being one published "for the dissemination of local or telegraphic news and intelligence of a general character, which has a bona fide subscription list of paying subscribers, and has been established, printed and published at regular intervals in the State, county, or city where publication, notice by publication, or official advertising is to be given or made for at least one year preceding the date of the publication, notice or advertisement." Sec. 6003. "For a newspaper to be 'printed,' the mechanical work of producing it, that is the work of typesetting and impressing type on paper, shall have been performed during the whole of the one year period. If a monthly average of at least 50 per cent of the work of typesetting and a monthly average of at least 50 per cent of the work of impressing type on paper is done in accordance with the other provisions of this article, the requirements embodied in 'printed' are met." Sec. 6004. "For a newspaper to be 'published,' it shall have been issued from the place where it is printed and sold to or circulated among the people and its subscribers during the whole of the one year period." Sec. 6005. "'Printed' and 'published' are not synonymous. Each relates to separate acts or functions necessary to constitute a newspaper of general circulation."

It is first contended that the evidence shows that the entire press work and type setting for the respondent "Westmorland Mail", during the period in question (May 16, 1946, to May 16, 1947) was done at Brawley, an incorporated city, and the papers were mailed from the post office at Westmorland, an adjacent incorporated city; that this newspaper did not conform to the requirements of section 6004 et seq. for the reasons above stated, citing Application of Monrovia Evening Post, 199 Cal. 263, 248 P. 1017.

The evidence on this question may be thus briefly summarized: F. W. Greer testified that in 1942 he purchased the "Westmorland Mail" and printing plant located at Westmorland and employed a man to print said paper and publish it in that city; that due to conditions induced by the war, he was unable to secure competent help or adequate facilities with which to operate in that city; that since 1943 he and his wife actually "printed" the paper in Brawley and delivered it to the Westmorland Post Office for circulation; that although the printing plant machinery is still in Westmorland where he intends to again operate he still, at the time of the hearing, "printed" the paper in Brawley. He testified that the population of Westmorland was about 1,500 with a rural population of about 4,500, and that he "published" over 2,500 copies of the paper each week in 1946 and had over 500 actually paid subscribers but that number was cut down due to paper shortage; that his galley sheets showed only 146 such subscribers but shortly after May, 1947, some person burglarized his shop and stole the records which showed the names and addresses of his subscribers during the period in question, and that only about one-third of their number appeared on the galley sheets produced in evidence; that he never skipped any publication of the newspaper;

that on two or three occasions a few papers were actually published, but a few days late, due to paper shortage. He produced a deputy sheriff who testified that respondent reported such a theft about August 4, 1946, and that a deputy sheriff went to the office and was unable to find any evidence of such theft or to locate the alleged thief. He then stated that the "Democratic Club" purchased $200 worth of subscriptions to his paper during the election campaign for individuals holding post-office boxes in Westmorland and that the postmaster distributed them to the respective boxes. The postmaster testified that 15 to 21 pounds of newspaper, averaging 32 papers to the pound, were delivered to the post office each week during 1946 and 1947.

Objector produced publishers who testified they suffered no paper shortage during the period in question; that 15 pounds of paper would produce 186 one-page newspapers or 270 four-page papers the same size as the "Westmorland Mail". Upon the evidence produced the trial court denied the motion to vacate the previous decree establishing such paper a paper of general circulation.

[7] If the trial court believed respondent's testimony, there was sufficient evidence to warrant the implied finding that respondent was, during the period in question, complying with the statute, Sec. 6000, Government Code, as to this paper having a bona fide subscription list of paying subscribers and being published at regular intervals. In re Santa Ana Independent, 75 Cal.App.2d 764, 171 P.2d 548.

However, the evidence conclusively shows that respondent did not "print", i. e., the mechanical work of producing it (the type-setting and impressing the type on the paper) in Westmorland but did this work since 1943 and up to the time of the hearing of this objection in October, 1947, in Brawley, in connection with his publication of the "Imperial Valley Democrat".

Application of Monrovia Evening Post, 199 Cal. 263, 248 P. 1017, 1018, involved a decree declaring that paper a newspaper of general circulation. The evidence showed, without conflict, that although it was distributed in Monrovia and subscriptions were taken in that city, all the mechanical portion of making up and issuing the paper was done in Pasadena, in the office of the "Pasadena Evening Post", in conjunction with which the Monrovia paper was regularly issued. The Supreme Court definitely declared that it was the clear intent of the legislature to require a newspaper of general circulation to be both printed and published in the city, town, or county wherein it seeks the patronage of such legal notices. It was therefore held that, in fact, the Monrovia Evening Press was both "printed" and "published" at Pasadena and not at Monrovia, and declared it not to be a paper of general circulation qualified to print legal notices. Earlier cases indicating a contrary view are fully discussed.

The only saving clause through which respondent might escape a reversal as to this order is section 6007 of the Government Code, added in 1945 Stats. 1945, p. 1186, chap. 641, sec. 1, which provides: "The status of a newspaper of general circulation remains unchanged in the event that the publication of the newspaper is discontinued by reason of economic or other conditions induced by any war to which the United States is a party and the publication is then renewed either while the war is still pending or within a period of one year from and after the date on which hostilities officially terminate."

It is clear from this section that if the "Westmorland Mail", after having been declared a newspaper of general circulation, had discontinued its publication by reason of conditions induced by the war, it would have one year from and after the date on which hostilities officially terminated, to wit, from December 31, 1946, See Proclamation No. 2714, U.S. Code Annotated, Title 50, War and National Défense, Appendix, § 601 note, to conform to sec. 6000 et seq., or suffer the penalties attached by sec. 6024 of the Government Code.

[8] Since the respondent, in and after 1943, discontinued "printing" and "publishing" that paper in Westmorland as a paper of general circulation, due to conditions induced by the war, as indicated, we see no plausible reason why sec. 6007 of the Government Code should not equally apply to

him under the circumstances related, and accordingly, on the showing made, he would have until December 31, 1947, to comply. The order in this proceeding having been made in October, 1947, two months before that date, the trial court was justified in denying the objector's petition on that ground.

[9] The next question involves a similar order respecting the "Imperial Valley Democrat". Respondent testified that Mrs. Greer owned the newspaper for over 15 years, but that he was manager and editor thereof; that it was a weekly paper, printed, published and mailed in the city of Brawley, which city had a claimed population of 13,000, and that it served the surrounding territory which contained about 55,000 people. He produced galley sheets showing the names and addresses of about 143 paid subscribers but testified that it contained only about 7½ per cent of the total and that his records in that respect for the period involved, had been stolen; that he knew that he printed between 3,000 and 4,000 papers per week during that year and that they were distributed to the subscribers by mail and by means of carrier boys; that during the campaign time he obtained 220 subscribers not listed on the galley sheets; that he published an issue each week although some issues might have been delayed a few days because of paper shortage due to war conditions. Evidence was produced from the post office department for a three-month period during the year in question, and evidence was received as to the probable number of newspapers mailed, based upon the poundage indicated. There was evidence of considerable variance per week in the poundage mailed which respondent endeavored to justify upon the ground of shortage of paper. There was produced from the post office department respondent's statement made to it, as required by its regulations, that he had, at that time, 4,111 paid subscribers. Under the facts related and the evidence produced, the trial court had the right to believe this testimony and accordingly was justified in holding that objector had not met the burden placed upon it to show that the said newspaper "ceased" to be one of general circulation. In re Simpson, supra; In re Santa Ana Independent, supra; Sec. 6007 Government Code.

Orders denying motions to set aside decrees affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

92 Cal.App.2d 420

In re LEONARD'S ESTATE.

Civ. 7551.

District Court of Appeal, Third District, California.

June 15, 1949.

Rehearing Denied July 15, 1949.

Hearing Denied Aug. 11, 1949.

1. Wills 🔑31

It is not every form of insanity nor every departure from the normal will that destroys an otherwise valid testamentary act.

2. Wills 🔑34

The will of person who by reason of insanity is incapable of making valid testamentary disposition of his estate may not be upheld.

3. Wills 🔑21, 55(1)

In order to set aside a will for insanity or mental derangement, the abnormalities of mind must have a direct bearing on the testamentary act, and the evidence must establish the fact that the property was devised in a manner which, except for the claimed infirmities, would not have occurred.

4. Wills 🔑34, 38(1)

Testamentary incapacity because of unsoundness of mind is either insanity of such broad character as to establish mental incompetency generally, or a specific and narrower form of insanity under which the testator is the victim of some hallucination or delusion which directly influenced the testamentary act.

5. Wills 🔑50

A testator has sufficient mental capacity to execute a will if he has sufficient capacity to understand the nature of his act, the extent and character of his property, and the persons who are the natural objects of his bounty.

6. Wills 🔑55(1)

Before the law will permit judges or juries to make disposition of a decedent's property irrespective of his or her desires, substantial evidence is required to show lack of testamentary capacity at the time of the execution of the will.

7. Wills 🔑384

On appeal from judgment denying probate of will, all conflicts in the evidence must be resolved in favor of the contestant, who must be given all reasonable and legitimate inferences so that the verdict may be sustained if possible.

8. Wills 🔑384

In determining the propriety of trial court's action in granting proponent's motion for a nonsuit upon the issue of undue influence, appellate court is governed by rule that a court should grant such a motion only when, after disregarding conflicting evidence and giving to contestant's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the contestant.

9. Wills 🔑166(2)

Evidence showed a confidential relation between the testator and the beneficiaries of will and that the mental and physical condition of the testator were such as to render him susceptible to undue influence.

10. Wills 🔑156

The mental and physical condition of the testator are factors to be considered on the issue of undue influence.

11. Wills 🔑324(3)

In will contest, whether the beneficiaries of the will were active in procuring its execution by testator between whom a confidential relation existed was for jury.

12. Wills 🔑163(2)

Where a person sustains a confidential relation to the testator, is active in the preparation of the will, and unduly profits by its terms, a presumption of undue influence arises, casting the burden of showing that the will was not the product of undue influence upon the proponent of the will.

13. Wills 🔑324(3)

Where there was evidence from which the jury could have reasonably concluded that a confidential relationship existed between the testator and beneficiaries and that the latter actively participated in the preparation of the will and that they unduly profited thereby, the issue of undue influence should have been submitted to the jury.

◆

Appeal from Superior Court, Tehama County; H. S. Gans, Judge.

Proceeding in the matter of the estate of Patrick H. Leonard, deceased, on petition of Ellen Bagwell for the probate of decedent's will to which Leonard J. Moore filed a contest. From judgment denying probate and from order denying motion for judgment notwithstanding the verdict, the proponent appeals, and, from order granting proponent's motion for nonsuit on the issue of undue influence, the contestant appeals.

Judgment reversed and order denying motion for directed verdict and order granting motion for nonsuit set aside and cause remanded for further proceedings in conformity with opinion.

Curtiss E. Wetter and Rawlins Coffman, Red Bluff, for contestant and appellant and respondent.

Stanley Pugh and William H. Stoffers, Red Bluff, for proponent and respondent and appellant.

PEEK, Justice.

By his last will and testament dated January 8, 1947, Patrick H. Leonard devised all of his estate, "both real and personal, and wheresoever situate, to my said sister Ellen Bagwell and my said sister Margaret Danielson and to my brother-in-law, Herman Danielson, husband of said Margaret Danielson, share and share alike."

He died on September 26, 1947, and on September 30, 1947, the executrix therein named—the proponent in this proceeding—Ellen Bagwell, petitioned for probate of said will. Shortly thereafter Leonard J. Moore, decedent's nephew, filed a contest of the will on the grounds that at the time of the execution thereof decedent was not of sound and disposing mind, and was acting under the undue influence of Margaret Danielson, Ellen Bagwell and Herman Danielson. The contestant additionally alleged that the decedent had been declared mentally incompetent on May 19, 1947 by the Superior Court of Tehama County. It was further alleged that decedent had executed a previous will on August 31, 1943, by the terms of which he devised his entire estate to contestant and his wife Annabel, as joint tenants, and in the event that they should predecease him the property was left to their children, share and share alike.

Proponent's answer to the contest admitted that she and Margaret Danielson were appointed decedent's guardians on May 19, 1947 for the reason that said decedent was incompetent but denied that decedent was of unsound mind on the date of execution of the will, and further denied that the will was the result of undue influence as alleged by contestant.

At the conclusion of contestant's case the trial court granted proponent's motion for nonsuit as to the issue of undue influence but denied a like motion upon the issue of the testator's mental capacity. The jury returned a verdict that the testator was not of sound mind at the time he executed the will on January 8, 1947, and judgment was entered denying the will probate. Both parties have appealed—the proponent from the judgment as entered on the sole ground that the evidence was insufficient to sustain the verdict and from the order denying her motion for judgment notwithstanding the verdict. While the contestant has appealed from the order granting proponent's motion for nonsuit on the issue of undue influence.

A summary of the evidence, which because of the questions raised by both proponent and contestant is necessarily lengthy, is as follows:

Decedent was 68 years of age at the date of his death and had never married. From 1925 until his retirement about one and one-half years prior to his death he concededly had enjoyed good health and had been employed continuously as a gardener and caretaker at an estate near McCloud, California. Following his retirement and until the Fall of 1946 he made his home with contestant.

He was described by one witness as a fiery little Irishman possessed of a strong will, and by another as being jolly and good-natured and one who had many friends and few enemies. However, these witnesses further testified that subsequent to a nasal operation in the early part of 1945 a change occurred in decedent's mental and physical condition; he no longer was jolly; he could not carry on a coherent conversation, and he had become the victim of hallucinations.

The contestant and another witness who accompanied decedent on a trip to the coast in the latter part of 1945 testified that the decedent requested them to get his gun and shoot some coyotes which decedent claimed to see on the roof of a building adjoining the hotel where they stayed in San Francisco. There was further testimony by other witnesses concerning letters the decedent had written in which he referred to strange men digging up his flowers; of guards in the trees and of people swarming around them and of gold operations on his employer's estate.

Various witnesses who visited contestant's home during the period of decedent's stay testified that he was unable to converse intelligently or coherently. One witness testified to a conversation in which decedent was worried concerning some women under the Chesterfield who were after him and kept peeking at him; that he next looked out of the window and professed to see some women riding horses in a nearby field, stating that "They have been running them hard all afternoon," and requested that the witness stop them from bothering the horses. The witness changed the subject and took the decedent for a ride in his automobile during the course of which he stated that he had been a Chief of a tribe of Indians.

The contestant testified that since he was ten years of age he and his uncle had been very intimate and that during the last fourteen years of his life, which coincided with contestant's marriage, the decedent spent all of his vacations with contestant and his family. Further testimony of contestant revealed that decedent during his stay with them would tear the covers off his bed endeavoring to find a skunk which he imagined was there; that frequently he would arise at night and go to the bathroom but not turn on any lights and would get lost in the house—that he would have to get up and get decedent back to his own bed; that he obtained a flashlight for him to use at night but that he lost it; that decedent had taken various canned goods from the kitchen, such as tuna, peaches, and asparagus; that he opened the cans and mixed the contents all together in a bucket in the barn and when this was discovered he stated that he was feeding his dog; that the testator had an identical twin who had a dog, an identical twin of a dog owned by decedent, both of whom followed him wherever he went; that the decedent was unable to care for his personal wants and that contestant and his wife had to treat him like a child; that he would not get a haircut or take a bath unless told to do so but that he would do whatever he was told; that he did nothing on his own initiative in regard to his business affairs, but with assistance would do as he was directed; that he would destroy his mail unless he was watched carefully, and that when he would receive checks in the mail he would endorse them only after contestant explained them to him—that contestant would then deposit them to decedent's account, and that anyone could get him to do anything they wanted if they handled him right.

The contestant further testified that on September 1, 1946 the decedent developed the idea that contestant and his family had turned against him. He related a conversation with decedent in which his uncle stated: "I know all about you. Maggie told me all about you * * * Maggie told me you were going to throw me out of the place" and "Maggie told me you were afraid I was going to cut the kids' heads off and that I was going to do bodily harm to them." (We assume the reference to Maggie as meaning his sister, Margaret Danielson, one of the beneficiaries named in the will.) The witness testified that during such conversation the decedent appeared quite angry and that from that time on his uncle's attitude toward him changed completely. However, at a subsequent meeting decedent stated: "I'm supposed to be mad at you but I'm really not."

While returning from a visit to contestant's home during the 1945 Christmas holidays decedent, instead of changing trains as planned in Oakland, hired a taxicab and was driven to the home of his niece, Irma Benefield, in Mill Valley. She testified that when he arrived he was confused and dazed and could not tell her where he had come from or where he was going, necessitating that she telephone to contestant to obtain such information. The decedent remained overnight at his niece's home, and on the following day she took him to San Francisco and placed him on the proper train after placing a note in his pocket giving him directions as to where he was going and after wiring ahead to his destination to make arrangements for someone to meet the decedent there.

Contestant's wife testified to similar experiences, that decedent was afraid that people were after him, that when she would return home she would find all of the lights on and all of the windows shades pulled down; that he followed her around whereever she went wanting to do whatever she did and gladly doing whatever she told him to do; that she treated him as she did her seven year old daughter; that she had to watch him while he took any medicine for the reason he might take the whole bottle instead of the prescribed dosage, and that he would write checks for any amount if he were not carefully watched. This witness also testified that the decedent cried when he told her that his sister had said he would have to live in her house because the contestant's family were going to be mean to him. During this same conversation he told the witness that Maggie had obtained a lawyer for him but he didn't know his name. Also she testified to a conversation with Mrs. Bagwell in the summer of 1946 during which Mrs. Bagwell told how sorry she was about Unlce Pat's condition; that she realized that he was difficult to care for; that she was too old and didn't want to be bothered with him, saying "I don't want him at my house at all." She further testified that same summer he stayed with the Danielsons while she was confined to a hospital undergoing an operation; that upon her return home they brought decedent back saying that he was going into their vineyard with big sticks trying to kill snakes and that Maggie was afraid of him and would keep him no longer.

On or about September 20, 1946, decedent was taken by contestant to the home of his father James E. Moore. Contestant testified he did so because he had planned to go on a hunting trip, and that decedent was in such a condition that he didn't want to leave him with his wife and children while he was absent. The contestant concluded his testimony with the statement that during the period in which the decedent resided with him he was, in his opinion, mentally unsound and that "anyone could take him and get him to do anything they wanted him to do if they handled him right."

James E. Moore testified that decedent stayed with him approximately three weeks during which time he slept on the sleeping porch; that decedent told him of men peeking through the screen at him, of seeing people dancing on the neighbor's lawn and of seeing contestant's daughter in a tree. Decedent left the home of James E. Moore on October 21, 1946, and went to the home of Margaret Danielson, his sister, and her husband Herman Danielson, where he resided until his death. James E. Moore further testified that when decedent went to the Danielson home he left some of his clothing behind, that after it had been returned by the laundry he notified decedent to come for it, that instead Mrs. Danielson came and demanded the clothes, and that when she was asked if decedent was in the car she replied that he could not talk to the decedent. The witness disregarded her statement and walked out to the car, that decedent shook hands with him and moved to get out of the car, but that Mr. Danielson, who was sitting beside decedent, grabbed him by the arm and said to the witness: "Pat Leonard is not going into your house." There was also testimony in this regard by contestant who stated that he went to see his uncle about a week after he had left the home of James E. Moore and was told by Mr. Danielson to get off the property, that he couldn't see him. After a heated dispute Mr. Danielson told his wife to bring Pat out. Contestant testified that "My aunt got him by the arm and brought him to the door and Herman got him on the other side by the arm and said, 'Here he is. Now talk to him.' * * * So I just figured then that it was no use * * * so I turned around and left."

Sometime in January 1947, a friend of decedent's visited at the Danielson home. He testified that he attempted to talk with him but got no response at all and that Mrs. Danielson said, "I don't think he understands what you are talking about." He further testified that when he took his departure the decedent went with him as far as the front gate and that he then invited him to see his new car, to which decedent replied, "This is my bounds, right here. I can't go any further than this."

Mrs. Danielson testified on direct examination that at no time did decedent leave her home unaccompanied by either herself or Mr. Danielson, or both of them.

In April 1947, the decedent was discovered by a police officer wandering about the streets of Red Bluff in a semi-dressed condition. He was unable to state who or where he was. He was first taken to a hospital and then to the home of a friend where he told the persons there gathered that people had been chasing him through a big cave full of mud but that he heard his nephew whistle to him and he knew he was all right. The witness further testified that when the contestant arrived in response to a telephone call the decedent refused to shake hands with him, stating that he was supposed to be mad at his nephew. Decedent requested that he not be taken back to the Danielson home and expressed the desire to stay at the home of contestant's father.

The decedent's attending physician who was called as a witness by the proponent testified that in his opinion the decedent was of sound mind during the month of January 1947, but of unsound mind from May until the date of his death in September 1947. The proponent also produced witnesses who were of the opinion that decedent was of sound mind during January 1947.

The only evidence relative to the execution of the will of January 8, 1947, is the testimony of the attorney who prepared the same. He testified that he saw decedent several times subsequent to October 1946, when he was served in the guardianship proceedings brought by contestant. The petition which sought the appointment of contestant as guardian of the decedent was opposed but the basis therefor does not appear in the record. However, it does appear that pursuant to an agreement the proceedings were dropped. The witness further testified that decedent was never alone when he came to his law office but was always accompanied by his sister; that on one occasion he brought up the subject of making a new will, stating that "he had given Leonard everything he had and Leonard had thrown him out." The witness also testified that he and his secretary were the only ones present when the will was executed and that in his opinion the decedent was of sound mind at that time. The secretary, however, could recall nothing concerning the facts.

The proponent contends that the foregoing evidence does no more than show occasional delusions which occurred at times at least three months prior to and three months after the execution of the will, and cannot serve to establish incapacity at the time of execution. In other words, proponent's attack upon the judgment is based upon the sole ground of the insufficiency of the evidence to sustain the verdict of the jury.

[1-6] Not every form of insanity nor every departure from the normal will destroy an otherwise valid testamentary act. In re Estate of Pessagno, 58 Cal.App.2d 390, 136 P.2d 644. Therefore the rule is not merely that no person who is insane may make a valid will, but rather is that the will of no person who, by reason of insanity, is incapable of making valid testamentary disposition of his estate shall be upheld. Thus, to set aside a will for insanity or mental derangement, the abnormalities of mind must have a direct bearing on the testamentary act, and the evidence must establish the fact that the property was devised in a manner which, except for the claimed infirmities, would not have occurred. See In re Estate of Llewellyn, 83 Cal.App.2d 534, 189 P.2d 822, 191 P.2d 419; In re Estate of Selb, 84 Cal.App.2d 46, 190 P.2d 277. Testamentary incapacity because of unsoundness of mind is therefore of two classes: either insanity of such broad character as to establish mental incompetency generally, or a specific and narrower form of insanity under which the testator is the victim of some hallucination or delusion which directly influenced the testamentary act. See In re Estate of Dupont, 60 Cal.App.2d 276, 140 P.2d 866. It necessarily follows that a testator has sufficient mental capacity to execute a will if he has sufficient capacity to understand the nature of his act, the extent and character of his property, and the persons who are the natural objects of his bounty. In re Estate of Russell, 80 Cal.App.2d 711, 182 P.2d 318. However, what persons other than the testator may think as to the justice or injustice of a will is simply a matter of opinion, and therefore, "before the law will permit judges or juries to make disposition of a decedent's property irrespective of his or her desires, substantial evidence is required to show lack of testamentary capacity at the time of the execution of the will." In re Estate of Schwartz, 67 Cal.App. 2d 512, 155 P.2d 76, 81.

[7, 8] Applying the rules as enunciated to the evidence before us, resolving all conflicts therein in favor of the contestant, and indulging in all reasonable and legitimate inferences to uphold the verdict, if possible, In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689, it is readily apparent that such evidence does no more than show, as proponent contends, that the deceased suffered occasional delusions and hallucinations during the latter years of his life. There is nothing to show, and therefore no substantial evidentiary basis for inferring, that the will was the product of such delusions or that the testator was not aware of the nature of his property and the naural objects of his bounty, and the judgment must therefore be reversed.

[9] In determining the question raised by contestant's appeal, the propriety of the court's action in granting proponent's motion for a nonsuit upon the issue of undue influence, we are governed by the well established rule that a court should "* * * grant such a motion when, and only when, disregarding conflicting evidence, and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff." In re Estate of Green, 25 Cal.2d 535, 546, 154 P.2d 692, 698.

The evidence presented to the jury shows that the testator executed the attacked will while he was living in the home of his sister, Mrs. Danielson, and at a time when he was described as an obedient child who would do anything anyone "wanted him to do if they handled him right." He had lived intermittently with contestant for many years, and by a prior will had made the nephew and his wife the sole beneficiaries of his estate, yet shortly after moving to the Danielsons' his whole attitude toward the contestant completely changed. He was restricted to the premises of the Danielson home and could not leave them unaccompanied. The Danielsons' sought to prevent him from conversing with the contestant or his wife. The beneficiaries obtained a lawyer for the testator and always accompanied him to the lawyer's office. The beneficiaries of the challenged will took the entire estate to the exclusion of the contestant who, with his wife, were the sole beneficiaries of the prior will which was executed at a time when the testator was admittedly of sound mental capacity and possessed of a fiery and independent personality. The record presents no explanation why the testator should have excluded the contestant, particularly when Mr. Danielson, a stranger to the blood, was included.

[10-13] Such evidence establishes a confidential relation between the testator and the beneficiaries of the attacked will and that the mental and physical condition of the testator was such as to render him susceptible to undue influence. Viewing the foregoing evidence in the light of the rule that the mental and physical condition of the testator are factors to be considered on the issue of undue influence (26 Cal.Jur. 669-670), we find a testator who was like an obedient child, susceptible to suggestion, restricted to the premises of the home of the beneficiaries of the attacked will which he never left unaccompanied by them, and who was prevented by them from conversing with the contestant and his wife. The jury could reasonably infer therefrom that the beneficiaries of the attacked will were active in procuring its execution. In addition, the will was unnatural in the sense that it included a stranger to the blood and excluded the testator's nephew who would have shared in the estate if the decedent had died intestate and who, with his wife, were the sole devisees of a prior will. Where a person sustains a confidential relation to the testator, is active in the preparation of a will and unduly profits by its terms, a presumption of undue influence arises casting the burden of showing that the will was not the product of undue influence upon the proponent of the will. In re Estate of Teel, 25 Cal.2d 520, 154 P.2d 384; In re Estate of Hull, 63 Cal.App.2d 135, 146 P.2d 242; In re Estate of Abert, 91 Cal.App.2d 50, 204 P.2d 347. Therefore since the record contains evidence, although contradicted, from which the jury could reasonably conclude that a confidential relation existed between the testator and beneficiaries that

the latter actively participated in the preparation of the will and that they unduly profited thereby, the issue of undue influence should have been submitted to the jury under the rule in Re Estate of Green, as above set forth.

For the foregoing reasons the judgment is reversed, the order of the trial court denying the motion for a directed verdict is set aside, as is the order granting the motion for nonsuit, and the case is remanded for further proceeding in accordance with the views expressed herein.

ADAMS, P. J., and THOMPSON, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

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92 Cal.App.2d 472

LYON et al. v. CITY OF LONG BEACH et al.

Civ. 16652.

District Court of Appeal, Second District, Division 1, California.

June 17, 1949.

Rehearing Denied July 5, 1949.

Hearing Denied Aug. 11, 1949.

1. Appeal and error 🔑930(1), 989

Where trial court ruled that as a matter of law decedent was a guest at time of automobile accident and hence plaintiffs could recover only upon a showing of willful misconduct of host, and jury was instructed accordingly and found verdict for defendant, question presented on appeal was whether evidence viewed in light most favorable to plaintiffs afforded any support for a finding, had such finding been made by the jury, that decedent's status was that of passenger at time of accident. Vehicle Code, § 403.

2. Automobiles 🔑181(2)

Contribution toward expenses of automobile ride taken for mutual pleasure of parties does not take contributor out of category of guest. Vehicle Code, § 403.

3. Automobiles 🔑244(20)

Evidence that automobile owner carried fellow employees for consideration during war time to employer's parking lot and then left to go to restaurant was insufficient to justify inference that a fellow employee's status on side trip was that of a "passenger" rather than a "guest" on ground that owner sustained benefit by way of good will, so as to permit employee's survivors to recover for death as result of owner's negligence. Vehicle Code, § 403.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Guest" and "Passenger".

4. Appeal and error 🔑233(2)

Where court sustained objection to cross-examination because of lack of foundation, but stated that ruling was without prejudice to bringing matter up again if foundation developed, and matter was never brought up again, error could not be based on court's original refusal to permit cross-examination. Code Civ.Proc. § 2055.

◆

Appeal from Superior Court, Los Angeles County; Stanley N. Barnes, Judge.

Action by Bonnie Lyon, Duane E. Lyon, a minor, and others, by their guardian ad litem, Bonnie Lyon, against the city of Long Beach, and others, and against Vearl Shaver, for the wrongful death of Henry Lyon in an automobile accident. From a judgment in favor of Vearl Shaver, plaintiffs appeal.

Judgment affirmed.

Bauder, Veatch & W. I. Gilbert, Los Angeles, for appellants.

Joseph A. Ball, Long Beach, for respondent.

WHITE, Presiding Justice.

This is an appeal from a judgment in favor of defendant Vearl Shaver, entered upon the verdict of a jury, in an action for damages for the wrongful death of Henry Lyon, who was killed in an accident in the City of Long Beach, California, on or about May 31, 1943. The decedent sustained his fatal injuries when the station wagon owned and operated by defendant Vearl Shaver, and in which decedent was riding, struck a concrete retaining wall during a war-time "dim-out."

The action was originally directed against the City of Long Beach and various public officials, as well as defendant Shaver, charging the city and officials with negligence in the erection and maintenance of the retaining wall. The action ultimately proceeded to trial against defendant Shaver (hereinafter referred to as defendant or respondent) alone.

Defendant was employed at the plant of Douglas Aircraft Company in Long Beach. He made a practice of carrying fellow employees for a consideration from the vicinity of his home in La Verne to the plant and back. The decedent, Lyon, was also a Douglas employee and had been a rider in defendant's station wagon for about four months before the accident. The amount charged his riders by defendant was based upon the cost of operation and maintenance of his vehicle in making six round trips per week, traveling an estimated 100 miles per round trip.

On the evening of May 31, 1943, defendant picked up four passengers, including the decedent, and drove to the Douglas plant where they all were to report for work at midnight. They reached the plant a little early. Two of the passengers alighted. Defendant, a Miss Anderson and decedent proceeded in the station wagon to a cafe for the purpose of getting some coffee. The cafe being too crowded, they drove to another. It was while they were returning from the cafe to the Douglas plant that the accident took place.

Plaintiffs contended that at the time of the accident decedent was a passenger for hire. The trial court ruled that as a matter of law the decedent was a guest and not a passenger at the time of the accident, and hence plaintiffs could not recover for negligence but only upon a showing of wilful misconduct, Vehicle Code, sec. 403, there being no issue of intoxication involved. The jury was instructed accordingly.

Appellants in their brief state that they make no contention on this appeal that defendant was guilty of wilful misconduct. It is at least questionable whether a verdict based on wilful misconduct could be permitted to stand. At any rate, this question has been determined by the jury, under admittedly proper instructions, adversely to appellants.

[1] There is no question but that the status of decedent Lyon was that of a passenger during the trip between his home and the plant. The trial court was of the view that this status ceased when the party arrived at the plant, and then embarked on an independent journey for a social purpose. The question therefore directly presented is whether, viewing the evidence in the light most favorable to plaintiffs, it affords any support for a finding, had such finding been made by the jury, that decedent's status was that of a passenger at the time of the accident.

Appellants take the position that the jury might have inferred from the evidence either (1) that decedent was a passenger for the reason that a tangible benefit was being conferred upon defendant at the time of the accident, in that it was to his business advantage to maintain the good will of his riders who wanted to go to a restaurant, or (2), that the contract of carriage included the side trip in question, claiming that "the evidence would have justified an inference that the transportation agreement was broad enough to include the trip from decedent's home until he was finally deposited at his place of employment."

Defendant testified under section 2055 of the Code of Civil Procedure:

Lyon had been riding with him approximately four months. Two or three times when his station wagon was not available defendant had ridden in Lyon's car. Defendant at times hauled as many as seven or eight people to work at a time, but the numbered varied, sometimes four, sometimes seven. He charged his riders "approximately all the same * * * around two or two and a half" per week. "I would get what they could put in a week to help out expenses." He did not know exactly how much he spent for gas and oil. He drove about 100 miles per day, from his home to the plant and back. His mileage was about 12 to 13 miles per gallon. He figured it cost him $16.00 per week for gas, oil and maintenance. He did not receive enough from his riders to take care of the payments on the vehicle. He later testified that the amount charged would vary according to the expenses and according to the number of riders—that is, the more riders the less the charge per rider.

Upon returning to the stand after a recess and under examination by his own attorney, Mr. Shaver testified that he did not collect the same amount from each rider each week, but "what my expenses would run. Why, on the wagon, four riding or seven riding, I would figure it up, the percentage on it, or what it would cost for that amount of riders I had.

"Q. Was it a cheaper amount each week than if four rode? A. Yes." Again he testified:

"Q. In figuring the amount * * * you knew the exact number of miles you drove each day? A. Yes, sir. Checked it lots of times.

"Q. Was there an exact number of miles you had figured that went into that computation? A. *I figured about what it cost me in gas.*

"Q. *No, your mileage, what was the mileage* you figured for these riders? A. *At the time I picked them up into the Long Beach plant and back to my home, was 100 miles, a mile or two over.* * * * I checked it on my speedometer."

Under examination by the court, the witness testified:

"The Court: Well, is this correct; you charged $2.00 or $2.50 per week for a passenger whether you carried three or eight? A. If I had around three or four it would be more. If I had eight it would be less a person.

"The Court: Did it always vary between two and two and a half a week? A. Yes, sir.

"The Court: If you had three, how much did you charge? A. What my expense would be for a week for gas.

"The Court: If you had eight, how much did you charge? A. I don't recall exactly what it would be.

"The Court: Did you keep any records? A. No, sir, only just figure up on the week, at the end of the week *what it cost us.*

"The Court: Ever charge any more than $2.50? A. No, sir.

"The Court: Ever charge any less than $2.00? A. Well, I'd say it would be—

"The Court: Not what it would be. I want to know what you charged. A. When there are two and three and four riding, it would run more than that.

"The Court: Did you ever charge less than $2.00? A. Yes, sir.

"The Court: What is the least that you charged? A. Around—I don't know—

"The Court: If you had eight riding—A. It would be around maybe a dollar—something like that."

In his own defense Mr. Shaver testified as follows:

"Q. *In making your charges to your riders, did you charge any other mileage except from your home to the plant and back?* A. *No, I didn't.* Q. *Ever include in that mileage any side trips?* A. *No.*" He further testified that the use of the car during the day by his wife was not included in the charges; that the charge for gasoline was based on mileage and not on actual consumption; that if he had occasion to buy a tire, he would "more or less figure in the week as I go along, or next week"; he "added more onto one week, that week, and make it up in two weeks or three weeks, or something like that"; that if he had a "ring job" he would charge that to the riders, but would spread it out "add into weeks, the coming week."

The wife of defendant testified that she helped him "figure out the cost for the week"; that if there were eight riders the cost might be as low as $1.00 unless there were extra expenses, but she could not remember exactly; that they did not include depreciation; that they never asked for more than $2.50 per rider, but absorbed the extra expense if it could not be recovered over "a period of time."

Mr. Dempsey, one of defendant's riders, testified that his payments varied, depending on whether he had been riding with defendant or had furnished his own car to carry some of the defendant's passengers; that the payments varied from $1.00 to $2.50—then he testified that the lowest he paid—on a full load—was $1.50.

So far as the facts surrounding the decision to make the side trip for coffee are concerned, it appears that defendant transported his riders, a Miss Anderson, the decedent and two others, to the parking lot across the road from the Douglas plant, parked his vehicle in its accustomed parking place and shut off his motor. Two riders alighted, leaving decedent, defendant and Miss Anderson in the vehicle. The decedent, who was sitting in the middle seat behind the front seat, suggested, "Let us go down to Long Beach and get us something to eat." The three drove to the "Bomb Shelter" cafe and entered the establishment, but left after a few minutes, as it was too crowded.

"Q. Did somebody suggest going somewhere else? A. I don't recall.

"Q. Remember a conversation about that? A. No, sir, more than said 'Let us go'—something like that. * * * The first place we saw to eat we stopped."

[2] It is conceded that so far as the daily trip to and from the Douglas plant is concerned, the relationship between defendant and his riders was that of carrier and passenger. Further, it cannot be denied that when the party arrived at the parking lot on the evening of the accident, the purpose of the transportation for which the decedent gave compensation had been accomplished, that is, he had been transported to his place of employment. As the undisputed facts show, two of the passengers had alighted and gone to work. The decedent, Miss Anderson and defendant then embarked upon an independent trip for a purely social purpose. It may be conceded that decedent contributed to the expense of the trip to the cafe, in the sense that his weekly payments to defendant included part of the expense of upkeep of the vehicle, such as tires and motor repairs, but it is settled that contribution toward the expenses of a ride taken for the mutual pleasure of the parties does not take the contributor out of the category of guest. Rogers v. Vreeland, 16 Cal.App.2d 364, 60 P.2d 585; McCann v. Hoffman, 9 Cal.2d 279, 286, 70 P.2d 909, 913. As was said in the last-cited case:

"Therefore, where a *special tangible benefit* to the defendant was the *motivating influence* for furnishing the transportation, compensation may be said to have been given. But it is not given where the *main purpose* of the trip is the joint pleasure of the participants. The payment of a portion of the expense, as for gasoline and oil consumed on the trip, is merely incidental, and does not constitute the *moving influence* for the transportation. The provocation for the offer of transportation remains the joint social one of reciprocal hospitality or pleasure." (Emphasis added.)

We cannot adopt appellants' view that the evidence would have justified an inference that the transportation agreement was broad enough to cover the trip in question. Appellants claim that it could be inferred that the agreement was broad enough to include the trip from decedent's home *"until he was finally deposited at his place of employment."* The uncontradicted evidence shows that decedent was in fact "deposited" at the usual terminus, the parking lot, the automobile was parked in its usual place and the engine shut off, and two of the passengers alighted and went to work. We see no escape from the conclusion that the contract of carriage had been fully performed at the time the decedent suggested that they "go down to Long Beach and get us something to eat."

It is urged by appellants that "a tangible benefit" was being conferred upon defendant, in that the "motivating influence" for the defendant's driving decedent to a restaurant was personal gain in retaining the good will of decedent and his continued patronage as a rider. In this respect it is argued:

"* * * The respondent, except for the fact that he was working in a war plant and carrying riders, was getting only the 'A' coupon. * * * Even assuming that the story told by the survivors was true, it does not take much in the way of mental gymnastics to reach the conclusion that, when the respondent was confronted with the request that a cup of coffee or a bite to eat be obtained before proceeding to work, he concluded that it would be to *his benefit* to maintain the good will of the decedent and the others who wanted to participate in the food, by driving them to the restaurant. It is a matter of common knowledge that extra gasoline was allotted to war-time workers who used their cars to transport themselves and others to and from the various war plants. It was essential to the respondent that he maintain at all times the good will of his passengers, so that he could himself obtain the extra gasoline which made it possible for him to travel the 100 miles a day from his home to his place of employment."

The inference which appellants contend the jury could draw would be based, in our opinion, wholly upon conjecture. True, it was to defendant's advantage to have enough riders to qualify for a "B" or "C" gasoline ration book, but there is nothing in the testimony from which it could be inferred that these two riders, Miss Anderson and the decedent, were indispensable for that purpose. The defendant recovered his expenses irrespective of the number of riders. The supposed benefit conferred upon defendant—the good will of the two riders—is not, under the facts of the instant case, such a tangible benefit as would constitute the riders as passengers at the time the accident happened.

The cases relied upon by appellants are, in our opinion, readily distinguishable from the situation presented in the case at bar. In Kruzie v. Sanders, 23 Cal.2d 237, 143 P.2d 704, the sole purpose of the plaintiff in riding with the defendant was to help the defendant select some Christmas gifts. In Piercy v. Zeiss, 8 Cal.App.2d 595, 47 P.2d 818, defendant drove the plaintiff home from work in the hope of selling her some insurance. In Whittemore v. Lockheed Aircraft Corporation, 51 Cal.App.2d 605, 125 P.2d 531, 533, an official of an airline was to take delivery of a plane at Las Vegas, Nevada. Instead, however, he came to Burbank and boarded the plane for the flight from Burbank to Las Vegas, during which flight the plane crashed, resulting in his death. The court there said: "It is admitted that decedent did not pay anything for the ride, but defendant must be deemed to have received compensation if he was taken along because it was considered by defendant to be to its business advantage that he be taken to Las Vegas in the plane. * * *"

[3] In the foregoing cases, a definite, substantial benefit was being conferred upon the defendant driver in connection with the trip during which the accident occurred. In Whittemore v. Lockheed Aircraft Corporation, supra, the trip was being made in pursuance of defendant's business. As the court said, "In its essential features the transaction was one in which defendant was promoting its own business interests." The case at bar presents no such situation. Defendant was not in the business of carrying passengers for profit. The possibility that he agreed to make the trip because he feared losing the good will of his two passengers is wholly speculative and conjectural; moreover, irrespective of what might have been the motives in defendant's mind, his act was an act of hospitality in connection with a trip undertaken for a purely social purpose and the mutual pleasure of the three people who had remained in the vehicle after the business trip had been concluded.

[4] In their reply brief appellants for the first time urge that the trial court erred in refusing to permit cross-examination of defendant as to the custom of taking side trips on prior occasions. The contention cannot be sustained. At the opening of the trial, plaintiffs' counsel examined defendant under section 2055 of the Code of Civil Procedure and asked the following question:

"Q. Now, when you would come to work with these people, had you on occasions before May 31, gone to get something to eat before you went on your shift?

"Mr. Ball (Defendant's counsel): Object. That is immaterial.

"Mr. Gilbert: I asked that in view of counsel's opening statement.

"The Court: I think there is no foundation now that it would make it material. Objection sustained *at this time* as to what was done upon previous occasions, without prejudice to bringing it up again if you think there is any foundation for it. I don't see any now."

Examination of the record discloses that the matter was never brought up again, although, as the foregoing quotation shows, the plaintiffs were not foreclosed from this line of inquiry by the court's ruling. Miss Anderson and Mr. Dempsey, both riders with defendant, testified at the trial, but no attempt was made to elicit from either of them any testimony relative to side trips or any custom that might have existed.

The judgment is affirmed.

DORAN, and DRAPEAU, JJ., concur.

Hearing denied; GIBSON, C. J., and CARTER, J., dissenting.

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92 Cal.App.2d 367

WEEDON v. WEEDON.

Civ. 16854, 16950.

District Court of Appeal, Second District,
Division 2, California.
June 13, 1949.

Rehearing Denied June 28, 1949.

Hearing Denied Aug. 11, 1949.

1. Divorce 🔑245(1)

Superior Court in divorce action has jurisdiction to modify interlocutory decree relating to support and maintenance even though award for support was predicated on written agreement purporting to effect a division of community property incorporated in decree, although it must first be ascertained whether stipulation in agreement for payments to wife was part of settlement of property rights or was one solely for alimony or support money.

2. Appeal and error 🔑1012(1)

Determination of issue of fact by trial court, if not unreasonable, will not be disturbed on appeal even though a contrary finding might be equally tenable.

3. Divorce 🔑254

Where court in divorce action did not determine character of written agreement purporting to effect division of community property at time of entering interlocutory decree incorporating agreement as it should have done, court could properly do so in proceedings for modification of decree.

4. Divorce 🔑245(1), 254

If a contract is a settlement of property rights and incidentally makes provision for support of wife in part payment of her share of community property, contract may not be modified after being incorporated in interlocutory decree of divorce; but if agreement for support money is incorporated in judgment, that fact does not forestall modification of decree as new circumstances dictate. Civ.Code, § 139.

5. Divorce 🔑245(1)

Where parties to divorce action entered into written agreement purporting to effect division of community property and total expense of family had exceeded aggregate earnings of husband, and in cross-complaint wife demanded award of support money, and agreement itself provided for monthly payments for support until wife's death or remarriage, court could properly modify interlocutory decree incorporating agreement and require husband to pay monthly sum for support until further order. Civ.Code, § 139.

6. Divorce 🔑284, 286

Trial court has discretion to order husband to pay expense of wife's defense of appeal from order modifying interlocutory decree with respect to provision for support, and discretion will not be interfered with unless it affirmatively appears that discretion has been abused.

7. Divorce 🔑284

Where written agreement between parties purporting to effect division of community property contained agreement that husband would pay wife's reasonable attorney fee to be fixed by the court, and thereafter wife sought modification of decree incorporating agreement, court could properly award sums for wife's defense of appeal from order modifying decree in absence of claim that sums were oppressive to husband.

◆

Appeal from Superior Court, Los Angeles County; Otto J. Emme, Judge.

Action by George W. Weedon, Jr., against Elizabeth Weedon for divorce, wherein defendant filed a cross-complaint. From an order modifying the interlocutory decree with respect to a provision for support, and an order that plaintiff pay defendant's attorney for defending an appeal and costs, plaintiff appeals.

Orders affirmed.

Don Lake, Los Angeles, for appellant.

Leon W. Delbridge, Pasadena, for respondent.

MOORE, Presiding Justice.

On the cross complaint of Mrs. Weedon, an interlocutory decree of divorce was entered February 3, 1943. Pursuant to a "Property Settlement Agreement" executed by the couple two months prior to the decree, the court ordered appellant to pay his wife "for her support and maintenance the sum of $66.67 per month * * * subject to all the terms * * * in paragraph 7 of said property settlement agreement * * * incorporated herein by reference." After providing for the payment of support money for respondent and the children the contract provides that appellant's obligations to pay the support money, and the hospital and medical expenses of the minor children shall cease "at the expiration of twelve years from and after date hereof," upon the remarriage of respondent, or upon her being deprived of the custody of the children by death or court order.

In June, 1948, on the application of respondent, the interlocutory decree was duly modified with respect to the provision for support by the following order:

"(1) The plaintiff shall pay to defendant for her support and maintenance the sum of $100.00 per month hereafter, commencing on the 1st day of June, 1948, and continuing thereafter until further order of court."

Thereafter, pursuant to hearing duly had of respondent's motion for order requiring appellant to pay counsel fees and costs "to defend the appeal now pending in the above entitled action" the court ordered appellant to pay respondent's attorney $300 for counsel fees for defending the appeal and to pay respondent $200 as her costs on such appeal.

[1-4] The superior court has jurisdiction to modify that part of an interlocutory decree relating to support and maintenance even though the award for support was predicated on a written agreement purporting to effect a division of community property, incorporated in the decree. However, it must first be ascertained whether the stipulation in the agreement for payments to the wife was a part of a settlement of property rights, or was one solely for alimony or support money. The determination of such issue of fact by the trial court, if not unreasonable, will not be disturbed on appeal even though a contrary finding might be equally tenable. In re Estate of Rule, 25 Cal.2d 1, 11, 152 P.2d 1003, 155 A.L.R. 1319; Davis v. Stulman, 72 Cal.App.2d 255, 269, 164 P.2d 787. If the court in the instant case did not determine the character of the agreement at the time of entering the interlocutory decree as it should have done, Adams v. Adams, 29 Cal.2d 621, 625, 177 P.2d 265, it properly did so on the modification proceedings. Hough v. Hough, 26 Cal.2d 605, 615, 160 P.2d 15; Alexander v. Alexander, 88 Cal.App.2d 724, 727, 199 P.2d 348; Wallace v. Wallace, 136 Cal.App. 488, 493, 29 P.2d 314. Of course, if the contract is a settlement of property rights and incidentally makes provision for the support of the wife in part payment of her share of the community property it may not be modified after being incorporated in the interlocutory decree. Puckett v. Puckett, 21 Cal.2d 833, 840, 136 P.2d 1; Leupe v. Leupe, 21 Cal.2d 145, 148, 130 P.2d 697. But if an agreement for support money is incorporated in the judgment, that fact does not forestall a modification of the decree as new circumstances dictate. Civ.Code, sec. 139; Hough v. Hough, supra, 26 Cal.2d at page 612, 160 P.2d 15.

[5] The finding that the agreement is not one for division of community property is justified by virtue of the following established facts: (1) It was so determined after trial of the application for a modification of the interlocutory decree. The court's failure to make an explicit finding thereon is immaterial. Atlass v. Atlass, 112 Cal.

App. 514, 517, 297 P. 53. (2) Upon the issue squarely presented at the divorce trial it was determined that there were never any "acquests and gains" of the parties but that the total expense of the family had exceeded the aggregate earnings of appellant. (3) In her cross complaint respondent demanded an award of support money. (4) The agreement itself provides for appellant to pay respondent $66.67 monthly for her support and maintenance until her death or remarriage. If the payments had been her share of the community estate, why should they cease before a specified sum should be fully paid? (5) Prior to commencement of the divorce trial both counsel stated to the court that all issues between the parties had been settled and comprised by agreement except the issue of divorce and community property. Appellant offered no proof as to either.

The Holloway decision (Holloway v. Holloway), 79 Cal.App.2d 44, 179 P.2d 22, is not authority for a reversal of the instant judgment. This court there held that the written agreement of the Holloways was for the purpose of dividing the community estate. By it Mrs. Holloway received certain moneys and chattels, her husband was obligated to make regular payments on life insurance policies and she expressly "waived any and all rights and claims for support and maintenance." The agreement was incorporated in haec verba in the interlocutory decree. The holding there that the trial court on a petition for modification correctly denied the application is not authority for reversing an order where the court found the contract was not a property settlement. Also, in Adams v. Adams, 29 Cal.2d 621, 177 P.2d 265, 266, the plaintiff "in view of her skill and training * * * particularly waives any right to support and maintenance * * * each party hereto is hereby released and absolved from any and all obligations and liabilities for the * * * claims of either party upon the other for support and maintenance." She waived alimony in return for a more favorable division of the community property.

No such circumstances beset respondent herein at the time of the interlocutory decree. At the time the court was finding that there was no community property she was asserting her demand for support and maintenance.

As to Counsel Fees and Costs

[6, 7] There is no reasonable ground for reversal of the order for counsel fees and costs. Discretion is vested in the trial court to order a husband to pay the expense of the wife's defense of an appeal from such an order, and it will not be interfered with unless it affirmatively appear that the discretion has been abused. Baldwin v. Baldwin, 28 Cal.2d 406, 413, 170 P.2d 670. There is no evidence of such abuse. The sums awarded are modest. No claim is made that they are oppressive to appellant. Moreover, in his agreement with respondent it is provided that if respondent prevails in any proceeding against appellant hereunder he will pay her a reasonable attorney's fee to be fixed by the court.

The orders are affirmed.

McCOMB and WILSON, JJ., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

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92 Cal.App.2d 383

RAHIM et al. v. AKBAR et al.

Civ. 7571.

District Court of Appeal, Third District, California.

June 14, 1949.

Rehearing Denied July 14, 1949.

Hearing Denied Aug. 11, 1949.

1. Appeal and error ⇨1010(1)

District Court of Appeal may not interfere with trial court's findings where they are supported by substantial evidence.

2. Stipulations ⇨14(12)

Stipulation entered into between assignees of building lease and assignors on appeal from municipal court judgment stating that judgment therein for assignees in unlawful detainer action would not be res judicata in assignors' pending action wherein they were seeking to set aside assignment on ground of alleged fraud, prevented municipal court judgment from being res judicata in pending action.

3. Appeal and error 🔑173(9)

Where case was tried without any plea of res judicata and upon theory that no such issue was involved, appellant would not be permitted to assert plea of res judicata for first time on appeal.

4. Trusts 🔑110

Evidence sustained finding that confidential relationship existed between assignors and assignees of lease, so that oral promise by assignees to reconvey lessees' interest in leasehold would be enforced.

5. Landlord and tenant 🔑80½

Evidence sustained finding that assignees of lease procured assignment by fraud, so that assignment would be set aside and damages awarded to assignors for loss of business as result of fraud.

6. Frauds, statute of 🔑119(2)

Statute of frauds could not be invoked by assignees of lease in assignors' action to set aside assignment and to enforce oral agreement to reconvey on demand, where confidential relationship existed between parties and assignment was procured by fraud. Civ.Code, § 1624, subd. 4; Code Civ.Proc. § 1973, subd. 4.

7. Frauds, statute of 🔑119(2)

Statute of frauds is not available to one who seeks to invoke it that he may retain the fruits of fraud. Code Civ.Proc. § 1973, subd. 4.

8. Appeal and error 🔑1012(1)

Trial court must determine weight of evidence, and while it cannot find fraud upon mere suspicion, if there is any substantial evidence tending to prove fraud, trial court must determine whether such evidence outweighs or preponderates over that adduced in opposition thereto, and, when trial court has found that such evidence does so preponderate, its decision thereon is final.

9. Landlord and tenant 🔑80½

Rule that there is no presumption of fraud was inapplicable where trial court found on substantial evidence that assignment of lease was obtained by fraud.

10. Trusts 🔑107

Rule that there is no presumption of fraud was inapplicable where a confidential relationship existed between assignors and assignees of lease, so that oral promise to reconvey leasehold interest on demand would be enforced.

◆

Appeal from Superior Court, Sacramento County; B. F. Van Dyke, Judge.

Action by Abdul Rahim and Abdul Khanan against Ali Akbar and Khan Bahadar for an adjudication that plaintiffs were owners of a certain lease and to set aside an assignment of the lease. From a judgment for the plaintiffs, defendants appeal.

Affirmed.

McGilvray & McGilvray, Sacramento, for appellants.

Ralph H. Lewis, Sacramento, for respondents.

ADAMS, Presiding Justice.

Respondents Abdul Rahim and Abdul Khanan brought this action to have it adjudged they were the owners of a lease on the Metropolitan Hotel in Sacramento, that appellants Ali Akbar and Khan Bahadar held the lease in trust for them, that an assignment of respondents' interest in the lease to appellants be set aside on the ground of fraud and deceit, and that appellants be required to assign the lease to respondents. From a judgment in favor of respondents appellants perfected this appeal.

The evidence is conflicting but there is substantial evidence to support the following findings of the trial court.

On and prior to April 6, 1944, respondent Rahim and appellant Bahadar, as lessees, were the owners of a half interest each in a leasehold estate in and to the Metropolitan Hotel in Sacramento, which lease was for a term beginning June 10, 1944, and ending June 9, 1949, at an aggregate rental of $8,680, $280 thereof being payable upon execution of the lease and the balance at $140 a month. On the same date respondents entered into a partnership and ever since have been copartners, and all transactions herein involved were for the benefit of their partnership. On or about said April 6, 1944, appellant Bahadar stated and represented to respondents that if respondents would conduct the Metropolitan Hotel and pay the rent provided for in the lease, appellants would hold their undivided one-half interest in the leasehold estate in trust for respondents and would assign their interest to respondents upon demand. As consideration for holding said one-half interest in the lease in trust for respondents, it was agreed that respondents would, and they did, pay appellants the sum of $100. Respondents entered upon the leased premises at the beginning of the term, paid the advance rental of $280, and operated the hotel until interrupted by appellants; and while in possession, respondents paid the rent specified in the lease, and since said interruption have made due offer to pay all rent installments falling due during such interruption, and at all times have been and are ready, willing and able to pay the same and the whole thereof. Neither of the respondents is or ever was able to read or write the English language and are almost entirely unable to speak said language. They are Afghans and speak only the Afghan language. Appellants are likewise Afghans, but appellant Bahadar has been and is able to speak English with a considerable degree of fluency, and to read and write English to some extent. At none of the times herein involved have respondents been, or are they now, familiar with the business customs and legal practices in the United States; and, until they entered into the transactions here involved, they were entirely inexperienced in any transaction of the same or of a like nature. Appellant Bahadar, on the other hand, had had considerable experience in such transactions and for a number of years had been successfully operating a hotel business in Sacramento, and had had other varied experiences of like kind and nature; and he professed to be familiar with making and filing income tax returns and of being likewise familiar with the usual forms and practices of leasing and hiring real property. At all times mentioned prior to the trouble and disputes involved in the action, respondents and appellants were close and intimate friends and social associates, and at all times respondents looked upon Bahadar as their true and loyal friend and each respondent admired and respected his business judgment and acumen and each of them reposed in him great trust and confidence, both as to his business sagacity and honesty and integrity toward each of them. On or about December 14, 1944, when, as aforesaid, appellants held in trust for respondents an undivided one-half interest in the leasehold estate, and while respondents still regarded Bahadar as their friend, confidant and adviser and still reposed in him their trust and confidence, and prior to Bahadar's having committed any act that caused them to suspect Bahadar of fraud, dishonesty or crookedness, Bahadar brought to respondents a certain document written entirely in the English language and stated and represented to each of them that it was necessary that the document be executed by respondent Rahim, for the purpose of complying with Federal rules and laws relating to the income tax of the respondents, and that the document had no other import and effect. Each of the respondents believed and relied upon said statements and representations made by Bahadar and believed the document was some sort of routine document necessary to be signed and filed by respondent Rahim in connection with respondents' income tax and had no other import or effect; and not knowing anything to the contrary, respondent Rahim signed and executed the document and delivered it to Bahadar. It was not true that the document was necessary to be signed or executed for income tax purposes, but said document was a formal and specific assignment by respondent Rahim to Bahadar of all the right, title and interest of respondents in and to the lease of the Metropolitan Hotel.

At this point it is noted that the evidence shows the assignment was executed on December 14, 1944, and that not until June 6, 1946, nearly 18 months thereafter, did appellants assert ownership of the lease, at which time they instituted an unlawful detainer action; and in those intervening months respondents continued in possession of and managed and operated the hotel as lessees thereof.

The trial court further found that at the time Bahadar made said statements and representations to respondents relative to the document purported to be for income tax purposes, he also told respondents that the landlord was complaining about the manner in which respondents were maintaining the hotel premises, and he said that if respondents would thereafter pay their rentals directly to appellants, Bahadar would handle the transactions in relation thereto with the landlord and thus avert further trouble upon that score. Believing and relying upon such representations respondents thereafter paid their monthly rental to Bahadar instead of to the landlord directly as they had previously been doing. It was not true that the landlord had complained to anyone about the manner of respondents' maintenance of the hotel; and the method of paying rent thus induced by Bahadar was merely an artifice and device calculated by Bahadar to lend color to his fraud and culpability in securing the said assignment. Until a certain judgment of eviction, hereinafter referred to, respondents continued to operate and conduct the hotel; and they purchased furniture, furnishings and equipment and installed same therein at a cost of $4,000, and also made repairs and improvements at an additional cost; and they so diligently and efficiently operated and conducted the hotel that the business was regularly producing for them a net monthly revenue of $416.66 for the several months next preceding and at the time of their eviction; and the business was so successful and lucrative that it was of the value of $12,536.86 at the time respondents were evicted. On or about June 6, 1946, appellants began an action in the Municipal Court at Sacramento against respondents in which action in unlawful detainer they sought restoration to them of said Metropolitan Hotel and damages for the detention. On August 14, 1946, the Municipal Court made and entered a judgment in favor of these appellants, adjudging that they were entitled to the possession of the hotel and to recover $500 per month from May 14, 1946, until possession was restored to them. Respondents perfected an appeal from that judgment, but when the appeal came on for hearing in the Superior Court the parties entered into a written stipulation that the judgment appealed from should be affirmed upon condition that the things found by the Municipal Court judgment should not be considered as res judicata of the matters and things appearing in the instant action or be a bar to the prosecution thereof. The Superior Court accepted the stipulation and affirmed the judgment accordingly. These appellants, in compliance with such stipulation, did not plead or assert the Municipal Court judgment as res judicata of the matters and things herein involved or as a bar to the prosecution of the instant action. After the affirmance of the Municipal Court judgment, a remittitur went down to that court, and an execution and writ of possession were issued and levied on the properties of these respondents at the hotel, seizing and applying same on that judgment for damages with interest amounting in all to the sum of $3,375.35. The officer serving said writ also forcibly evicted these respondents and their goods and possession from the hotel and caused them to transport and to store same at a total cost to them of $1,064.06.

The court further found that the conduct of appellant Bahadar, for and on behalf of appellants, caused the going and flourishing business of respondents to be utterly destroyed and rendered of no value, and caused respondents to suffer the entire loss thereof and use of the hotel from the date of their eviction to the date of restoration, if restoration be had; and found that if respondents were not restored to possession, then they would have suffered damage from the loss of the business and the leasehold estate in the sum of $5,000 per year from December 1, 1946, to the end of the term, the value thereof, together with the sums caused by the levy of writs, amounting in all to $16,976.27; but that in the event that appellants restored the business and premises to respondents, respondents' damages would be $4,439.41 together with the sum of $416.66

for each and every month between the time of eviction and the restoration.

The judgment followed the findings and adjudged that respondents were the equitable owners of the leasehold estate and that appellants held the bare legal title thereto for respondents as their trustee; that respondents should recover from appellants, and each of them, the sum of $4,439.41 together with the sum of $416.66 per month for each and every month subsequent to December 1, 1946, until the end of the term of the lease or respondents' restoration to peaceful possession, whichever event might first occur, and that appellants should assign the lease to respondents and restore them to possession; and if appellants were not able to restore respondents to possession within ten days after entry of the judgment, that respondents recover from appellants, jointly and severally, the sum of $16,976.27 as money and property fraudulently and corruptly obtained by them from respondents as a result of the fraud and misrepresentations practiced upon respondents by appellants.

[1] Before proceeding with a consideration of the contentions made by appellants, it must be understood that this court may not interfere with the trial court's findings since they are supported by substantial evidence. 2 Cal.Jur. 921, sec. 543; Tobola v. Wholey, 75 Cal.App.2d 351, 355, 170 P.2d 952; People v. Cannon, 77 Cal.App.2d 678, 688, 176 P.2d 409; Lagares v. Kappas, 82 Cal.App.2d 569, 577, 186 P.2d 471; Dreyer v. Cole, 210 Cal. 339, 341, 292 P. 123.

The first contention of appellants is that the Municipal Court judgment was res judicata on the controversial issues determined in the instant action. With that contention we cannot agree. The instant action was filed in the Superior Court on June 24, 1946, and appellants filed their answer therein on July 3, 1946; the Municipal Court action went to trial thereafter, to wit, on July 23, 1946, and therefore the instant action was at issue and pending when the Municipal Court action went to trial. From an adverse judgment entered in the Municipal Court these respondents perfected an appeal, and pending that appeal the parties entered into the written stipulation filed in the cause, which stipulation in material part provided that the judgment of the Municipal Court should be affirmed but that the affirmance "shall not be construed as being res adjudicata of the equitable defenses interposed by defendants and appellants [these respondents] * * * which said defenses are now the basis of an equitable action between the parties to this action and which action is *now pending* in the Superior Court * * *." (Italics added.) In affirming the Municipal Court judgment the appellate department of the Superior Court recognized the stipulation and in material part ordered: "* * * that in accordance with said stipulation, said affirmance does not pass on the merits of the affirmative defense interposed by the appellants and defendants [these respondents] and which affirmative defense is now the subject of an action *pending* in the Superior Court * * *." (Italics added.)

[2, 3] By virtue of said stipulation, the judgment of the Municipal Court is not res judicata in this action. Comer v. Associated Almond Growers, 101 Cal.App. 687, 689, 282 P. 532; Morrow v. Morrow, 40 Cal.App.2d 474, 485, 105 P.2d 129, hearing in Supreme Court denied; City of Los Angeles v. Cole, 28 Cal.2d 509, 515, 170 P.2d 928; Buick v. Boyd, 37 Cal.App. 508, 512, 174 P. 913. Also it is to be noted that at no time during the trial, and not until after all the evidence was in, did the appellants assert or claim that the Municipal Court judgment was res judicata. The case was tried without any plea of res judicata and upon the theory that no such issue was involved. Under such circumstances a litigant will not be permitted to assert a different claim or theory for the first time on appeal. MacKenzie v. Angle, 82 Cal.App.2d 254, 263, 186 P.2d 30, and cases therein cited, hearing in Supreme Court denied; Wiltsee v. Utley, 79 Cal.App.2d 71, 75, 179 P.2d 13; Holbrook v. Smith, 87 Cal.App.2d 66, 71, 196 P.2d 84; Guardianship of Romine, 91 Cal. App.2d 389, 205 P.2d 733.

[4] Appellants next argue that the evidence was insufficient to establish a con-

fidential relationship between appellants and respondents. The entire record has been examined and therein we find substantial evidence to support the trial court's finding on that subject. Therefore, this court will not interfere with that finding. Adams v. Talbott, 61 Cal.App.2d 315, 320, 142 P.2d 775, hearing in Supreme Court denied.

[5] Next appellants question the sufficiency of the evidence to sustain the finding that appellants procured by fraud the assignment from respondents of their interest in the lease. There is substantial evidence to support the finding that at the time the assignment was executed appellants held a one-half interest in the lease in trust for respondents and while respondents regarded appellant Bahadar as their friend, confidant and adviser and reposed in him their trust and confidence, and before he committed any act that caused them to suspect him of dishonesty or crookedness, he brought to respondents the document typewritten in the English language and represented to respondents that it was necessary that they execute the document for their income tax purposes; and that believing such representation they signed the document which turned out to be an assignment by respondents of all their interest in the lease. In view of the evidence, this court will not interfere with that finding.

[6, 7] The next contention of appellants is that the statute of frauds barred respondents' claim. With that we cannot agree. The contention is based on the proposition that the alleged oral agreement between the parties involved an assignment of a lease to real property and was required by section 1624, subd. (4) of the Civil Code, and section 1973, subd. 4 of the Code of Civil Procedure, to be in writing and subscribed by the party to be charged. Those code sections are not applicable to this case for the reason that an oral trust existed between the parties and appellants were found guilty of fraud. In his opinion the trial judge stated: "The statute of frauds is not available to one who seeks to invoke it that he may retain the fruits of fraud." Under such circumstances appellants will not be permitted to set up the statute of frauds as a defense. Le Blond v. Wolfe, 83 Cal.App.2d 282, 286, 188 P.2d 278; 12 Cal.Jur. 933, sec. 102.

[8] Appellants next claim that they did not practice fraud upon respondents. The difficulty with that contention is that the trial court found against them on that issue and the finding is supported by substantial evidence. In such a case the rule is thus stated in Noll v. Baida, 202 Cal. 98, 101, 259 P. 433, 434: "* * * it is for the trial court to determine the weight of the evidence, and, while it cannot find fraud upon a mere suspicion, yet if there is any substantial evidence tending to prove fraud, it is for the trial court to determine whether such evidence outweighs or preponderates over that adduced in opposition thereto, and when the trial court has found that such evidence does so preponderate, its decision thereon is final, and an appellate court has no right or authority to disturb such a finding, * * *." (Cases cited.) The rule above quoted from the Noll case has been cited and adopted in the following later cases: Divani v. Donovan, 214 Cal. 447, 452, 6 P.2d 247; Boulevard Land Co. v. King, 125 Cal.App. 224, 226, 13 P.2d 864; Bank of America v. Sanchez, 3 Cal.App.2d 238, 242, 38 P.2d 787; Cox v. Klatte, 29 Cal.App.2d 150, 161, 84 P.2d 290; Brakhage v. McCaslin, 52 Cal.App.2d 382, 386, 126 P.2d 378.

[9, 10] Finally, appellants argue that there is no presumption of fraud. That is a correct statement as a general matter, but it has no force in this case for two reasons: (1) Upon substantial evidence the trial court found and concluded that appellants were guilty of actual fraud; (2) the court found on substantial evidence that a relation of trust and confidence existed between the parties, and such a relationship creates an exception to the rule stated. Levy v. Scott, 115 Cal. 39, 42, 46 P. 892; Wendling Lumber Co. v. Glenwood Lumber Co., 153 Cal. 411, 417, 95 P. 1029; Millard v. Epsteen, 58 Cal.App.2d 612, 616, 137 P.2d 717; 12 Cal.Jur. 818, sec. 72.

The judgment is affirmed.

PEEK and THOMPSON, JJ., concur.

CASE et al. v. KADOTA FIG ASS'N OF PRODUCERS et al.

Civ. 13880.

District Court of Appeal, First District,
Division 2, California.
June 15, 1949.

As Modified June 23, 1949.
Rehearing Denied July 15, 1949.
Hearing Granted Aug. 11, 1949.[*]

1. Master and servant 🔑1

Full control and direction by master is the essential characteristic of "master and servant" relation. Labor Code, § 3000.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Master and Servant Relation".

2. Master and servant 🔑5

Fact that agreement by unincorporated growers' association with respect to services of members of partnership, in operating association's cannery, was not made with members individually but with their partnership and that partnership was to receive compensation, did not exclude existence of employment relation between association and partnership members. Labor Code, § 3000.

3. Master and servant 🔑5

An employer can lend or hire an employee to another, at least with employee's consent, and there will be an employment relation with the general employer, special employer, or both, depending on who has control and direction of employee, and whether buyer pays employee directly or reimburses lender is not decisive. Labor Code, § 3000.

4. Partnership 🔑65

A partnership can contract to provide labor of its members with their consent, either under control and direction of party for whom work is done or independently. Labor Code, § 3000.

5. Master and servant 🔑5

Fact that no deductions for income tax, social security, etc., were made by unincorporated growers' association in making payments to partnership for services of members of partnership in operating association's cannery, was not conclusive against an employment relation between association and members of partnership, where unusual set-up of the contract caused question of deductions to be problematic. Labor Code, § 3000.

6. Licenses 🔑44(2)

Contract entered into by growers' association with partnership under terms of which members of partnership were to perform services in operating association's cannery, with right in partnership to can its own products independently at cannery, was properly construed as giving partnership only personal right of operation as against association, and not as placing partnership in position of lessee.

7. Licenses 🔑44(2)

Test whether an agreement for use of real estate is a license or a lease is whether contract gives exclusive possession of premises as against all the world, including the owner, in which case it is a "lease", or whether it merely confers a privilege to occupy under the owner, in which case it is a "license".

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Lease" and "License".

8. Licenses 🔑44(2)

A "lease" is not only a contract but also a conveyance, while a "license" is only a permission to do certain acts on the land without any interest therein.

9. Landlord and tenant 🔑20

For a "lease" it is essential that instrument show an intention to establish the relationship of landlord and tenant, although no particular legal terminology is required.

10. Licenses 🔑63

Where a license is given as part of a contract for a certain time, revocation of the license may constitute a breach of the agreement and give rise to an action for damages.

11. Appeal and error 🔑1010(1)
Contracts 🔑323(1)

Whether there has been a substantial breach or misconduct justifying termination of an agreement is generally a question of fact or a mixed question of law and fact, which also, as a rule, is for determination of trial court, whose decision thereon is binding upon reviewing court if supported by substantial evidence, and only in a situation so marked that reviewing court can say that no other conclusion can reasonably be supported than that there was or was not a substantial breach does the matter become a question of law to be decided by appellate court.

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[*] Subsequent opinion 220 P.2d 912.

12. Appeal and error ⚿934(1)

If there are any findings sustained by evidence upon which judgment may rest, it will be regarded as one upon which judgment did rest and the others will be disregarded.

13. Contracts ⚿321(1)

Where contract creates a confidential relationship, a party is not required to give the other opportunity to undo whatever breach of confidence was committed prior to termination of such confidential relationship.

14. Contracts ⚿322(3)

Evidence supported finding that members of partnership willfully violated their duties under contract with unincorporated growers' association by terms of which members of partnership were to perform services in operating association's cannery, with right in partnership to can its own products independently at cannery, before any breach had been committed by association, so that partnership had no right of action for damages based on breach by association or to compel performance of the contract by association.

15. Conspiracy ⚿8
Torts ⚿12

If any legal ground existed for termination of contract entered into by unincorporated growers' association with partnership under terms of which members of partnership were to perform services in operating association's cannery, with right in partnership to can its own products independently at cannery, the motives which activated association in terminating the contract were immaterial and partnership's contentions as to malice, inducing of breach, and conspiracy would not be considered.

16. Appeal and error ⚿1004(1), 1013

Reasonable value of services performed is a question of fact as to which a verdict or finding is conclusive upon appellate court if supported by any substantial evidence.

17. Payment ⚿89(5)

Evidence supported finding that amount charged partnership by unincorporated growers' association for use of warehouse facilities after termination of agreement between parties therefor was not unreasonable, so that partnership was not entitled to restitution of allegedly excessive charges.

18. Associations ⚿20(2)

Persons associated in business under a common name may be sued by such common name, but such relaxation of a common-law rule applies only to associated defendants, whereas associated plaintiffs still have to sue in their individual names. Code Civ.Proc. § 388.

19. Trusts ⚿1

Agreement of unincorporated growers' association established that organization was not a true trust but must follow rules of partnership or unincorporated business association in bringing actions, notwithstanding that it was organized and operating pursuant to certain express trust agreement under Capper-Volstead Act. Capper-Volstead Act, § 1, 7 U.S.C.A. § 291; Const. art. 12, §§ 1, 4.

20. Corporations ⚿3

The constitutional definition of the term "corporations" as used in article therein as including all associations and joint-stock companies having any of the powers of corporations not possessed by individuals or partnerships, providing that all such corporations shall have right to sue and be sued, applies only to associations which derive their special privileges from general laws in accordance with constitutional provision, not only from agreement. Const. art. 12, §§ 1, 4.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Corporation".

21. Pleading ⚷147

A "cross-complaint" should be considered as a completely separate pleading of character of a complaint in a separate action.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Cross-Complaint".

22. Agriculture ⚷6

Fact that unincorporated growers' association was sued in original action under its business name did not give association capacity to maintain cross-complaint in its business name. Code Civ.Proc. §§ 388, 442; Const. art. 12, §§ 1, 4.

23. Agriculture ⚷6

Where unincorporated growers' association was sued by original action under its business name, association, if it desired to file cross-complaint, could have done so simply by adding to its business name the phrase "being the following individuals of associated and doing business under said name * * *" or other words to same effect and thereafter listing names of its members. Code Civ.Proc. §§ 388, 442; Civ. Code, § 2468; Const. art. 12, §§ 1, 4.

24. Agriculture ⚷6

Fact that plaintiffs contracted with and sued unincorporated growers' association under its business name did not prevent plaintiffs from objecting to use of such name as sole indication of cross-complainant. Code Civ. Proc. §§ 388, 442; Civ. Code, § 2468; Const. art. 12, §§ 1, 4.

25. Contracts ⚷284(2)

Where partnership had paid to growers' association all that was owing under contract between partnership and association for processing of peaches of association as a joint venture according to accounting rendered by its accountant, and correctness of such accounting with respect to costs was only matter which needed decision in association's cross-complaint for recovery under the contract, it was a "matter involving the computation or allocation of the costs under this agreement" within arbitration provision of the agreement, and compliance with the arbitration provision was a condition precedent to filing of the cross-complaint.

26. Appeal and error ⚷1208(1)

Generally a party whose money has been taken under a judgment thereafter reversed is entitled to restitution of amount taken with interest. Code Civ.Proc. § 957.

27. Appeal and error ⚷1208(1)

Where no final decision on merits was given upon reversal of judgments upon reversal of judgment for cross-complainants upon their cross-complaints and it was conceded that at any rate certain amounts were due cross-complainants, amounts which cross-complainants had collected from cross-defendants by writ of execution would not be ordered returned to cross-defendants but would be directed to be paid into court to abide final disposition. Code Civ.Proc. § 957.

28. Associations ⚷16

Individual members of unincorporated associations organized for profit are individually liable for obligations of association contracted during their membership.

29. Agriculture ⚷6

Where liability of unincorporated growers' association for restitution was only caused by execution which it had obtained pursuant to judgment which was thereafter reversed, only those who were members of association at time of execution were individually liable for restitution. Code Civ.Proc. § 957.

Appeal from Superior Court, City and County of San Francisco; Elmer E. Robinson, Judge.

Action by Paul W. Case and others against Kadota Fig Association of Producers, a growers' cooperative association, and its individual members, for breach of a contract, and against the Yosemite Growers Co-op Association, for inducing breach of the contract, wherein defendant Kadota Association filed cross-complaint alleging breach of contract, praying cancellation, recovery of money due and damages, and an accounting, and defendant Yosemite Growers' Cooperative Association filed a separate cross-complaint for recovery under another contract. From adverse judgment, the plaintiffs appeal.

Judgment with respect to original action affirmed, and with respect to cross-actions reversed and cause remanded.

C. Ray Robinson and Margaret A. Flynn, Merced, for appellants.

Preston, Braucht & George, and V. G. Preston, Merced, for respondents.

NOURSE, Presiding Justice.

Case-Swayne Company sued Kadota Association and its individual members for breach of contract and Yosemite Growers Co-op Association, a corporation, for inducing the breach. The defendant Kadota cross-complained alleging a breach of the contract, praying cancellation, recovery of money due and damages and an accounting. Yosemite Growers filed a cross-complaint for recovery under another contract. Judgment went against Case-Swayne denying them any relief on their complaint and in favor of both Kadota and Yosemite Growers on their respective cross-complaints. Kadota Fig Association of Producers is herein referred to as "Kadota," defendant Yosemite Growers Co-op Association as "Yosemite."

Kadota is an unincorporated fig growers association formed by an agreement of May 10, 1938. The principal place of business is in Merced. It is directed by a Board of Trustees, of which defendant R. D. Leuschner was chairman. Originally it acted only as a marketing cooperative. In the years 1943–1944 the agreement of association was amended so as to make funds available for the building of a cannery. Some of the original members, defendants in these proceedings, deny that the amendments and resolutions as to the cannery project are binding on them.

The building of the cannery began April 24, 1944. At that time Kadota had already started negotiations to obtain the cooperation of Paul W. Case and Amos C. Swayne, then working in important positions with another canning concern.

Case and Swayne associated for the purpose of this cooperation into a partnership, Case-Swayne Company, which on June 1, 1944, entered into an agreement in writing with Kadota as to the operation of the cannery, which was being erected. Later in the year 1944 the other three appellants entered into the partnership.

The agreement contains provisions to the effect that Case-Swayne Company would provide Kadota with the services of Swayne for the direction of the processing of figs and of Case for the marketing of fig products in the western territory. During the fig canning season Swayne would have to give his entire time; at other times his supervision and direction of further processing of fig and fig products could be combined with canning operations of Case-Swayne Company itself if Kadota's operations were fully provided for. Swayne would also direct and supervise the current maintenance and repair of Kadota's machinery and equipment and the annual general overhaul. Case was never required to give his entire time. The company would receive for the services of Swayne $20,000 annually of which $10,000 was payable on September 1st and $10,000 on November 1st of each year, and moreover 10% of the annual savings effected by his services, and for the services of Case a commission on the net sales and reimbursement of office and travelling expenses connected with them. Case-Swayne Company was granted the right to operate the cannery upon its own account and responsibility for the processing of vegetables and fruits other than figs when not required for Kadota's fig processing, and even contemporaneously with it if not interfering in the opinion of Kadota with its operation. For the use of the cannery equipment and facilities Case-Swayne Company had to pay Kadota a certain amount for each case the company packed. The agreement was made for the period of June 1, 1944, until May 30, 1947, with annual continuation thereafter. Case-Swayne Company could install supplementary machinery to be removed on termination of the contract. Each party would pay its own direct costs, Kadota the current maintenance and repair and annual overhaul of its machinery. Field warehouse expense would be allocated on the basis of case day use, other joint expenses in proportion to the number of cases packed by each; accounting to be made quarterly, costs to be laid out by Kadota. Each party would keep its own books and permit inspection to the other or its agent. The personal services of Case and Swayne to Kadota are expressly stated to be a material consideration for the execution of the agreement.

While the cannery was being built an agreement was negotiated between Case-Swayne Company and Yosemite for the processing of the peaches of Yosemite in the cannery as a joint venture. Although Yosemite was an organization completely separate from Kadota, there was a strong personal connection as R. D. Leuschner, the chairman and general manager of Kadota, was also secretary and general manager of Yosemite. The processing of peaches began on August 7, 1944, in the uncompleted cannery. The written agreement signed August 12, 1944, provided that Yosemite was to supply the peaches, Case-Swayne Company all other materials and processing and sales service. Provisionally all amounts received by Case-Swayne Company from the sale of the peach products were to be credited to the bank account of Yosemite except certain amounts for estimated processing costs to be retained by Case-Swayne Company, subject to later definitive division: Yosemite would then receive an agreed price per ton for all peaches delivered by its members, Case-Swayne Company its actual packing costs inclusive of $.20 per case as plant rental for Kadota, but no salaries of Case or Swayne would be charged as costs; the profit remaining would be divided equally up to $32 per ton, the excess to go one-fourth to Case-Swayne Company, three-fourths to Yosemite. Such adjustment was to be made on or prior to October 1st pending a final accounting and audit as per December 31st. In case of disagreement as to computation or allocation of costs the determination was to be made by an accountant to be selected by the parties. The agreement was made only for the 1944 peach crop. The agreed provisional deposit of funds received by Case-Swayne Company was amended in a writing of August 14, 1944, to the effect that Case-Swayne Company would try to sell the whole pack to the United States Quartermaster for $12.30 per dozen (2 cases), would take a loan advance of $5 per case of which $2 would be paid to Yosemite, $3 to go toward paying Case-Swayne Company's operating expenses; the remaining $2.30 per dozen Case-Swayne Company would collect for its own account. The above would not change the agreed final settlement. Most of the pack was sold in advance in that manner to the United States Quartermaster. The canning took place in August and the beginning of September; in the latter month it was combined with the canning of the figs of Kadota which took place in September and October. During this period the cannery was incomplete and partly open. The mechanical system intended to be installed for the automatic movement of cans had not been put in.

There is conflicting evidence as to whether the services of Case and Swayne were satisfactory and of the relations with Case-Swayne Company during that period. Mr. Leuschner testified that from the beginning Swayne took insufficient care of the cleanliness of the plant and of screening or covering to keep insects out of the syrup and the finished products, and did not comply with Leuschner's orders in this respect. The plant was under continuous inspection for official grading of qualities of the canned products by the United States Department of Agriculture. According to the daily reports of that service and the testimony of the inspector the sanitation was as a rule not unsatisfactory and the compliance with remarks of the inspector sufficient. All products canned for Kadota or Yosemite made the grades for which they were intended except a small quantity of fig jam canned on September 27. Mr. Leuschner also testified to loss of fruit through delays in canning because Case and Swayne ran out of cans, sugar or pectin.

According to Mr. Leuschner, Yosemite had from the beginning difficulty in getting timely payment of the money due it under the agreement of August 12. His contentions as to very large amounts (over $100,000) retained by Case-Swayne Company seem not to take into consideration the amendment of the provisions for temporary deposits by letter of August 14,

1944. In accordance with the agreement Case-Swayne Company on October 3, 1944, sent a tentative statement of division of profits subject to final adjustments as of December 31, 1944. This statement showed that as of September 19, 1944, Yosemite was entitled to nearly $56,000 profits over and above the price of the fruit paid to its members. The provisional cash payments to the amount of more than $134,000 made by Case-Swayne Company covered the price of the fruit and Yosemite's share of profit except for approximately $16,000 as to which Case-Swayne Company asked deferment of payment until outstanding invoices would be paid. There was as of September 19 still a certain inventory of goods to be sold. According to Mr. Leuschner he asked further information as to this accounting, but no selection of an accountant for the determination of costs in dispute was proposed.

Kadota paid both installments of $10,000 due for Swayne's services without protest or reservation, the last in accordance with the agreement on November 1, 1944.

After the end of the fig canning, Case-Swayne Company continued canning of different products in the Kadota cannery on a large scale for its own account until the canning was stopped in June, 1945, by measures of Kadota. In the beginning of 1945 Case-Swayne Company acquired a plant of its own in Santa Ana. Mr. Leuschner was informed of this fact in advance by letter of January 12, 1945, and did not protest. A second plant, in Portland, was purchased by Case-Swayne Company in June, 1945, just before the culmination of the conflict between the parties.

Until March, 1945, there were no very serious difficulties. On November 16, 1944, Kadota expressed its dissatisfaction as to maintenance of cleanliness in the plant in writing and listed several desires, but Swayne promised full compliance. In general the government inspector remained satisfied except that 9000 cases of Case-Swayne grape jam were not certified for government use and therefore sold elsewhere. Mr. Leuschner further testified that the installations were not completed before the 1944 fig season and the necessary repairs were being postponed. In the middle of January there were conferences of Mr. Leuschner and Mr. Swayne with the principal engineering and managing personnel as to the plan in this respect and Mr. Swayne drew a memorandum as to the improvements to be considered before the 1945 operation and budgets for repair work and new work to be done. Later it would become one of the main grievances of Kadota that this work was unduly neglected and preference given to work in which Case-Swayne Company had a more immediate interest. Mr. Leuschner testified also that the difficulties to get money and further information from Case-Swayne Company in behalf of Yosemite continued but there never was any demand in writing, and when Case-Swayne Company asked to change the date for final accounting from December 31 to January 10 this was "entirely satisfactory" to Yosemite. A further postponement of the date to January 31 was also acceded to when on February 6 a check of $15,000 was given on account. In a letter of February 28, 1945, Yosemite asked Case-Swayne Company about the possibility of an arrangement for the packing of the peach crop of 1945 similar to that of 1944. The final report of the peach packing as of January 31, 1945, was transmitted on March 8. It was signed by Wayne Mayhew & Co., certified public accountants. It showed a balance still due Yosemite of $2,272.39 for which a check was enclosed. The check was cashed, no objections to the accounting were made or selection of an accountant to make determination as foreseen in the agreement proposed. There is evidence that Mr. Leuschner immediately contacted his own accountant, Mr. Hershey, who then had no time available and who contacted Case-Swayne Company only at the end of April. Case-Swayne Company then required a letter of authority of Yosemite to examine the records.

At that time the relations of the parties had seriously deteriorated. On March 12, 1945, Case-Swayne Company had submitted to Yosemite a draft of a new provisional agreement as to the canning of the 1945 peach crop, much more advantageous to Case-Swayne Company than the preceding one. Yosemite had not reacted. On or about April 17 Kadota took the position that prorations and settlements made between it and Case-Swayne Company were not in accordance with their contract and should be considered tentative pending complete auditing. In a letter on the same subject of April 28 Kadota complains of the charging to it of current maintenance and repair of machinery and prorating of costs in quarterly periods in which Case-Swayne Company was solely operating the plant and of the use of Kadota's labor and material for the installation and construction of machinery of Case-Swayne Company, of use by Case-Swayne Company of boxes without remuneration and insufficient prorating of costs of warehouse equipment. In this same letter Kadota asks Case-Swayne Company's suggestion as to a convenient time for shut-down for the annual overhaul. In the answer to this letter of May 9, 1945, Case-Swayne Company maintains that the practice followed by the parties was in accordance with their agreement and binding, and that there was no reason for a shut-down, according to Mr. Swayne, as the annual overhaul was in progress since the end of the 1944 fig season and could be completed without shut-down before the 1945 fig season.

At the meeting of Kadota on May 15th it was decided to proceed to terminate the agreement with Case-Swayne Company as soon as possible. At the same meeting there was a discussion of a draft agreement with Yosemite for the operation to joint advantage of the cannery and a freezing and cold storage plant to be built by Yosemite near the cannery, negotiations for which agreement had been in progress for some time. Mr. Leuschner testified that about that time he dismissed Case and Swayne. Court action was instituted in Merced by Kadota on May 24, 1945, by Yosemite on May 28, 1945. Accountant Hershey, who in the middle of May returned for inspection provided with an authority of Yosemite, was asked to return May 21st when the accountant of Case-Swayne Company would be present and was then not shown the books but given information from them by the accountant. He testified that he only got full inspection by court order during the present proceedings. In the middle of May, Kadota began to make changes in the former routine which, according to Case-Swayne Company, interfered with its operations. On May 11th empty barrels of Case-Swayne Company were removed from the platform of the cannery and heavy equipment of Yosemite put in their place; on May 24 a jam line then in use by Case-Swayne Company for its canning of asparagus was dismantled by Kadota to install other equipment; beginning May 26 the storeroom was locked overnight also at times that Case-Swayne Company was working and would need replacement parts. On June 4 Kadota forbade mechanics to use any tools of the cannery in connection with Case-Swayne Company operations and terminated the use of its mechanics for those operations. On June 5 both lift trucks of the cannery in use with Case-Swayne were removed at the same time, without previous notice, for repair. On June 9 Kadota informed Case-Swayne Company that processing in the plant had to end because of maintenance repair and installation operations and on the same day Kadota forced Case-Swayne Company to close its operation by cutting off the steam and locking the boiler room. Kadota took possession of the cannery. On June 15th an agreement between Kadota and Yosemite as to the operation of the cannery and freezing plant was signed. The cannery reopened and the canning of apricot jam by Kadota started June 25, 1945.

The original complaint of Case-Swayne Company in this case is based on the above interferences with and termination of its operations considered as breaches of the agreement of June, 1944. The defendants were Kadota, all of its original members by name, among which R. D. Leuschner and Bear Creek Company, a company controlled by him, which had the technical management of the Kadota marketing, and moreover Yosemite, not a member of Kadota. The first count, directed against all defendants except Yosemite charges them with the above breaches; the second count charges Yosemite with maliciously inducing the above breaches for the purpose of replacing Case-Swayne Company in the operation of the cannery; the third is to the same effect with respect to defendants R. D. Leuschner and Bear Creek Company; the fourth count charges all defendants with conspiracy to bring about the breaches. The prayer is for large amounts of damages including exemplary damages, and as to Kadota in addition for restitution of certain excess warehouse charges paid under protest and for a contractual percentage of alleged savings on the costs of Kadota's fig processing due under the contract.

There were three separate answers; Kadota and several other defendants, among whom were R. D. Leuschner and Yosemite, admitted entering into the agreement but denied the alleged breaches and damages and denied that Case-Swayne Company itself had complied with the terms and conditions of the agreement. An amended answer of these defendants alleged further that plaintiffs by other activities could have prevented all future damage and incorporated by reference the allegations of the cross-complaint of Kadota to be mentioned hereafter.

The answer of several other defendants, sued as members of Kadota, among whom was Isabel Dibblee, moreover denied that they entered into the agreement with Case-Swayne Company.

A third answer, of the defendant Capital Company, which denied membership in Kadota, and was dismissed from the case, is not involved in this appeal.

There were also three separate cross-complaints. Kadota filed a cross-complaint in its own name as a growers cooperative association. This cross-complaint was based on a great number of alleged breaches of contract and misconduct by Case, Swayne and their company which entitled Kadota to terminate the confidential contractual relation and to an accounting and damages. The alleged breaches relate mostly to the maintenance, repair and installation of machinery and to the absence of Case and Swayne on their own business to a larger extent than compatible with the interest of Kadota; and the alleged misconduct to the submission to Yosemite of the final accounting which allegedly was padded deliberately in a fraudulent manner, the alleged bribing of employees of Kadota to obtain more advantages than appellants were entitled to under their contract with Kadota and some other minor points in which appellants allegedly tried to obtain an advantage over Kadota in behalf of their private business.

Appellants denied all facts alleged as justification of the termination by Kadota and moreover by demurrer, motion to strike and answer offered many defenses of law of which the only one urged on appeal is that Kadota is an unincorporated association without capacity to sue in its own name and that it had not complied with the provisions of section 2466 and 2468 of the Civil Code as required for a partnership.

The findings both as to the original action and the cross-action of Kadota were in all respects adverse to appellants except as to one count of the cross-complaint containing a claim for the use of and damage to fruit boxes, which was denied, from which ruling no appeal was taken. The court found in substance that appellants never performed the agreement on their part and had breached it prior to any of the alleged interferences by Kadota; each of the breaches and misconduct alleged by Kadota was found true, the interferences alleged by appellants were found reasonable under the circumstances, the taking of the cannery by Kadota and the refusal to permit further use of the premises to appellants justified by their violations, the agreement between Yosemite and Kadota lawful and not violative of appellants' rights; Kadota was the true party in interest and had capacity to sue in its own name. Judgment was that appellants take nothing and that Kadota recover $20,000 paid for the services of Swayne, $24,000 damages for failure to repair and install machinery and $29,655 as balance of the mutual account of the parties plus interest.

A second cross-complaint, of Yosemite, was for fraudulent overcharges and incorrect division of profits in the final accounting of the peach contract in the amount of $43,399.76 diminished in the amended cross-complaint to $20,438.99. Appellants by answer maintained the correctness of said final accounting, made independently by qualified accountants, that the balance due according to the accounting had been accepted without reservation as final except for the possibility of renegotiations by the government and that no selection of an accountant to determine the computation or allocation of costs had been requested, as required by the contract, and that Yosemite did not come into court with clean hands as it knowingly superseded Case-Swayne Company in the exploitation of the Kadota cannery. The court found that said allegations of appellants were untrue, that all payments had been made and accepted on account, that the costs in the accounting had been fraudulently padded in accordance with the allegations of Yosemite and awarded it $20,438.99 with interest in accordance with its cross-complaint.

A third cross-complaint, by Bear Creek Company, as to the use of and damages to fruit boxes, was decided adversely to cross-complainant and is not involved in this appeal.

I. Appeal as to Appellants' Original Action.

Appellants argue that if the contract between them and Kadota is correctly construed the evidence does not support the finding that the termination of such contract by Kadota was justified by conduct of appellants. In that respect appellants contend that the court below erroneously construed the operation contract as establishing a confidential employer-employee relationship, even while Case-Swayne Company was operating the cannery for its own account, during which period most of the conduct took place which was held to justify the termination. Although there are also findings as to violations of the contract by appellants during the period of the canning by Kadota itself which ended in October, 1944, we may assume that such conduct as was found with respect to that period, even if supported by the evidence, could not justify the termination in May or June, 1945, if in the meantime no other reprehensible conduct of appellants had occurred, the more so as at the end of the fig canning Kadota with full knowledge of all circumstances paid the remuneration for Swayne's services without reservation.

[1] Appellants contend that the agreement between them and Kadota is of the character of a lease combined with an agreement of Case-Swayne Company to provide management services as an independent contractor and that termination could be based only on the restricted grounds sufficient for the termination of a lease. Citing Beckett v. City of Paris Dry Goods Co., 14 Cal.2d 633, 96 P.2d 122. We cannot agree with this contention. The court found that Case and Swayne were employed by Kadota in a confidential relation and that the contract further gave Case-Swayne Company a license to possess and use the cannery. This finding is not unsupported or erroneous. An employer-employee relation is the normal relation in which the work of managing personnel such as that of Case and Swayne is performed. The terminology of the agreement points to the intention to create the same relation here, for instance in section 15 which reads: "Company agrees that said Amos Swayne and said Paul W. Case shall each, in serving the Association as above provided, devote their best efforts to further the canning, freezing, processing, manufacturing and marketing by the Association of its fresh figs and fig products." Moreover appellant Paul W. Case testified that he followed all directions or instructions given by Mr. Leuschner and each policy laid down by him. The full control and direction by the master is the essential characteristic of the master and servant relation. Labor Code § 3000; 16 Cal.Jur. 958–959; Counihan v. Lufstufka Bros & Co., 118 Cal.App. 602, 604, 5 P.2d 694.

[2-5] The fact, stressed by appellants, that the agreement with respect to their services was not made with Case and Swayne individually but with their partnership and that the partnership was to receive the compensation does not exclude the existence of an employment relation, even if we should consider in this respect the partnership as an entity separate from the individual members. An employer can lend or hire an employee to another, at least with the employee's consent, and there will be an employment relation with the general employer, the special employer or

both depending on who has control and direction of the employee. Industrial Indemnity Exch. v. Industrial Acc. Comm., 26 Cal.2d 130, 134, 156 P.2d 926, et seq. Whether the borrower pays the employee directly or reimburses the lender is not decisive. Compare 16 Cal.Jur. 959; Independence Indemnity Co. v. Industrial Acc. Comm., 203 Cal. 51, 262 P. 757. Although those questions as a rule come up in respect to liability for workmen's compensation, the principles apply also outside that field. See 56 C.J.S., Master and Servant § 2, p. 38. It would seem that in the same manner a partnership can contract to provide the labor of its members with their consent, either under control and direction of the party for whom the work is done or independently. If, as here, the party receiving the services takes control and direction there is an employer-employee relation with the individual workers. The fact that the payments were made by check to the order of Case-Swayne Company and booked in an account "Services purchased, Management contract," seems in accord with the manner in which the contract was drawn and without separate significance. That no deduction for income tax, social security, etc. were made, cannot be conclusive against an employment relation under the special circumstances, where the unusual set up of the contract caused the question of deductions to be problematic.

[6] If the existence of an employer-employee relation is accepted, that relation continued also in some respects during the period in which Case-Swayne Company was operating the cannery on its own account. According to section 2, last sentence of the agreement, Amos Swayne was still to direct and supervise the current maintenance and repair of Kadota's machinery and equipment and the annual general overhaul and Paul W. Case's marketing activities as to figs could well be required at a time that Case-Swayne Company was canning other products. Moreover there remained in the future the next fig season during which the services of Case and Swayne on a larger scale would be resumed and for which preparations might be required in advance.

It is true that the canning operations of Case-Swayne Company with respect to other products than figs were themselves not performed in an employment relation to Kadota. Section 6 of the agreement contains a statement to the effect that the processing of fruits other than figs "shall be solely by the (Case-Swayne) Company, at its sole expense and upon its own account and responsibility," and the last paragraph of section 11 reads: "The operations to be performed pursuant to this Agreement are not in any sense to be deemed a joint venture or partnership arrangement between the Association (Kadota) and Company. In substance, each party is canning, freezing, processing, and manufacturing its own products at its own risk and expense, but in the same plant, subject to the arrangement that the Company is furnishing the Association with certain production management and supervision and sales services in connection with the marketing of its fig products." These provisions obviously give Case-Swayne Company a right to can its products independently and equally, not in the employment of Kadota.

However this does not necessarily place Case-Swayne Company in the position of a lessee. The finding that they had only a personal right of operation as against Kadota seems correct.

[7-9] The test whether an agreement for the use of real estate is a license or a lease is whether the contract gives exclusive possession of the premises against all the world, including the owner, in which case it is a lease, or whether it merely confers a privilege to occupy under the owner, in which case it is a license. Von Goerlitz v. Turner, 65 Cal.App.2d 425, 429, 150 P.2d 278. A lease is not only a contract but also a conveyance; a license is only a permission to do certain acts on the land without any interest therein. For a lease it is essential that the instrument show an intention to establish the relationship of landlord and tenant, although no particular legal terminology is required. Beckett v. City of Paris Dry Goods Co., 14 Cal.2d 633, 96 P.2d 122. Whether in a particular case a license or a lease or other interest in land is created is often difficult to de-

termine. 53 C.J.S., Licenses, § 79, p. 806; 32 Am.Jur. 30. Similar relations (operation of another's mine or quarry, concession to have a department or booth in another's store or market) can be formulated so as to be considered either the one or the other. In the instrument before us we do not find anything that shows the intention to create a landlord and tenant relation, or to give exclusive possession or an interest in the property over and above a personal right of operation as against Kadota. This distinguishes our case from Beckett v. City of Paris Dry Goods Co., supra, on which appellants rely but in which an instrument for a concession to conduct an optical department in a store was held to be a lease mostly because the use of terminology like "this lease," "good, tenantable condition," "space demised" showed that this was the relation which the parties intended. The provisions of the present contract cited by appellants do not contain any such characteristic terminology. Appellants further point to the fact that Mr. Leuschner, in his deposition, indicates the agreement as the "lease." However his use of this word, in no way decisive in itself, is more than offset by the fact that the instrument itself is not entitled "lease" but "Operating Agreement" and that in the preamble of the contract signed between Case-Swayne Company and Yosemite it is stated: "Whereas Case-Swayne Company, a co-partnership, has *packing and marketing privileges* in the Kadota plant of the Kadota Fig Association of Producers." (Emphasis ours.)

In the course of the performance of the operating agreement by the parties no exclusive possession of the cannery was ever delivered to Case-Swayne Company. Although the right to operate given in paragraph 6 of the agreement relates to the cannery as a whole, Kadota at all times retained offices, workmen and supervisory personnel in it. This practical construction by the parties also points more to a license to operate than to a lease.

Moreover there are certain other points in the agreement which make it most unlikely that the parties should have intended to give Case-Swayne Company a leasehold interest in the cannery which might enable it to retain possession under circumstances which would entitle Kadota to terminate the management, supervision and sales agreement because of breach. The preamble of the agreement mentions only the desire to obtain and provide experienced production and sales managers for Kadota's fig processing and marketing, not the operation of the cannery by Case-Swayne Company and paragraph 15 contains the sentence, "The rendering by each of said individuals (Case and Swayne) of their personal services shall be deemed to be a material consideration for the execution of this agreement." Stated in other words: Failure of Case or Swayne to render their services will be considered material failure of consideration as to the whole agreement. The preamble and paragraph 15 seem drawn expressly for the purpose of preventing a construction as advocated by appellants.

[10] It must be conceded that if the construction of the agreement as a license to operate would necessarily result in that operating license being arbitrarily revocable at any time without liability for damages, such construction could not be accepted. However, the rule of revocability of a license at pleasure is not without modifications and exceptions. Bryant v. Marstelle, 76 Cal.App.2d 740, 746, 173 P.2d 846. Where, as here, a license is given as part of a contract for a certain time, revocation may constitute a breach of the agreement and give rise to an action for damages as instituted herein by appellants. 33 Am.Jur. 407–408; Baseball Pub. Co. v. Bruton, 302 Mass. 54, 18 N.E.2d 362, 119 A.L.R. 1518, 1522.

The agreement linked together indivisibly two elements, an employment relation of Case and Swayne, mostly during the fig processing period but not abrogated during other periods with personal rights of Case-Swayne Company as against Kadota for the operation of the cannery during such other periods. This employment relation was confidential in character. This follows necessarily, not only from the managerial character of the services but also from the close cooperation between Case-Swayne Company and Kadota required by the terms of their agreement; canning of Case-

Swayne Company for its own account and canning of Kadota under direction and supervision of Swayne could sometimes go on at the same time; Kadota would pay certain joint expenses to be allocated afterwards in the ratio of the respective production; they used the warehouse together; Case-Swayne Company had the right to install machinery of its own in Kadota's cannery; whereas at the same time Swayne directed and supervised the personnel of Kadota with respect to the maintenance and repair of Kadota's machinery. Such an intimate cooperation undoubtedly requires mutual confidence to a high degree. The standards applicable to breach of a confidential employment relation seem in general pertinent to this case.

[11, 12] Appellants contend that even considered from that point of view there is, contrary to the findings, no evidence of acts or conduct on their part which would justify the termination of the agreement by Kadota, either because the alleged shortcomings are not sufficiently substantial in character or because there is no supporting evidence. Our task with respect to this contention is restricted by well accepted rules: Whether there has been a substantial breach or misconduct justifying termination of an agreement is considered generally a question of fact (compare Murphy v. Sheftel, 121 Cal.App. 533, 540, 9 P.2d 568; Connell v. Higgins, 170 Cal. 541, 556–557, 150 P. 769) or maybe better a mixed question of law and fact which also, as a rule, is for the determination of the trial court, whose decision thereon is binding upon the reviewing court if supported by substantial evidence. Compare Lee v. Nanny, 38 Cal.App.2d 90, 94, 100 P.2d 832; Martinelli v. Stabnau, 11 Cal.App.2d 38, 40, 52 P.2d 956; Hillen v. Industrial Acc. Comm., 199 Cal. 577, 580, 250 P. 570; Loper v. Morrison, 23 Cal.2d 600, 605, 145 P.2d 1. Only in situations so marked that the reviewing court can say that no other conclusion can reasonably be supported than that there was (or was not) a substantial breach does the matter become a question of law to be decided by the appellate court. Moreover, if there is any finding sustained by the evidence upon which the judgment may rest it will be regarded as the one upon which the jugdment did rest and the others will be disregarded. American National Bank v. Donnellan, 170 Cal. 9, 15, 148 P. 188, Ann.Cas.1917C, 744; Owen v. Cohen, 19 Cal.2d 147, 151, 119 P.2d 713; Huebotter v. Follett, 27 Cal.2d 765, 770, 167 P.2d 193; Moore v. Mosher, 88 Cal.App.2d 324, 198 P.2d 714.

If therefore there is any substantial evidence that appellants have, as found, wilfully violated their contractual duties, have neglected the interests of Kadota and have given preference to their own business interests with respect to the maintenance, repair and installation of the machinery and equipment and the annual general overhaul that alone will support the decision with respect to appellants' original action and the more problematic instances of alleged misconduct can be disregarded by us.

Even with respect to maintenance, installation and repair, the evidence was strongly conflicting. However the following evidence can be considered to support the decision.

Mr. Leuschner testified that at the close of the 1944 fig canning season he told Mr. Swayne that he wished the installation of machinery, including automatic can runs and a fourth canning production line, immediately completed. Mr. Swayne said that they would get it done. In the middle of January Mr. Leuschner took the matter up again as nothing in that respect was being done and only products for Case-Swayne Company were being run. He was informed that plans were being made and would be carried out very shortly. The third week in February he spoke with Mr. Case about the upkeep of a filler and jam line, and was told that it would be done very shortly when Case-Swayne Company's apple butter run would be finished, but it was never done. Mr. Leuschner had difficulty finding either Case or Swayne because they were not there very often.

With respect to the condition of the machinery of the cannery on May 9th at which time Case-Swayne Company wrote that no shut-down for annual overhaul was necessary, Mr. Leuschner testified: The boilers had not been washed down for five

weeks; they had to be retubed because of sludge of hard water blisters and sprung tubes; the fronts were buckled by overheating. In the place where the belts for handling the fig crop should be installed Case-Swayne Company installed an asparagus cutting and washing machine for their convenience and all Kadota's skilled mechanics had been used to manufacture that asparagus machinery instead of being used on Kadota's mechanical transportation equipment so that on May 9 that work was so far delayed that it was almost impossible to get it going that fall. The fourth production line had not been installed and nothing done to complete that installation. Nothing had been done on the automatic can runs and other mechanical transportation equipment requiring skilled welders. The absence of mechanical transportation would necessitate large expense for manual handling. Even with the assistance of men of the Pacific Can Company the mechanical equipment could not be completed before September 20, 1945, although work on it was started immediately when Kadota got possession of the cannery. (The 1945 fig season started August 16 or 18.) The important No. 10 jam line had still not been repaired, nor replacement parts ordered. Three of the coolers were in such bad state that they could not be run continuously and the repair was very nearly a two-months' job. From May 9 to June 8 or 9 (when Kadota took possession) nothing was done toward maintenance and upkeep.

The witness, De Jonckheere, master mechanic of Kadota, testified that the condition of the plant about the 8th or 9th of June was such that it was necessary to have all the men they could possibly get together work 7 days a week and work 4 hours overtime a day to get the plant in operation. The gutters were dirty; the seals on them had to be broken and the gutters cleaned out. It was not true that overhaul was going on all the time (before Kadota took over). Some of the new construction work was being worked on but no repairs and overhaul. It would have been possible to run one or two lines during the overhaul. Part of the asparagus operation was in the way of the installation of the "D" line of the fig run, which took about 40 days to install. The plant was completely shut down until the middle of August but part was being run since June 25.

It is true that there was also substantial evidence which would have supported the opposite finding with respect to this point, among which the excerpts made from Kadota's administration showing on what work the labor of its mechanics was used and the evidence as to canning of other products by Kadota prior to the 1945 fig canning. However such evidence only caused a conflict, solved by the trial court adversely to appellants, and binding on this appeal.

It is also true that the agreement did not expressly charge Case or Swayne with the direction and supervision of the installation of new equipment and that no supplemental agreement to that effect is pleaded. However, Mr. Leuschner testified without objection to an understanding with Case and Swayne to that effect and the sufficiency of the measures taken by Swayne as to new installation was tried as if it were at issue. Amos Swayne himself testified at length as to his activities in this respect. It must therefore be held that direction and supervision of the new installation was by practical construction of the parties made part of Swayne's duties and that neglect or misconduct in that respect if supported by the evidence could be considered ground for termination of the agreement.

[13] Appellants contend that Kadota could not terminate the contract without giving appellants prior opportunity to rectify any claimed breaches. Although such a rule may apply where the termination of the contract is based solely on failure of the other party to perform (for instance to deliver goods sold) where time is not of the essence, it does not apply to breaches as found to have been committed in this case. If it is true that appellants used Kadota's mechanics for their own operation to such an extent as to neglect the installation and repair required for the business of Kadota and to harm its interests, such conduct would be inconsistent with the confidential relationship between the parties and constitute a positive breach of it. Appellants do not cite any authority and none is known to

us which would require a party, prior to the termination of a confidential relationship, to give the other opportunity to undo whatever breach of confidence was committed.

[14-17] It is in effect conceded, as it necessarily must be, that the finding that plaintiffs had violated the contract in material respects before any breach had been committed by defendants disposes of their action based on breach by defendants or to compel performance of the contract by Kadota. Los Angeles Corp. v. Amalgamated Oil Co., 168 Cal. 140, 143, 142 P. 46; Rathbun v. Security Mfg. Co., 82 Cal.App. 793, 796, 256 P. 296. If any legal ground existed for the termination, the motives which activated Kadota are wholly immaterial, 56 C.J.S., Master and Servant § 44 p. 435, and the contentions of appellants as to malice, inducing of breach and conspiracy do not require attention. However the part of the action relating to restitution of allegedly excessive warehouse charges paid under protest after the termination of the agreement is not dependent on performance by appellants, and we must therefore review appellants' contention that the refund was erroneously denied. Plaintiffs alleged and proved that Kadota required plaintiffs to pay fixed amounts for warehouse charges after one-sided determination by Kadota and dependent on the time of shipment of plaintiffs' goods and that plaintiffs paid these amounts under protest and reserving their right to a refund. The amount so paid totalled $12,838.27 and related to the period since June 1, 1945. It is conceded by appellants that if the agreement was terminated because of their breach, as was found hereinbefore, they are not entitled to have these warehouse charges calculated in accordance with the contractual provisions as such but have to pay reasonable charges. However, they contend that the contractual calculation is the best evidence of the reasonable rental of the warehouse facilities. The agreement provided (in section 10) that all expenses of maintaining the field warehouse and all other warehouse costs shall be prorated between the parties on the basis of the case day use. Appellants offered in evidence a computation by their accountant showing that during the year ended May 31, 1945, plaintiffs warehoused 293,177 cases and paid as their share of joint warehouse salaries $5,570.73 amounting to $.01900 per case. The number of cases on which warehouse charges were paid since June 1, 1945, totaled 118,203. If .01900 per case was considered the reasonable rental only $2,245.86 would have been due. Kadota offered a calculation of its accountant based on prorating per case of the total warehouse and shipping overhead during the fiscal year June 1, 1945, to May 31, 1946. During that period the total overhead amounted to $44,254.81 for 375,986 cases of Kadota and Case-Swayne Company together, or a cost per case of $.1177033453. If this amount is considered a reasonable charge per case, $13,912.88 would have been due for 118,203 cases or $1,074.61 more than actually paid by Case-Swayne Company. The rejection of appellants' claim for refund finds support in the above calculation by Kadota's accountant. Both parties in their calculations deviated from the contractual provision in that they were based on prorating per case instead of prorating per case day. If we accept this deviation we cannot say that the prorating proposed by respondents based on actual total costs in the year in question is less reasonable than the one proposed by appellants based on prorating of salaries only in a preceding year. Reasonable value is a question of fact as to which a verdict or finding is conclusive upon the appellate court if supported by any substantial evidence. 27 Cal.Jur. 234; Spellmire v. Buttress & McClellan, Ltd., 6 Cal.App.2d 550, 44 P.2d 649. The implied holding that the amount paid by appellants was not unreasonable must be sustained and the decision with respect to the original action of plaintiffs affirmed in toto.

II. Appeal as to Kadota's Cross-complaint.

With respect to this pleading appellants had presented many legal defenses of which only one is urged on appeal, to wit, that Kadota Fig Association of Producers, which maintained the cross-complaint solely in its business name, without stating any members or trustees, had no capacity to sue in that manner. In the trial court this objection was sufficiently presented by demurrer to the cross-complaint, by motion to strike the same and by answer, but consistently rejected by the court, which ruled that cross-complainant had capacity to sue. There are findings to the effect that cross-complainant is a growers cooperative association organized and operating pursuant to a certain express trust agreement under the federal Capper Volstead Act, 7 U.S.C.A. § 291 a business that has been principally interstate, and that it is not true that the cross-complaint is not brought in the name of the real parties in interest or that cross-complainant has no capacity to sue or to maintain the cross-complaint and that it is not true that the agreement pursuant to which cross-complainant is organized is not a trust agreement or declaration of trust.

[18] It is the rule in this state that persons associated in business under a common name may be sued by such common name, Section 388, Code of Civil Procedure; Jardine v. Superior Court, 213 Cal. 301, 2 P.2d 756, 79 A.L.R. 291, but that this relaxation of the common law rule applies only to associated defendants, whereas associated plaintiffs still have to sue in their individual names. Holden v. Mensinger, 175 Cal. 300, 305, 165 P. 950; Ginsberg Tile Co. v. Faraone, 99 Cal.App. 381, 384, 278 P. 866; Agricultural Club v. Hirsch & Son, 39 Cal.App. 433, 435, 179 P. 430, 7 C.J.S., Associations, § 12, p. 35.

[19] Respondents contend however that Kadota Fig Association is a business trust under a common name pursuant to a federal statute and as such a separate legal entity with capacity to sue. With respect to the character of cross-complainant the following points from the agreement of association, which forms part of the record, may be mentioned: The parties, producers of Kadota figs in California, "desire to act together in an unincorporated association, without capital stock * * * under the name and style of Kadota Fig Association of Producers * * * for the mutual benefits of the members * * * that there shall be five trustees of the Association who shall be elected each year at the June meeting of the Association by a majority vote of the members present." The agreement further contains not only provisions as to the authority of the trustees "to act for the Association" in certain specified matters, among which "the control over the application of the General Fund" and to perform certain other acts "in the name of the Association" but also the rights and duties of the members as to the marketing of their products through the Association and their contribution to its finances. Such organization seems to have no more in common with a business trust than the name of "trustees" given to its officers, but even if for purpose of argument only we would consider it a business trust no other rules would be applicable to the question before us than those applicable to any unincorporated business association or partnership. In the leading California case with respect to business trusts, Goldwater v. Oltman, 210 Cal. 408, 292 P. 624, 71 A.L.R. 871, the Supreme Court held that to business trusts no new principles of law should be applied by the courts without new legislation, 210 Cal. at page 421, 292 P. 624, 71 A.L.R. 871, and that they should be treated as true trusts or partnerships depending on the retention or nonretention of ultimate control by the members 210 Cal. at page 418, 292 P. 624, 71 A.L.R. 871. The case approved Old River Farms Co. v. Roscoe Haegelin Co. 98 Cal.App. 331, 276 P. 1047, as "authority for the point that, where the trustees are subject to election by the shareholders, the latter exercise ultimate control of the organization, and the organization is a partnership and not a true trust." 210 Cal. at page 420, 292 P. at page 625, 71 A.L.R. 871. There can be no doubt that under these rules the organization before us is not a true trust but must follow the rules of partnership or unincorporated business associations. See also Lincoln v. Superior Court, 51 Cal.App.2d 61, 67, 124 P.2d 179. With respect to the cross-complainant itself this same conclusion was reached in Kadota Fig Ass'n v. Case-Swayne Company, 73 Cal.App.2d 796, 801, 167 P.2d 518, et seq., although it must be conceded that all state-

ments in that case with respect to the character of Kadota Fig Association and its lack of capacity to sue are dictum.

[20] The parties pay considerable attention to the problem whether Kadota Fig Association should be considered in general as a separate legal entity or not. We cannot see that introducing the concept of separate legal entity into the question before us would be helpful. We would be constrained to hold that our law considers an unincorporated association or partnership as a separate legal entity for the purpose of being sued but not as such for the purpose of suing. Neither can we attribute any importance to the fact that the agreement of association contains a provision that the association shall conform to the requirements of the Capper-Volstead Act, 7 U.S.C.A. § 291. This Act permits the forming of associations of producers of agricultural products, "corporate or otherwise, with or without capital stock" for the collective marketing, etc., of agricultural products in interstate commerce, if conforming to certain requirements. The object is primarily to ensure cooperative associations that qualify thereunder immunity from prosecution under the federal antitrust laws. 7 U.S.C.A. § 291, note 1; 1930, 36 Op.Atty.Gen. 326. It gives no indication whatever that such associations, even though not corporate, must be granted capacity to sue in their own name in state courts. Respondents further argue that such capacity was granted to Kadota Fig Association by art. XII, sec. 4 of the California Constitution which reads: "The term corporations, as used in this article, shall be construed to include all associations and joint-stock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships; and all corporations shall have the right to sue and be subject to be sued, in all Courts, in like cases as natural persons." However it has been held that section 4, article XII of the Constitution applies only to associations which derive their special privileges from general laws in accordance with section 1 of article XII of the Constitution, not only from agreement. Old River Farms Co. v. Roscoe Haegelin Co., supra, 98 Cal.App. at pages 333, 334, 276 P. 1047; Kadota Fig Ass'n v. Case-Swayne Co., supra, 73 Cal.App.2d at pages 802-803, 167 P.2d 518; Ballantine & Sterling, California Corporation Laws, 1949 ed. p. 11. We conclude that in general Kadota Fig Association has no capacity to bring an action in its own name.

[21] However, the question remains whether it has capacity to do so by way of cross-complaint when sued in the original action under its own name. The answer must depend primarily on whether the cross-complaint must be considered as an act of the defendant in the original action or as the act of a plaintiff in a new and separate action. Although the decisions in this state as to whether an action in which a cross-complaint is filed is a single action, or consists of two separate actions are not in accord, Nicholson v. Henderson, 25 Cal.2d 375, 153 P.2d 945, the tendency of the majority of the decisions is to consider the cross-complaint as a completely separate pleading of the character of a complaint in a separate action. In the recent case of Schrader v. Neville, Cal.App., 200 P.2d 557, in which it was held that which is the prevailing party entitled to costs should be decided independently in the original action and the cross-action, the court stated, 200 P.2d 557, 558: "The reasons for the soundness of this rule become apparent upon consideration of the nature of a cross-complaint. When a cross-complaint is filed with an answer to the complaint, there are then two separate and distinct causes of action simultaneously pending between the same parties wherein the plaintiff in the complaint becomes the defendant on the cross-complaint, and the defendant in the complaint becomes the plaintiff on the cross-complaint. [Citations.]

"Referring to such a situation our Supreme Court in Pacific Finance Corp. v. Superior Court, 219 Cal. 179, 182, 25 P.2d 983, 984, 90 A.L.R. 384, thus states the rule: 'These cross-actions, however, are still distinct and independent causes of action, so that when properly interposed and stated the defendant becomes in respect to the matters pleaded by him, an actor, and there are two simultaneous actions pending between the same parties wherein each is at the same time both a plaintiff and a defendant. [Citations.] The same view has been taken by our appellate courts, for the cases recognize and establish the principle that the issues presented upon a cross-complaint and answer are entirely separate and distinct from the issues raised upon the original complaint and answer.'

"In Millar v. Millar, 51 Cal.App. at page 721, 197 P. [811], at page 813, the court quoting with approval from Pomeroy's Remedies and Remedial Rights, says: ' "When a defendant files a cross-complaint, and seeks affirmative relief, he becomes a plaintiff and the plaintiff in the original action becomes the defendant in the cross-complaint." ' "

In Luse v. Peters, 219 Cal. 625, 630, 28 P.2d 357, 359, it is said: "A cross-complaint is a pleading separate and apart from the answer, and is required to be complete and sufficient in itself. It cannot be aided by averments of the answer." To the same effect Bullard v. Bullard, 189 Cal. 502, 504-505, 209 P. 361; Asamen v. Thompson, 55 Cal.App.2d 661, 674, 131 P.2d 839. See also the following statement of this rule in 41 Am.Jur. 473: "A cross complaint or cross petition is in the nature of an original complaint or petition and must contain allegations that would be essential to an original complaint or petition purporting to set up the cause of action stated in the cross complaint or cross petition, and unless it avers all facts essential to a statement of a cause of action, it is subject to demurrer."

[22] The cross-complainant should for the same reasons be stated in a manner permissible for the plaintiff in an original complaint. There is the more reason to maintain this requirement as, according to section 442, Code Civil Procedure, a cross-complaint need not be directed against the original plaintiff, but may as well affect any other party to the action, which other parties have not influenced the name under which defendant was originally sued.

[23] Respondents contend that it would be impossible to mention individual members as cross-complainants where in the original complaint the defendant is an association sued under its business name because cross-complainant and defendant must be the same. It would seem that cross-complainant could have obviated all objections in this respect simply by adding to its business name "being the following individuals associated and doing business under said name * * *" or other words to the same effect, compare for combination of business-name and names of the members 7 C.J.S., Associations, § 35, p. 87.

The requirement of stating the names of members is not purely technical or historical. There is some practical advantage for the cross-defendant in knowing which individuals will be responsible for costs or restitution in case he wins. When plaintiff sues a business association or partnership under its business name he can fix individual liabilities by serving the individuals he wishes to hold responsible with process. Section 388, Code Civil Procedure. He would have no such possibility if an unincorporated business association or partnership were permitted to maintain a cross-complaint without stating the names of the members individually liable. The membership may have changed between the filing of the original complaint and the cross-complaint. If an unincorporated association or partnership were permitted to sue or maintain a cross-complaint as an entity separate from its members even the protection of section 2468, Civil Code, last paragraph, might not be available, as that paragraph prevents the individuals doing business as partners from maintaining action on contracts made under fictitious name so long as the requirements of the fictitious name statute have not been fulfilled, but does not prohibit such action by the partnership as such, obviously because such action was held inconceivable at any rate. That the practical problem here mentioned is not imaginary is illustrated by the fact that in the case before us where Kadota Fig Association was permitted to recover and levy execution under its business name, controversies have arisen as to which individuals would be liable for restitution pursuant to section 957, Code Civil Procedure, in case of reversal.

[24] Finally, we must reject respondents' contention that the fact that appellants contracted with and sued Kadota Fig Association under its business name prevents them from objecting to the use of such business name as sole indication of cross-complainant. The recognition by appellants of a legally approved use of the business name does not prevent them from opposing a use by cross-complainant not sanctioned by law.

The objections of cross-defendants in their different forms should have been sustained and the judgment with respect to Kadota's cross-complaint must be reversed.

III. Appeal as to Yosemite's Cross-complaint.

[25] With respect to this pleading appellants contend, as they had done below, that the provision of section 8 of their agreement with Yosemite "Should the parties be unable to agree upon any matter involving the computation or allocation of the costs under this agreement, then they shall select an accountant to make such determination" is in the character of an arbitration provision and that such arbitration, or an unsuccessful attempt to secure the same, is a condition precedent to the right to maintain an action as contained in Yosemite's cross-complaint. Clogston v. Schiff-Lang Co., Inc., 2 Cal.2d 414, 41 P.2d 555; 3 Cal.Jur. 49, et seq.

Respondent Yosemite does not contend that it made any attempt to have an accountant selected for such determination, or that this point was not sufficiently raised, but only argues that the provision quoted is not wide enough to comprehend the dispute contained in the cross-complaint, which according to Yosemite does not relate to computation or allocation of costs but to wrongful withholding of money after the contract had otherwise been fully executed.

Yosemite's argument seems without merit. Section 8 of the agreement, which contains the quoted provision as to the selection of an accountant, first mentions accountings and settlements to be made prior to October 1st pending a final accounting and audit on December 31st. Clearly the arbitration clause refers to possible disagreements involving costs with respect to the preceding accountings and audit. That is exactly what actually happened and forms the basis of Yosemite's cross-complaint. The cross-complaint as amended alleges among other things in substance that cross-defendants on March 2, 1945, rendered an account as of January 31, 1945, charging operating expenses (costs) to an amount of $425,382.14 whereas the actual cash costs which should be charged did not exceed $397,595.21 and that by such padding of the items of costs cross-defendants diminished Yosemite's share of the balance to be divided by $20,438.99. The separate items of overcharge of operating expenses or costs are alleged in detail with the conclusion that after a credit for undercharges the total overcharge amounts to $27,304.81, seventy-five percent of which amount or $20,478.61 was due and owing to cross-complainant, whereas cross-defendants have paid only $39.62 and wilfully retain $20,438.99, which amount is still due and owing. At the trial respondent Yosemite offered in evidence an adjusted statement of account as of January 31, 1945, containing the views of its accountant with respect to each item of costs contained in the account rendered by the accountant of Case-Swayne Company and the trial with respect to Yosemite's cross-complaint consisted mostly of evidence as to the merits of the respective systems of calculation of costs by the two accountants. Yosemite recovered the amount of $20,438.99 it claimed in accord with the position taken by its accountant. The above shows that the amount recovered consists only of Yosemite's share of an alleged overcharge of costs, dependent on the correct manner of calculating and allocating such costs, which technical subject the parties had wisely agreed to leave to the decision of an accountant. Neither cross-complainant nor the court had the right to deviate from this agreement without appellants' consent. It is true that the cross-complaint contains several other allegations and also prays for an accounting, but no accounting was ordered and the redundant matter alleged can in no way have influenced the decision. The record leaves no doubt that Case-Swayne Company had paid all that was owing according to the accounting rendered by its accountant and that the correctness of this accounting with respect to costs was the only matter which needed decision and was decided. It was a "matter involving the computation or allocation of the costs under this agreement" and nothing else.

Respondent tries to distinguish Clagston v. Schiff-Lang Co., Inc., supra, and other cases cited by appellants which hold an arbitration provision to constitute a condition precedent on the ground that in the cited cases the arbitration clause related generally to any difficulties arising between the parties, whereas here the field of arbitration is restricted to matter involving costs.

Where the actual dispute relates to the restricted field for which the arbitration agreement is made, the distinction is without meaning. In Davisson v. East Whittier Land etc. Co., 153 Cal. 81, 96 P. 88, 89, an arbitration provision restricted to "the true value of the extra work done" was held to constitute a condition precedent for court action relating to that subject.

Yosemite also argues that the following language in the answer to the cross-complaint estops cross-defendant from asserting that the arbitration provision was not complied with: "pursuant to paragraph 8 and to carry out its terms and provisions the cross-defendant Case-Swayne Company, with full knowledge and consent of cross-complainant, procured the services for the said parties hereto of Wayne E. Mayhew & Company, certified public accountants, to audit the accounts of the parties as provided in said contract to enable cross-defendants to render the accountings and make the settlements therein provided for * * * that thereafter, and on or about March 2, 1945, said Wayne E. Mayhew & Company completed its final accounting. * * *" The quoted language clearly relates only to the first sentence of section 8 with respect to the necessity of settling of accounts and audit, not to determination of disagreements the existence of which is not mentioned, and which only became apparent after the final accounting by Wayne E. Mayhew & Company was completed. But even if Case-Swayne Company had taken the position that the report of Wayne Mayhew & Company was the determination of disagreements by the accountant of the parties the expression of such view would not free Yosemite, which denies the existence of a binding determination, from the duty to attempt to secure the same and to allege the arbitration or the frustration of it by cross-defendants. Case-Swayne Company's refusal to let the accountant personally inspect their books cannot be considered to have frustrated arbitration. If Yosemite was not prevented from beginning court action it certainly would have been able to demand the appointment of an accountant to decide the disagreements. The decision of the court given without prior attempted or completed decision by an accountant can not stand.

IV. Restitution.

In case of reversal of the judgment respecting the cross-actions appellants pray for an order requiring restitution with interest of the amount collected from them by writ of execution on December 18, 1947, to wit, $80,550.55 in behalf of Kadota and $24,333.33 in behalf of Yosemite. Appellants contend that with respect to the restitution of the amount collected by Kadota all defendants are individually liable.

[26-29] As a rule a party whose money has been taken under a judgment which is thereafter reversed is entitled to restitution of the amount taken with interest. Section 957, Code Civil Procedure; Restatement of Restitution, sec. 74; Ward v. Sherman, 155 Cal. 287, 291, 100 P. 864; Levy v. Drew, 4 Cal.2d 456, 459, 50 P.2d 435, 101 A.L.R. 1144. However, as no final decision on the merits is given and it is conceded that at any rate certain amounts are due plaintiffs in the cross-actions we think it preferable, rules of equity being applicable, that the amounts be paid into court to abide final disposition and it will be so ordered. It is true that individual members of an unincorporated association organized for profit are individually liable for the obligations of the association contracted during their membership. Burks v. Weast, 67 Cal.App. 745, 751, 228 P. 541; Webster v. San Joaquin Fruit etc. Ass'n, 32 Cal.App. 264, 162 P. 654, 7 C.J.S., Associations, § 32, pp. 76-77; Wrightington, Unincorporated Associations, etc. secs. 12, 20, 24. But the liability for restitution was

only caused by the execution on December 18, 1947, and only those who were members of Kadota at that time are individually liable. In case of dispute their identity will have to be established by the court below.

Other points of controversy argued by the parties do not require decision under the view we have taken.

The judgment with respect to the original action of plaintiffs should be affirmed; with respect to the cross-actions it should be reversed and the cause remanded for further proceedings; moreover, it is ordered that for the purpose of making restitution Kadota Fig Association of Producers and its individual members as of December 18, 1947, pay into court to the county clerk and clerk of the superior court of the State of California in and for the City and County of San Francisco the sum of $80,550.55 and Yosemite Growers Co-op Association in the same manner the sum of $24,333.33, both to be paid within 10 days after issuance of the remittitur in this case with interest from December 18, 1947, and to abide final disposition of the cause. The appeal from the judgment of dismissal in favor of the defendant B. H. Dibblee, since deceased, has heretofore been dismissed on stipulation of the parties.

The judgment is affirmed and reversed in accordance with the foregoing directions.

GOODELL and DOOLING, JJ. concur.

92 Cal.App.2d 439

MANN et al. v. PACIFIC GREYHOUND LINES et al.

Civ. 13795.

District Court of Appeal, First District, Division 2, California.

June 16, 1949.

Hearing Denied Aug. 11, 1949.

1. Appeal and error 🔑991

On appeal from an order made on affidavits, involving the decision of a question of fact, appellate court is bound by same rule that controls it where oral testimony is presented for review, and if there is any conflict in affidavits, those in favor of prevailing party must be taken as true, and facts stated therein must be considered to be established.

2. Appeal and error 🔑874(1)

The denial of a continuance is reviewable on appeal from judgment of dismissal.

3. Trial 🔑18, 387(2)

Trial judge, in absence of some weighty reason to the contrary, must vigorously insist on cases being heard and determined with as great promptness as the exigencies of the case will permit.

4. Judgment 🔑162(2)

On motion to set aside default judgment, burden was on plaintiffs to convince court that judgment of dismissal had been entered because of their mistake, inadvertence, surprise, or excusable neglect. Code Civ.Proc. § 473.

5. Appeal and error 🔑948

On appeal from judgment of dismissal and from order denying motion to restore cause to trial calendar and to set aside default judgment, burden of convincing that denial of motion for relief was an abuse of discretion was on appellants.

6. Judgment 🔑143(3)

Plaintiffs' attorney who nine days before trial date learned that adversary party refused to stipulate to a continuance, and whose last minute application for continuance was denied, was not entitled to relief from judgment of dismissal on ground of mistake, inadvertence, surprise or excusable neglect. Code Civ.Proc. §§ 473, 581, subd. 3, 594, 1010.

◆

Appeal from Superior Court, San Mateo County; Edmund Scott, Judge.

Action by Norton Mann, and others, against Pacific Greyhound Lines and others to recover for injuries sustained in a collision between an automobile and a bus. From a judgment of dismissal of the action and from an order denying plaintiffs' motion to restore cause to trial calendar and to set aside default of plaintiffs, the plaintiffs appeal.

Affirmed.

Melvin M. Belli, San Francisco, Thelen, Marrin, Johnson & Bridges, San Francisco, Van H. Pinney, San Francisco, for appellants.

Bronson, Bronson & McKinnon, San Francisco, Hoge Pelton & Gunther, San Francisco (Leo V. Killion, San Francisco, of counsel), for respondents.

GOODELL, Justice.

This is an appeal from a judgment of dismissal of this action on the day set for its trial, and from an order denying appellants' motion to restore the cause to the trial calendar and to set aside their default.

On August 28, 1946 the complaint was filed alleging negligence of the defendant Pacific Greyhound Lines, its bus driver defendant Hurbace, and defendant Hawkins, who was the driver of another passenger car on the highway, resulting in the death of Calvin Mann and serious injuries to plaintiffs William and Kenneth Mann, all three of whom were riding as guests of an automobile which collided with the bus. Damages in a large amount were claimed.

Defendant Hawkins answered October 25, 1946, represented by Messrs. Bronson, Bronson & McKinnon. The answer of defendants Greyhound and Hurbace, represented by Messrs. Hoge, Pelton & Gunther, was filed on October 26.

On October 30 plaintiffs filed a memorandum to set the cause for trial by jury. On February 17, 1947 the matter was continued to the March setting calendar. On March 17 the trial was set for April 17 and 18, 1947, by jury.

On April 10 a stipulation dated April 7 was filed, signed by the attorneys for plaintiffs and for Greyhound and Hurbace (but not by Hawkins' attorneys) continuing the trial from April 17 "to a late date in May, as the Court may deem proper."

On April 17 the court, instead of continuing the case "to a late date in May", ordered "Trial dropped reset memo at end of calendar."

On July 18, 1947, Hawkins' counsel filed a new menorandum to set cause for trial showing that a jury trial was *not* demanded. It bears admissions of service on July 17 signed by counsel for plaintiffs and counsel for Greyhound and Hurbace.

On July 23 counsel for Greyhound and Hurbace filed a demand for jury trial, with the receipt of a copy admitted by counsel for plaintiffs only.

On August 4, 1947 the court ordered "Trial set for September 3, 1947." On August 15 a notice of time (September 3) and place of trial was filed, showing service on the 13th on counsel for plaintiffs and counsel for Greyhound and Hurbace. The notice was given by counsel for Hawkins, who had served and filed the second and last memorandum to set.

Thus on August 15 the trial was definitely set for September 3 and all counsel had the statutory notice of trial 21 days in advance of the trial day. The case was set and notice given not by plaintiffs but by defendant Hawkins.

On Wednesday, September 3 at 10 o'clock counsel for defendants Greyhound and Hurbace and counsel for defendant Hawkins were in court and answered ready when the case was called. Twenty-two prospective jurors were present. Attorney Jonathan Rowell, who was not an attorney of record, was present at the request of Attorney Belli and applied for a continuance because he (Belli) was engaged in the trial of another case in San Francisco. He presented two affidavits which had been made that morning, one by Attorney Belli, the other by Miss Thomas, his secretary. From the discussion between court and counsel it was apparent that the plaintiffs were not prepared to go to trial on that day. The court denied a continuance. Counsel for defendants Greyhound and Hurbace then moved for a dismissal and counsel for defendant Hawkins did likewise. Both motions were granted. See subd. 3, sec. 581, also sec. 594, Code Civ. Proc.

On October 2 a notice was served by plaintiffs on all defense counsel that on October 13 they would move the court "to restore the above cause to the trial calendar and set aside default entered on September 3, 1947." This motion was denied on November 21.

Notice of appeal was filed on December 19, 1947, from the judgment of dismissal and from the order denying plaintiffs' motion to set aside default and restore cause to the trial calendar.

Appellants' motion to restore the case to the trial calendar and to "set aside default entered on September 3, 1947" by its own terms concedes a default, and the only question for decision on that phase of the appeal is whether good grounds existed for such relief.

Section 1010, Code Civ.Proc. requires the statement in a notice of motion of "the grounds upon which it will be made, and the papers, if any, upon which it is to be based." The notice contains no such statements. Section 473, Code Civ.Proc. provides that "The court may * * * relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect" and it must be assumed that the motion was designed to seek such relief. No objection seems to have been made to the insufficiency of the notice. Court and counsel apparently treated it as substantially bringing the matter before the court, and we shall so treat it. The only question, then, is whether there was an abuse of discretion in the denial of the motion.

Accompanying the notice of motion was an affidavit of Attorney Belli in which he incorporated his affidavit of September 3 (when he sought the continuance). Later the affidavit of Miss Thomas was served and filed wherein she incorporated her affidavit of September 3. Affidavits in opposition to the motion were filed by counsel for Hawkins and by two of the counsel for Greyhound and Hurbace.

It appears that there was a conversation between Messrs. Belli and Gunther respecting the continuance of this case. No conflict is raised in their respective affidavits as to what was said therein, but there is a dispute as to when it took place. In a case entitled Deschamps v. Independent Cab Co., wherein Belli represented the plaintiff and Gunther the defendants, Belli had a motion pending to advance its trial date. Gunther telephoned Belli and told him that he did not want to try the Mann case on September 3 because he had a case in Napa county set for the 2nd; that if it was settled he would try the Deschamps case with Belli on the 3rd, instead of the Mann case. Bellie acceded to this proposal on Gunther's promise to draw up a stipulation for the continuance of the Mann case and to phone the clerk and arrange it, and with the proviso that the Mann case would not be dropped from the calendar. The conflict is as to the date of that telephone conversation, Belli deposing that it was on August 25 (a Monday) and Gunther that it was on August 22 (a Friday). Gunther in his affidavits states that on the 22nd, after that conversation, while preparing the promised stipulation he found (what he had apparently overlooked) that there was another defendant, Hawkins, in this case and thereupon, on the 22nd, telephoned to the office of Hawkins' attorneys but found that Attorney Lawrason Driscoll (who was handling the case) was out, and left his number. On Monday, the 25th, according to both Gunther's and Driscoll's affidavits, Driscoll on getting back to his office from out of town, returned Gunther's call of the 22nd and was told by him what had gone on respecting a proposed continuance, to which Driscoll replied that the case had been set for trial at their (Hawkins') instance; that he had been instructed by his client to proceed to trial and not to agree to a continuance, and added that if either Gunther or Belli desired one the matter should be taken up with the court. He asked Gunther to inform Belli that he could not consent. There is no conflict between Gunther and Driscoll as to this exchange of calls, or when they occurred, or what was said and done by each.

In Gunther's affidavit he states that on the same day, Monday, the 25th, he informed Belli over the telephone that following their previous conversation he had drawn the stipulation as promised and in doing so learned that there was a co-defendant (Hawkins) in the case, and on communicating with Driscoll he had been informed by him that the trial date had been set at their (Hawkins') instance "and that their client desired to press the * * * action to trial and that they would not sign the stipulation." Further he deposed that thereafter Belli made no effort to specially set the Deschamps case, and that Belli at that time was fully informed that so far as a stipulation was concerned, there would be no continuance of the Mann case. He stated also that either on August 27 or 28 he attempted to talk with Belli but was unable to reach him and that on either one of those days he talked with Belli's secretary to determine whether anything further had been done to secure a continuance and that she expressed herself as at a loss to know anything that could be done about securing such continuance.

In his affidavit Belli says nothing respecting a telephone call from Gunther reporting Driscoll's refusal to stipulate. He leaves the matter with Gunther's promise to arrange for the continuance, and says that upon that he "assumed said case was put over." He adds that thereafter he called Gunther "several times on other matters but Gunther was not in and did not call back" and that he had "not talked to him since said date" [August 25].

In Miss Thomas' affidavit she says that she listened in on a telephone conversation between Messrs. Belli and Gunther on August 25 and upon learning that Gunther was to arrange a continuance of this case she communicated with plaintiffs William and Kenneth Mann, both out of the state, and directed them not to come to California for the trial; that she also arranged for another case to be tried on September 3.

To summarize: Mr. Belli and Miss Thomas both fix the Belli-Gunther conversation as Monday, August 25, and neither says anything respecting a further Belli-Gunther conversation reporting the Driscoll refusal to stipulate.

Gunther places the first Belli-Gunther conversation on Friday, August 22 and a second one on Monday, the 25th, wherein he reported the Driscoll refusal. Driscoll places the Gunther-Driscoll conversation on Monday, the 25th.

[1] The problem presented to the trial court on the motion was whether plaintiffs were entitled to relief from the judgment of dismissal because of their "mistake, inadvertence, surprise or excusable neglect." That problem was presented on affidavits, and it is definitely settled that "In the consideration of an appeal from an order made on affidavits, involving the decision of a question of fact, the appellate court is bound by the same rule that controls it where oral testimony is presented for review. If there is any conflict in the affidavits, those in favor of the prevailing party must be taken as true, and the facts stated therein must be considered established." 1 Cal.Jur. p. 681; 2 Cal.Jur. p. 932. Hence it appears that the trial court settled the conflicts in favor of the respondents and accepted as true the statement in the Gunther affidavit that it was on Friday, August 22, that he first discussed a continuance with Belli and that it was on Monday, August 25, after Driscoll had definitely refused to stipulate *that Gunther relayed this refusal to Belli.*

The question which then confronted the trial court was simply Whether an attorney, who, nine days before a trial date (August 25–September 3) learns that an adversary party refuses to stipulate to a continuance, can remain inactive until the hour of trial and then claim "mistake, inadvertence, surprise and excusable neglect" when his last-minute application is denied?

The question answers itself.

There were other conflicts but it is not necessary to discuss them since under the rule in 1 Cal.Jur. p. 681, supra, they were resolved in favor of the respondents.

[2] The denial of the continuance is reviewable herein on the appeal from the judgment of dismissal. Marx v. McKinney, 23 Cal.2d 439, 444, 144 P.2d 353. It was pointed out earlier that plaintiffs' motion for relief by its very terms concedes their own default. Such concession of course weakens any claim they might make that it was error for the court to deny the continuance.

Plaintiffs have cited on this appeal just seven California cases and one from elsewhere. Pickett v. Hastings, 39 Cal. 105 is cited by appellants in support of their contention that they had been lulled into a false security by Greyhound's counsel. If, however, Gunther telephoned to Belli on Monday, August 25, as soon as he learned that

Driscoll would not stipulate, there was nothing in his conduct on which an estoppel could be based.

In each of the other six California cases it is true there was a reversal for failure to grant a continuance, but each of them presented a situation totally different from that presented here. In Jaffe v. Lilienthal, 101 Cal. 175, 35 P. 636 the plaintiff was seriously ill in Seattle; In Morehouse v. Morehouse, 136 Cal. 332, 68 P. 976 the defendant had suffered serious injuries in an accident; in Betts Spring Co. v. Jardine Machinery Co., 23 Cal.App. 705, 139 P. 657 the defendant was seriously ill in Europe; in Pacific Gas & Electric Co. v. Taylor, 52 Cal.App. 307, 198 P. 651, the defendant was seriously ill in Boston; in Carl v. Thomas, 116 Cal. App. 294, 2 P.2d 872, the defendant had obtained a leave of absence so as to attend the trial, but a letter notifying him of the date miscarried in the mails; in Swayne & Hoyt v. Wells-Russell & Co., 169 Cal. 204, 146 P. 686, a material witness residing in Mendocino County could not be reached in time and both sides agreed in writing to a two weeks continuance but despite their stipulation the court denied the application. They are clearly distinguishable and appellants cite no other cases.

When plaintiffs' application for continuance was presented to the court it was upon an affidavit in which Attorney Belli stated that he was "presently engaged in jury trial in San Francisco, Burgess v. Doerr; that he will start another jury trial in San Francisco on Monday, September 8th, Murray v. Southern Pacific Company." This brought the plaintiffs' showing within such cases as McGuire v. Drew, 83 Cal. 225, 231, 23 P. 312 and Canty v. Pierce & Anderson, 173 Cal. 205, 159 P. 582 where one of the parties chose to be elsewhere than in the courtroom at the time set for trial, and Tobias v. Adams, 206 Cal. 88, 89, 273 P. 579, and Berendsen v. Babdaty, 62 Cal.App. 185, 189, 216 P. 385 where counsel had another professional engagement. In none of them did the court hold the excuse to be a valid one.

Defendant Hawkins had caused the case to be set for trial and the statutory notice of trial had been served by him on August 13, which was nine days before the first Belli-Gunther conversation. By that written notice and by the telephone message from Gunther to Belli on August 25, the latter had been "fully advised of the desire [of Hawkins] to proceed with the trial upon the day set and of the fact that no further continuance would be consented to." Canty v. Pierce & Anderson, 173 Cal. 205, 208, 159 P. 582, 583, supra; see, also, Thomas v. Toppins, 206 Cal. 18, 272 P. 1042.

[3] It was "a part of the bounden duty of the trial judge, in the absence of some weighty reason to the contrary, to vigorously insist upon cases being heard and determined with as great promptness as the exigencies of the case will permit." Flynn v. Fink, 60 Cal.App. 670, 673, 213 P. 716, 717; In re Estate of Dargie, 33 Cal.App.2d 148, 158, 91 P.2d 126. The chronology given earlier shows that once before this case had been set for trial and then dropped from the calendar by a stipulation between plaintiffs and Greyhound without consulting defendant Hawkins, and that when it was on the calendar for September 3 it was there because Hawkins had taken the initiative and had brought it on for trial, as he had a right to do. Sec. 594, Code Civ.Proc.

Five days before the trial date, i. e., on Friday, August 29, the Clerk of the Court telephoned to Attorney Belli's office that the case would go to trial on September 3, and on the same day the Judge himself told the secretary in that office over the telephone "definitely, as far as the Court was concerned, the jury was going to be here, and that the Court was ready to proceed, and if the attorneys wanted to make stipulations about continuances they ought to consider the Court once in a while." See Weinberger v. Manning, 50 Cal.App.2d 494, 497, 123 P.2d 531; Nicholson v. Nicholson, 85 Cal.App.2d 506, 509, 510, 193 P.2d 112. Miss Thomas in her affidavit, after referring to her telephone conversations with the Judge and the Clerk on the 29th says: "That Mr. Belli had no knowledge of your deponent's conversation with Judge Scott until after the weekend holiday; that on September 2nd, he was advised while in the process of a jury trial in San Francisco * * *"

We find no error in the Court's denial of the motion for a continuance.

[4-6] The burden was on the plaintiffs, on their motion under section 473, to convince the Court that the judgment of dismissal had been entered because of their "mistake, inadvertence, surprise or excusable neglect." Bruskey v. Bruskey, 4 Cal. App.2d 472, 479, 41 P.2d 203; Weinberger v. Manning, 50 Cal.App.2d 494, 497, 123 P.2d 531, supra. That motion was heard some weeks after the judgment of dismissal and meanwhile all the parties had ample opportunity to present by affidavit their respective showings. On this appeal the burden of convincing this court that the denial of the motion for relief was an abuse of discretion was of course on the appellants, Hecq v. Conner, 203 Cal. 504, 509, 510, 265 P. 180; Stub v. Harrison, 35 Cal.App.2d 685, 96 P.2d 979 and that burden has not been sustained.

The appeal from the judgment and from the order are, and each of them is, affirmed.

NOURSE, P. J., and DOOLING, J., concur.

Hearing denied; CARTER, J., dissenting.

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92 Cal.App.2d 542

BRIGGS v. NATIONAL INDUSTRIES, Inc. et al.

Civ. 3699.

District Court of Appeal,
Fourth District, California.
June 22, 1949.

1. Judgment ⇨199(3.7)

A motion for judgment notwithstanding verdict of jury may be granted only if it appears from evidence, viewed in light most favorable to party securing verdict, that there is no substantial evidence to support the verdict, and if there is any substantial evidence or reasonable inferences to be drawn therefrom in support of verdict, the motion should be denied.

2. Negligence ⇨134(1)

Evidence not disclosing that cold wave solution for hair was dangerous or more irritant to skin than cosmetics widely used by women or that many persons were susceptible to solution or that defendant manufacturer of solution had knowledge of dangerous character of solution was insufficient to permit plaintiff to recover for personal injuries resulting from processing of plaintiff's hair in beauty shop with such solution.

3. Negligence ⇨27

Generally, manufacturer must give appropriate warning of any known dangers which user of his product would not ordinarily discover.

4. Negligence ⇨27

A manufacturer having knowledge of dangerous character of product and not giving appropriate warning of such danger is liable for injuries sustained by user.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Personal injury action by Golden Briggs against National Industries, Inc., a corporation, and others. From a judgment in favor of National Industries, Inc., the plaintiff appeals.

Affirmed.

Ray Miller, San Diego, for appellant.

Gray, Cary, Ames & Driscoll, San Diego, for respondents.

MUSSELL, Justice.

This is an appeal from a judgment in favor of defendant corporation in an action brought against it and others by plaintiff for damages for personal injuries resulting from the processing of plaintiff's hair with a preparation known as a "Helene Curtis Creme Oil Cold Waves." This product was manufactured, sold and distributed by the defendant corporation to beauty shops generally and, in the instant case, the preparation used on plaintiff's hair was purchased by defendant Bernard N. Boyd and applied by Mary Carmen, an operator in a beauty shop conducted by defendant Boyd in San Diego. A jury trial resulted in a verdict for defendants Carmen and Boyd and against the defendant corporation. A motion for judgment notwithstanding the verdict was made by defendant National Industries, Inc. The trial court granted the motion, vacated and set aside the judgment which had been entered, and plaintiff appeals from the judgment then entered in favor of defendant corporation.

[1] The question for our determination is whether the court erred in granting the motion for judgment notwithstanding the verdict of the jury. Such a motion may properly be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence to support it, and if there is any substantial evidence, or reasonable inferences to be drawn therefrom, in support of the verdict, the motion should be denied. Brandenburg v. Pac. Gas & Elec. Co., 28 Cal.2d 282, 284, 169 P.2d 909; Estate of Green, 25 Cal.2d 535, 546, 154 P.2d 692; Brock v. Southern Pacific Co., 86 Cal.App.2d 182, 190, 195 P. 2d 66.

The evidence viewed in the light most favorable to plaintiff is that she visited the Boyd Beauty Shop on May 15, 1946, and asked the operator, Mrs. Carmen, for a "Helene Curtis" cold wave; that plaintiff was placed in a chair, a plastic robe fastened around her neck over her clothing, a thin strip of cotton material was placed around her neck underneath the plastic robe, her hair was shampooed, "blocked off", and the cold wave solution applied to the hair, after which a "neutralizer" was used to stop the action of the cold wave solution and the hair was lightly shampooed to free the cold wave solution. Plaintiff's hair was then fingerwaved and dried. Plaintiff testified that some of the cold wave solution came in contact with her forehead, the side of her face and some splashed on her right forearm as she smoked a cigarette. About three days after this occurrence plaintiff had a severe dermatitis or inflammation of the skin involving her face, neck, ears and shoulders, with some spots beginning to appear on other parts of her body. She was treated by a physician for this condition until December 18, 1946, at which time she was discharged as cured.

It was admitted that the cold wave solution used contained thioglycollate, a substance which softens the hair so that it can be shaped. Dr. Hiram Newton, a physician and surgeon specializing in the treatment of skin diseases, testified as a witness for plaintiff that thioglycollic acid is a direct irritant if used in concentration over seven or eight percent; (It was stipulated that the percentage of thioglycollic acid in the solution used was approximately 6.28 percent.); that plaintiff had a more light, tender skin than the average person. When questioned as to whether plaintiff was allergic to the substance used the doctor testified as follows:

"A. I felt this case was a partially allergic background. You see, the point is that an allergy is defined as an abnormal reactivity of tissue, and if you put some sort of acid on a person's skin, there occurs an inflammation that occurs in practically all people, but if you put lipstick on a thousand women you will find one or two who will develop an irritation to the lipstick, which exemplifies the term that we use as 'allergy'. I felt definitely that there was an allergic factor to this, otherwise all cases of cold wave would produce a dermatitis.

"Q. That is true of all cosmetics, isn't it, Doctor, generally; your face powders, cold creams, nail polish; all of these things? A. Practically all of them will produce an irritation on a certain number of people.

"Q. And generally a very small percentage of the users of the product, isn't it? A. Yes, sir.

"Q. And that is true in the case of these cold wave solutions, is it not? A. I feel so.

"Q. You know of your own knowledge and experience that many millions of women use them in America every day throughout the years and only the small— A. Only a small percentage develop irritations from it; that is right.

"Q. Some people are allergic to sunlight, are they not? A. Yes, sir.

"Q. And eggs? A. Yes, sir.

"Q. And milk? A. Yes, sir.

"Q. And strawberries? A. Definitely.

"Q. And animal hair? A. That is correct.

"Q. Dye and furs? A. Yes, sir.

"Q. I think we could say that some people are allergic to almost any substance you could find in the world today? A. That you could find some person who has or could react to almost any substance with which they might come in contact, that is true."

Dr. Newton also stated that plaintiff had been vaccinated for small pox a short time previous to the development of the skin irritation and that there was a definite possibility that the vaccination could have increased plaintiff's sensitivity to the solution used.

Plaintiff testified that in each of the four years preceding May 15, 1946, she had used the Helene Curtis Cold Wave solution without suffering any harmful effects therefrom, and Mrs. Carmen testified that she had worked with this product for about three years without having any difficulty with it at any time. Defendant Boyd testified that he had used the Helene Curtis Cold Wave product in his shop for approximately four years; that his operators administered it about seven times a week on an average; that the product was used all over the United States and that he experienced no difficulty with it. The record is devoid of any evidence indicating that the product in question had ever caused skin irritation prior to its use in the instant case.

While the evidence might well support an inference of liability on the part of defendants Carmen and Boyd in that the neutralizer used with the cold wave solution was not used upon any portion of plaintiff's person except her hair, and that the cold wave solution was negligently applied, that question was resolved by the jury in favor of the defendants named.

The complaint as originally filed by plaintiff contained allegations of fraud in that defendant corporation in advertising its product made certain false and fraudulent representations upon which plaintiff relied, which representations were intended to deceive plaintiff and the public generally. No evidence was introduced at the trial on the issue of fraud and this issue was withdrawn from the jury by the court's instruction. At the conclusion of the taking of evidence the trial court permitted an amendment to the complaint wherein it was alleged that the defendant National Industries, Inc., carelessly and negligently failed to warn the public or intended users of their product that it contained a chemical toxin known as thioglycollate and that many persons were susceptible to and might suffer serious damage through its use and that defendant corporation carelessly and negligently failed to warn the public that great care should be taken in the application of the product.

[2] We conclude that the evidence would not support a judgment in favor of plaintiff against the defendant corporation on the grounds stated in the amendment to the complaint. It was not shown that the solution used on plaintiff was in fact dangerous or an irritant to the skin of any person any more than many cosmetics, face powders, cold cream and nail polish universally used by women. There is nothing in the testimony indicating that many persons were susceptible to the product and might suffer damage through its use. In fact, from the record, plaintiff's complaint is the only instance in which injury from it was claimed.

[3, 4] The general rule is that a manufacturer must give an appropriate warning of any known dangers which the user of his product would not ordinarily discover. Tinkey v. E. F. Houghton & Co., 30 Cal.2d 97, 102, 179 P.2d 807. One of the essential elements of liability is knowledge on the part of the manufacturer of the dangerous character of the product. There is no substantial evidence that the defendant corporation had any such knowledge. We find no merit in plaintiff's contention that the defendant corporation was required to warn the public that great care should be taken in the application of the product. The directions sent with the solution used are that it was to be used on the hair and not on the skin and there is evidence that had the neutralizer been properly applied no injury would have resulted.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

KAYS v. BUNDY et al.

Civ. 16896.

District Court of Appeal, Second District,
Division 1, California.

June 21, 1949.

Rehearing Denied July 11, 1949.

Hearing Denied Aug. 18, 1949.

1. Limitation of actions ⇨167(2)
Quieting title ⇨14

A mortgagor may not quiet title against a mortgage until he pays his debt secured by the mortgage, whether or not the statute of limitations has run against the obligation, since the running of the statute does not extinguish the debt or operate as payment.

2. Limitation of actions ⇨197(4)

In action by mortgagee to quiet title, finding that defendant mortgagors had made no payments on the debt after running of statute of limitations was not sustained by the evidence.

3. Quieting title ⇨43

In action to quiet title, where the defendants had dismissed their cross-complaint and there was no issue as to whether title should be quieted in defendants raised by the complaint and answer, judgment quieting title in defendants was not sustained by the pleadings.

◆

Appeal from Superior Court, Los Angeles County; Mildred L. Lillie, Judge.

Action to quiet title by Carl R. Kays, as executor of the estate of Allie M. Kays, also known as Louise Dando Kays, deceased, against Ross F. Bundy and Blanche A. Bundy, husband and wife, and others. From a judgment for defendants, the plaintiff appeals.

Judgment reversed and cause remanded for a new trial.

Louis Budway, Brea, and Kenneth K. Wright, Los Angeles, for appellant.

Simon, Fox & Fraider and Stanley E. Fox, Beverly Hills, and William T. Selby, Ventura, for respondents.

DORAN, Justice.

In this action to quiet title, the record reveals, as recited in respondents' brief that, "There are three separate interests represented in this litigation. Plaintiff and appellant, who is the successor in interest of Allie M. Kays. The original owners of the property in question who are Ross F. Bundy and Blanche A. Bundy. The respondents Dean A. Tobias, Helen M. Philpott and Title Insurance and Trust Company, holders of a trust deed."

The record further reveals as recited in respondents' brief that, "On August 31, 1930, Bundys, who were then the owners of the property in question, mortgaged it to Allie M. Kays to secure a note for $8,000.00. The mortgage note was due August 31, 1935, and in normal course of events would have been barred by the statute of limitation August 31, 1939. On September 10, 1932, the trust deed to Tobias was made by Bundys, that being second to the Kays mortgage.

"On October 15, 1940, Allie M. Kays commenced an action to foreclose the mortgage. That action was never brought to trial nor was service made upon the parties defendant. The action was subject to dismissal pursuant to Section 581a of the Code of Civil Procedure for want of prosecution and was treated at the trial by all parties as being of no force and effect and upon appeal appellants so treat the action. At the trial respondents Tobias moved dismissal of that action because of the want of prosecution. The lower Court first granted the motion to dismiss, then withdrew the order granting the motion to dismiss recognizing that the action was subject to dismissal but stating that the matter was not before the particular department of the court.

"On June 1, 1942, Bundys executed a deed to Allie M. Kays of the property in question and deposited that deed with Allie M. Kays' attorney. The deed was not recorded until after the death of Allie Kays. The Trial Court held that the deed was not delivered and was not effective as a conveyance of the property. * * *

"It was shown at the trial that there was a transaction entered into between Bundys and Allie M. Kays whereby Allie M. Kays agreed to resell it to Bundys for six thousand dollars ($6,000.00) upon receiving title to the property and clearing the Tobias obligation. It was not possible to clear off the Tobias trust deed so that transaction never was completed. However, beginning in 1942 and continuing without interruption, Bundys paid to Kays, or the successors of Kays, monthly amounts equal to six per cent (6%) interest on six thousand dollars ($6,000.00). The court found that the payments were not made as payments upon the original mortgage note.

"There was a later action started to foreclose the mortgage but that was dismissed by appellants."

The answer of defendants Bundy set up ten separate defenses and a cross-complaint to quiet title as well.

At the conclusion of the trial the following occurred:

"The Court: * * * On the complaint, the Court gives judgment for the defendants Ross F. Bundy and Blanche A. Bundy, the Title Insurance and Trust Company, a corporation, formerly Title Guarantee and Trust Company, a corporation, Deane A. Tobias and Helen M. Philpott.

"Now, do you want to move to dismiss your cross-complaint?

"Mr. Fox: Your Honor, on behalf of the defendants and cross-complainants, Ross F. Bundy and Blanche A. Bundy, husband and wife, I move to dismiss the cross-complaint on file in this action.

"The Court: No objection having been made, your motion is granted.

"You will prepare findings in accordance with judgment."

The findings and judgment that followed provided accordingly and in addition thereto, although as above note, defendants cross-complaint had been dismissed, the judgment quieted title in defendants Bundy.

[1] It is contended by appellant that, "There is probably no rule better settled in equity jurisprudence than that which requires the payment by a litigant of obligations relating to the subject matter of the action before equity will interfere on his behalf, and thus a mortgagor may not quiet title against a mortgage unless and until he pays his debt secured by the mortgage, whether or not the statute of limitations has run against the obligation (Fontana Land Co. v. Laughlin, 199 Cal. 625 [250 P. 669, 48 A.L.R. 1308]). This, of course, for the reason that the running of the statute of limitations does not extinguish the debt or operate as payment (Flack v. Boland, 11 Cal.2d 103 [77 P.2d 1090])."

[2] Appellant's contention finds abundant support in the authorities. See also Sipe v. McKenna, 88 Cal.App.2d 1001, 200 P.2d 61. Moreover the evidence shows payments to have been made on the debt in question whether denominated rent or interest and the finding to the contrary lacks support in the evidence; the defendants Bundy are in no position to seek refuge in the statute of limitations.

[3] It should be noted also that the Bundy cross-complaint having been dismissed, there is no basis in the pleadings for the judgment entered. The issue as to whether the title should be quieted in defendant Bundy was not raised in the complaint and answer.

The judgment is reversed and the cause remanded for a new trial.

WHITE, P. J., and DRAPEAU, J., concur.

92 Cal.App.2d 576

BUSICK v. ROSENBERG BROS. & CO. et al.

Civ. 3773.

District Court of Appeal, Fourth District, California.

June 24, 1949.

Rehearing Denied July 21, 1949.

1. Sales 🔑384(7)

Where buyer of raisins had refused to accept them seller was required to act with reasonable promptness in disposing of the raisins to others and could not speculate on a rise in price.

2. Sales 🔑384(7)

In action for damages for buyer's refusal to take raisins finding that the seller was damaged only in the amount of $1500 and that further damages sustained by seller were due to his own unreasonable delay in selling raisins to others in the belief that market price would rise, was sustained by the evidence.

Appeal from Superior Court, Fresno County; Arthur C. Shepard, Judge.

Action by John Busick against Rosenberg Bros. & Co. and others for breach of contract for the purchase of certain raisins. From a judgment for plaintiff for $1500, the plaintiff appeals.

Judgment affirmed.

Claude L. Rowe, Fresno, for appellant.

Harris, Willey & Harris, John A. Willey, Everett G. Harris, Fresno, for respondent.

BARNARD, Presiding Justice.

This is an action based upon the breach of a contract for the purchase of certain raisins.

On October 22, 1946, plaintiff sold his entire crop of raisins to Bonner Packing Co. for $335 per ton. The contract provided that the seller guaranteed the fruit to be his sole and absolute property "free from all encumbrances"; that title should immediately pass to the buyer; and that payment was to be made on delivery. It also contained the provision "No moisture test. If moisture excessive contract to be canceled without penalty." On October 28, 1946, the plaintiff delivered a portion of his crop to Bonner Packing Co., which refused to accept them saying they were too wet.

On November 8, 1946, the plaintiff wrote to Bonner Packing Co. stating that its men had rejected his raisins for moisture and had canceled his contract, and that he intended to sell the raisins for the best price obtainable. On the same day, November 8, he entered into a contract with the defendant for the sale of 100 tons of his raisins at $350 a ton. This contract also contained a provision that the seller guaranteed the fruit to be his sole and absolute property free from all encumbrances.

On November 12, 1946, the defendant received a telegram from Bonner Packing Co. stating that it had a contract for these raisins, dated October 22, and giving notice that it was insisting upon delivery to it under the terms of that contract. On November 12, Bonner Packing Co. also sent a letter to the plaintiff stating it had been informed that he had contracted with the defendant for the sale of his raisins notwithstanding his previous contract with Bonner Packing Co., and insisting upon delivery of the raisins in accordance with the contract of October 22. The plaintiff admitted receiving this letter and probably received it on November 13. On November 13, he attempted to deliver a part of the 100 tons of raisins to the defendant and offered to deliver the balance. The defendant refused to accept delivery for the reason that it had just been notified that Bonner Packing Co. was claiming the raisins under its previous contract.

On November 13, the plaintiff sent a letter to Bonner Packing Co. demanding that it "immediately revoke your order to Rosenberg Bros. & Co. that they not buy my raisins"; stating that Bonner Packing Co. had terminated its contract by insisting on a moisture test; and demanding that it cease representing that it owned these raisins or that he would hold it responsible for any loss he might sustain in failure to sell these raisins at top market price. On November 15, the plaintiff wrote to the defendant notifying them that he had delivered 16 tons of raisins on November 13, and that they had been refused. On November 18, defendant's counsel replied to this letter stating that, "as you already know", delivery had not been accepted because defendant had been notified by Bonner Packing Co. that it had purchased the raisins and was insisting upon delivery. On December 27, the plaintiff wrote to the defendant offering to deliver the raisins under the contract of November 8. On December 30, defendant's counsel replied to that letter stating that delivery of the raisins would not be accepted as title to the raisins had already passed to Bonner Packing Co. at the time the November 8 contract was entered into.

The price of raisins remained at $350 until about November 30, 1946. It then began to drop and from about the middle of January to March the packers were not buying raisins. On March 28, 1947, the plaintiff sold his raisins for $235 a ton. He then brought this action claiming a loss of $11,500.00.

The court found that a contract was entered into on November 8, 1946, between the plaintiff and the defendant for the sale and purchase of 100 tons of raisins at $350 per ton; that the defendant had refused to accept delivery of the raisins without just cause or excuse; that the plaintiff was not forced to sell said raisins for $235 per ton; that the plaintiff had an opportunity on or about November 12, 1946, to sell the raisins to Bonner Packing Co. for $335 a ton; that plaintiff suffered damage in the sum of $1500; that at the time the contract of November 8, 1946, was entered into the raisins were the sole and absolute property of the plaintiff, free of all encumbrances; and that prior to that date and on or about October 28, 1946, the plaintiff's contract with Bonner Packing Co. was canceled. Judgment was entered in favor of the plaintiff for $1500, from which judgment the plaintiff has appealed.

The appellant contends that in order to mitigate the damages he was not compelled to attempt to sell the raisins to Bonner Packing Co. at a time which was prior to the respondent's breach of this contract, and for $15 per ton less than the then market price. This is based upon the fact that Bonner Packing Company's telegram to the respondent and its letter to the appellant insisting upon its contract were both dated November 12, and that delivery to and refusal by the respondent occurred on November 13. It is further contended that the fact that the appellant refused to comply with the Bonner Packing Company's demand upon him, at a time when his contract with that company had been canceled and when the market price of raisins was $15 per ton more than the price called for by that contract, does not indicate that the appellant could have mitigated the damages. In effect, the contention is that the court's finding that the appellant was damaged only in the amount of $1500 is without evidentiary support, and that the evidence conclusively shows that, despite the fact that he did everything that he could reasonably have done, he was damaged in the sum of $11,500.00.

The uncontradicted evidence is that the market price of raisins remained at $350 for two weeks or more after November 13, when the respondent refused to accept the raisins, although the court impliedly fixed this value at $335 per ton. The appellant testified that after Bonner refused to accept the raisins on October 28, it looked to him as though the price was going to go up "so I wasn't in a hurry"; that on November 8, when he sold to Rosenberg he thought it was better to sell only 100 tons "in case that there was a chance of going up"; that the price of raisins stayed at $350 for two weeks after November 13; that he knew on November 13, that the respondent would not take any of his raisins; that after the respondent's refusal to take the raisins he did not immediately go out on the open market and try to sell them to someone else; that he did not offer to sell them to anyone else for "two weeks or so"; and that he could have delivered them to Bonner Packing Co. and received $335 a ton. There was evidence that the respondent still wanted raisins at $350 on November 30, and that on that date it informed the appellant that it would take the raisins under its contract if he would get a cancellation of his contract with Bonner Packing Co. While the court found that the Bonner contract was canceled prior to November 8, the further finding that "said fruit" was then "free of all encumbrances", if technically correct, does not reflect the actual situation which admittedly existed. The Bonner Packing Co. was insisting on its contract, and the legal effect of what had occurred in connection therewith had in no way been determined. In a practical sense, at least, there was a serious encumbrance on the title to the raisins.

[1, 2] It was incumbent upon the appellant to act with reasonable promptness after the respondent's refusal to accept the raisins on November 13, for the reason stated. The evidence justifies the inference that the long delay resulted both from the appellant's hope that the market would continue to rise, and from the insistence of Bonner Packing Co. on the enforcement

of its contract with him. The respondent is not responsible for that situation and its reluctance to proceed with its contract, under the circumstances, was natural. Instead of forcing the issue with the Bonner Packing Co. the appellant chose to await developments, making no attempt to sell the raisins for some two weeks, and no serious attempt for a considerable period thereafter. The appellant testified that nothing was said about the Bonner contract at the time the Rosenberg contract was executed, and the court found to that effect. The respondent knew that a contract with Bonner had been previously executed, but did not know that it had not been canceled, and accepted the appellant's guarantee that his title was good and that he was free to sell his raisins.

It clearly appears that the appellant could have sold to the Bonner Packing Co. for $335 per ton within any reasonable time. By securing a release from that concern he could have sold for $350 a ton in the open market or to the respondent, at least up until the end of November. The existence of the Bonner contract was the sole cause for respondent's refusal to accept the raisins. If that contract was canceled, as found by the court, this fact was not established and the contract was still being insisted upon by the Bonner Packing Co. Instead of dealing with the Bonner Packing Co., getting a release from it, or attempting to hold it responsible, the appellant delayed action for months and then sought to place the entire blame upon the respondent.

Under these circumstances, it cannot be said that the court's findings are without support in the evidence and it cannot be held, as a matter of law, that the appellant did everything that he should have done and that he was entitled to recover the full difference of $115 a ton. The trial court was justified in believing that the entire blame for the full amount of the loss which occurred did not rest with the respondent and that only a part thereof was attributable to it. There is no evidence that the respondent in any way interfered with the appellant's right to sell these raisins, either for $350 or for $335 per ton. While the appellant later twice demanded that the respondent comply with its contract the respondent had definitely refused on November 13, as the appellant admittedly understood, and the only subsequent "negotiations" between the parties which appears in the record is that on November 30 the respondent offered to take the raisins at $350 if the appellant would secure a release from Bonner Packing Co. from the claim upon which it was insisting.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

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92 Cal.App.2d 524

PEOPLE v. HOOPER.

Cr. 2133.

District Court of Appeal, Third District, California.

June 21, 1949.

1. Robbery 🔑24(1)

Evidence sustained conviction of robbery in first degree.

2. Criminal law 🔑1159(2)

District Court of Appeal is reluctant to reverse a judgment of conviction which appears to be amply supported by evidence.

3. Criminal law 🔑656(6), 703, 1166½(12), 1171(1)

In robbery prosecution, attitude, conduct, form of questioning defendant on cross-examination, and oral comments by judge on evidence which tended to discredit defendant's testimony in support of his defense that his companion coerced him to commit crime, constituted reversible error. Pen.Code, § 1439.

4. Criminal law 🔑1166½(12)

Statement by trial judge to jury, in criminal prosecution, that jurors are sole judges of credibility of witnesses and of weight of evidence, will not cure partisan statements by trial judge which are prejudicial and necessarily result in a denial of due process.

5. Criminal law 🔑656(1), 1166½(12)

In robbery prosecution, oral comments on evidence by trial judge delivered to jury in an impassioned and argumentative manner of an advocate, by means of undue emphasis, intonation, and gesticulations, constituted, reversible error although jurors were instructed they were sole judges of credibility of witnesses and weight of evidence. Pen.Code, § 1439.

6. Criminal law 🔑656(1)

Under statute giving trial judge power to comment on evidence and credibility of any witness in a criminal case, the word "comment" means to explain or construe rather than to criticize. Pen.Code, § 1439.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Comment".

7. Criminal law 🔑656(1)

Conduct and comments on evidence by trial judge to jury in a criminal case authorized by statute must be fair, temperate, judicial, dispassionate, and free from apparent contentiousness, partisanship, or advocacy. Pen.Code, § 1439.

8. Criminal law 🔑1186(4)

A "miscarriage of justice", within meaning of constitutional provision requiring affirmance of a conviction unless error results in miscarriage of justice, may result from a lack of due process or prejudicial denial of rights of an accused in course of criminal proceeding and extends beyond mere question of whether an innocent man has been convicted or a guilty man has been acquitted. Const. art. 6, § 4½.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Miscarriage of Justice".

9. Criminal law 🔑1186(4)

Where defendant in robbery prosecution had been denied a fair trial because of trial judge's comments tending to discredit defendant's testimony and prejudicial conduct in commenting on evidence in an impassioned and argumentative manner of an advocate, a miscarriage of justice resulted and a new trial would be granted. Const. art. 6, § 4½.

Appeal from Superior Court, Solano County; C. C. McDonald, Judge.

Odell Hooper was convicted of robbery in the first degree, and he appeals.

Reversed.

John C. Henderson, Oakland, for appellant.

Fred N. Howser, Atty. Gen., Doris H. Maier, Deputy Atty. Gen., for respondent.

THOMPSON, Justice.

The defendant, Odell Hooper, was convicted by a jury of the crime of robbery of the first degree and sentenced to San Quentin for the term prescribed by law. His motion for new trial was denied. From the judgment and from the order denying a new trial this appeal was perfected.

[1] There is ample evidence to support the verdict and judgment. The only point urged on appeal is that the defendant was deprived of an impartial trial and due process by prejudicial conduct of the trial judge in discrediting defendant's testimony at the trial by his observations affecting the credibility of the witness, and also by his oral comments and instructions to the jury, pursuant to Section 1439 of the Penal Code, and by his manner, gestures and language, tending to discredit the defendant's evidence.

The record shows that appellant lived with his wife in Oakland. She was employed for several years in a Naval Supply Store in that city.

The appellant had been acquainted with James Smith of Oakland for several months. Smith owned an automobile. In the forenoon of February 28, 1948, Smith called on appellant and asked him to ride with him in his machine to Vallejo. Hooper accepted the invitation and they first went to Richmond. Leaving that city about 3:30 P.M., they drove to Vallejo. They spent some time at various bars, playing games and drinking liquor. Hooper claimed that he had about $90 which his wife had delivered to him. About 7:30 that evening they drove to the outskirts of Vallejo and, for the asserted purpose of obtaining some matches, they parked their car in the rear of the Variety Store owned and operated by Alex Schmall, and entered the store where they spent some time playing pin-pool and other chance games. Smith borrowed a dollar from Hooper, which he lost at some game. There were then no other customers in the store. Suddenly, Smith drew a revolver and flourishing it told the proprietor "it was a stickup." The appellant testified that he had not previously known that Smith had a revolver, or that he intended to rob that store or any other place; that when Smith displayed his revolver he said, "This is a stickup, lock that door, Odell"; that Smith repeated his command to Hooper, saying, "You heard what I said, lock the door and then go get that money"; that Smith then addressed himself to the proprietor, saying, "Give him that money, every nickel, or I will blow your brains out." The proprietor, Mr. Schmall, said that he proceeded to take from the cash drawer the sum of $45, which was all the money it contained, and handed it to Hooper. He testified, "I wasn't fast enough for him, I guess, and he [Hooper] said 'Make it snappy.'" Hooper took the money and went to the door, but a woman customer just then entered and Smith told her "this is a holdup," and ordered her to get over into a designated corner. Two or three other customers entered the store at that time and were likewise forced by Smith into the same corner. By means of threats to shoot them if they did not promptly obey orders, Smith robbed them of their purses.

In the meantime, Hooper left the store with the $45 which he received from the proprietor. Apparently he was not in the room when the customers were actually robbed by Smith. Hooper testified that when he left the store he went directly to their car and left the $45 on the cushion of the front seat, and that he then walked away. Smith testified at the trial of Hooper, corroborating much of his evidence regarding the affair. Smith said that he ordered Hooper to get the money from the proprietor, and that he (Smith) left the store immediately after getting the purses from the customers and went directly to their machine where he found the $45 on the cushion of the front seat; that he drove around the block and picked up Hooper on a nearby corner; that he took the money, aggregating the sum of $225, from the stolen purses in his possession, and threw the empty purses out on the pavement; that he offered to divide the stolen money with Hooper, but that Hooper refused to accept any portion of it, saying that he was not implicated in the robbery. At the trial Hooper testified that he took the money from the proprietor only because he feared that Smith would shoot him if he did not obey his orders, and that he knew nothing of Smith's plan to stage the holdup.

After the robbery the young men drove back to Oakland. They were subsequently arrested and separately charged with the crime. They signed a written statement at the request of the officers, which contained some inconsistencies. Hooper claimed that he was coerced into signing the statement.

It appears that Smith was separately charged with the crime and that he either pleaded guilty or was convicted, for he was an inmate in San Quentin at the time he was called as a witness in the Hooper trial. Hooper was convicted of the crime as charged. His motion for a new trial, which was based on affidavits of prejudicial misconduct of the trial judge in his cross-examination of the defendant and in his oral instructions to the jury, was denied. From the judgment and order denying a new trial this appeal was perfected.

It is immaterial for the purpose of this appeal that there is ample evidence to support the judgment of conviction, or that the defense of Hooper may appear to be fictitious. The evidence was conflicting in that regard. The appellant contends that he had no knowledge that his companion, Smith, was armed with a revolver, or that he intended to stage a holdup. The appellant claimed that he obeyed the command of Smith and received $45 from Mr. Schmall, the proprietor of the Variety Store, only because he feared that he would be shot if he refused to do so, and that he did not *feloniously* take the money or participate in the robbery.

[2, 3] We are reluctant to reverse a judgment of conviction which appears to be amply supported by the evidence. But we are persuaded that the attitude, conduct, form of questioning the defendant on cross-examination and oral comments by the judge on the evidence which was given to the jury, together with his alleged manner of so doing, which was not refuted by counter-affidavit or otherwise, exceeded the province of the court and resulted in discrediting the evidence of the defendant to his prejudice. We are impelled to hold that the manner of cross-examination and oral comments on the evidence, considered as a whole, constitute reversible error.

There were some inconsistencies between defendant's testimony at the trial and his previous signed statement with respect to his recognition of Mr. Schmall as the proprietor of the Variety Store where the robbery was committed, and as to whether he went there with his companion, Smith. When those inconsistencies were developed on cross-examination, the judge addressed the defendant and said, "You don't always tell the truth then, do you?" After the court had brought out the inconsistency by cross-examination, the judge closed that colloquy by again saying to him, "Then, I say, you don't always tell the truth, do you?"

The defendant testified that his wife, who had been working for several years in a Naval Supply Store, had delivered her earnings in the sum of $90 to him "to tote" for her, and that she had asked him that day to buy her a pair of stockings. Defendant's wife corroborated his testimony with respect to the delivery of her earnings. She said she gave him her check amounting to $131, out of which some bills were paid, leaving a balance in his possession of about $92. It was assumed by the prosecution that the $90 in question was not given to the defendant by his wife, but that it was a portion of the stolen money. The district attorney asked him on the stand if he had not "rehearsed this story quite a number of times." After an objection to the question had been overruled, the defendant replied, "No sir, I haven't." The judge then turned to the defendant and said: "Let me ask you this: Did your wife ask you to get her ninety dollars worth of stockings?" The defendant again attempted to explain his possession of the $90, and the court said, "What made her so benevolent?" The court closed that episode by again inquiring of the defendant, "Why did she give you ninety dollars to get a pair of stockings?"

After the defendant had testified that he and Smith had spent about 45 minutes in the Variety Store playing pin-pool and chance games, and that Smith then drew his revolver and commanded Hooper to take the money from the proprietor, the court then addressed the witness, Hooper, and said, "Weren't you fellows kind of stalling around and waiting until dark, about closing time, so that there wouldn't be any people coming in?" Other similar and sarcastic remarks were addressed to the witness which tended to discredit his testimony.

[4] The court's oral comments to the jury upon the evidence, under Section 1439 of the Penal Code, were transcribed and are before this court. They appear to be argumentative and partisan in effect. We are convinced the jury must have inferred from the attitude and comments of the judge that he discredited the defendant's testimony and believed he should be found guilty of robbery. They were therefore clearly prejudicial. It is true that the challenged charge to the jury began and closed with statements that the jurors were the sole judges of the credibility of witnesses and the weight of the evidence. But it has been uniformly held that such instructions will not cure partisan statements which are prejudicial and necessarily result in a denial of due process. In this case the most harmful invasion of the rights of the defendant was the passionate manner in which the comments were alleged to have been delivered, by intonation and gesticulations, which was not denied by counter-affidavits or otherwise. In those comments the court marshalled seven separate inquiries, each of which commenced with the injunction that "You have the right to inquire:" (1) "Is it likely in the natural course of human events" that the defendant, through fear of receiving bodily injury from his associate, Smith, would

obey his command to take the $45 from the proprietor, "without any previous agreement or arrangement" between them? (2) "If the defendant took the money from Schmall at the point of a gun and through compulsion by Smith, why he didn't take the money directly to Smith"; (3) "If there was no previous understanding between them, * * * why he [Smith] didn't direct the defendant to bring it and deliver it to him immediately"; (4) "If there was no previous arrangement between them, * * * why he [Hooper] took it and left the building without taking it directly to the witness Smith"; (5) "If he did take the money from Schmall and took it out the door, would he, as a reasonable man, dare do such a thing, or would he seem duty bound to take it directly to the witness Smith"; (6) "If he took it innocently, is it reasonable to suppose he would have [subsequently] met Smith and rode with him"; (7) "If there had been no previous arrangement between them, would Smith, as a reasonable man, having committed the crime of first degree robbery, been glad to get rid of the man with whom he had no previous arrangement, and would he have directed the defendant to deliver the forty-five dollars to him and let him [Hooper] get home the best way he could and take off by himself?"

We think the foregoing comments sound very much like the argument of an advocate of the guilt of the accused person, in spite of the fact that the judge closed his remarks by stating that he was not passing on the weight of evidence or the credibility of any witness, and that those duties were solely within the province of the jury.

[5] We conclude that the oral comments on the evidence, which we must assume were delivered to the jury in an impassioned and argumentative manner of an advocate, by means of undue emphasis, intonation and gesticulations, were prejudicial and prevented an impartial trial or due process.

[6] We are aware of the fact that by the adoption of Article VI, Section 19, of the California Constitution in 1934, and Section 1439 of the Penal Code in 1935, the power of the trial court to "comment on the evidence and the testimony and credibility of any witness" in a criminal case, was enlarged beyond the scope previously allowed by law in that regard. The word "comment" is derived from the Latin word "commentari," which ordinarily means to explain or construe, rather than to criticise.

[7] It is true that it is impossible to apply a fixed rule to determine just what conduct or comments of a trial judge may amount to a prejudicial invasion of the rights of a defendant. "Each case must necessarily turn upon its own peculiar circumstances." People v. De Moss, 4 Cal.2d 469, 477, 50 P.2d 1031, 1034. But the rule is well established by numerous California cases, and by a multitude of authorities in other jurisdictions, that the conduct and comments on the evidence by the judge to the jury in a criminal case must be fair, temperate, judicial, dispassionate, and free from apparent contentiousness, partisanship or advocacy. It has been frequently held that such comments should not be argumentative. People v. De Moss, supra; People v. Patubo, 9 Cal.2d 537, 542, 71 P.2d 270, 113 A.L.R. 1303; People v. Dail, 22 Cal.2d 642, 657, 140 P.2d 828; People v. Talkington, 8 Cal.App.2d 75, 90, 47 P.2d 368; 113 A.L.R. 1312, note.

The foregoing rule with respect to the prejudicial effect of the court's comments to the jury on the evidence and the credibility of witnesses, has been enforced and the judgments reversed an that account, notwithstanding the fact that the court also definitely instructed the jurors they were the sole judges of the weight of the evidence and the credibility of witnesses. People v. Patubo, supra; People v. Mason, 72 Cal.App.2d 699, 711, 165 P.2d 481. In the Mason case, last cited, the court quoted with approval 72 Cal.App.2d at page 711, 165 P.2d at page 487, from the Talkington case, supra, which in turn quoted with approval from O'Shaughnessy v. United States, 5 Cir., 17 F.2d 225, as follows:

"'General statements in the charge, to the effect that the jury were at liberty to disregard the court's views as to (the defendant's) guilt or innocence, and to base their verdict on their own conclusions from the evidence, do not cure the fault in the charge of a lack of impartiality in submitting the evidence to the jury, or justify the court in making one-sided recitals of evidence, or in furnishing arguments in behalf of only one side of issues, as to which the evidence is conflicting.' "

We are convinced that the challenged comments of the judge to the jury, particularly in view of the uncontradicted averments that they were made in an argumentative and partisan manner of an advocate, by means of his attitude, gestures, intonation and voice, were prejudicial to the defendant and deprived him of an impartial trial and due process. There was at least a conflict of evidence as to whether the defendant *feloniously* took the money from the proprietor of the store with intent to rob him, or, as he contended, that he merely obeyed the command of his armed associate and took it only to save himself from being shot, and that he had no previous knowledge that Smith was armed with a revolver or that he intended to commit robbery.

[8] It is not our province to hold, upon a conflict of evidence, as a matter of fact, that the defendant was guilty of robbery, and that therefore the judgment should be affirmed under Article VI, Section 4½, of the Constitution, because there was no miscarriage of justice. A miscarriage of justice may result from a lack of due process, or from prejudicial denial of the rights of an accused person in the course of the trial. It extends beyond the mere question of whether an innocent man has been convicted, or a guilty man has been acquitted. In the Mason case, supra, it is said 72 Cal. App.2d at page 716, 165 P.2d at page 490:

"* * * And in any event, the term 'miscarriage of justice' as used in the constitutional provision, 'does not simply mean that a guilty man has escaped, or that an innocent man has been convicted. It is equally applicable to cases where the acquittal or the conviction has resulted from some form of trial in which the essential rights of the people or of the defendant were disregarded or denied.' People v. Wilson, 23 Cal.App. 513, 524, 138 P. 971, 975. See, also, People v. Duvernay, 43 Cal. App.2d 823, 829, 111 P.2d 659."

And in People v. Dail, supra, it is said 22 Cal.2d at page 659, 140 P.2d at page 837:

"* * * In considering the effect of article VI, section 4½ of the Constitution, 'We are not substituted for the jury. We are not to determine, as an original inquiry, the question of the defendant's guilt or innocence.' People v. O'Bryan, 165 Cal. 55, 66, 130 P. 1042, 1046; see, also, People v. Roe, 189 Cal. 548, 561, 209 P. 560. As stated in Tupman v. Haberkern, 208 Cal. 256, 263, 280 P. 970, 973, 'Whether the error found to be present "has resulted in a miscarriage of justice" presents a question of law on the record before the court, and the purpose of the section [4½] was to require the court to declare as matter of law whether the error has affected the substantial rights of the party complaining against it, and not for the purpose of determining the evidentiary value of the testimony or where the preponderance of the evidence lies.' "

[9] We conclude that Article VI, Section 4½, of the Constitution has no application to the circumstances of this case, and that it may not afford a cure for the prejudicial conduct complained of in this case. People v. Talkington, supra, 8 Cal. App.2d at page 100, 47 P.2d 368.

People v. Ramos, 66 Cal.App.2d 731, 152 P.2d 758, upon which the respondent relies, is distinguishable from the present case. In that case this court affirmed a judgment of conviction of robbery, notwithstanding the voluntary comments of the trial judge on the evidence. The comments in that case were in no wise comparable to those which were made in the present case. But irrespective of the question of whether they appeared to be argumentative or partisan in character, there was no evidence in that case that the judge delivered his comments in the prejudicial attitude of an advocate, with gestures, intonation of voice, and argument so as to impress the jury with the fact that he discredited the defendant's testimony. Moreover, there was no evidence in that case of prejudicial statements made by the court to the defendant in the course of his cross-examination, as there is in the present case.

The other cases cited by the respondent, in which appropriate comments of the judge upon the evidence were approved on appeal, are likewise distinguishable from the present case.

The judgment and the order denying a new trial are reversed.

ADAMS, P. J., and SCHOTTKY, Justice pro tem., concur.

92 Cal.App.2d 467

Ex parte JOHNSON.

Cr. 2585.

District Court of Appeal, First District, Division 1, California.
June 17, 1949.

1. Divorce 🔑209(14)

Chapter of Code relating to discharge of persons imprisoned on civil process, under which a person confined in jail on an execution issued on a judgment rendered in a civil action must be discharged if he is unable to pay the judgment for which he is confined, applies where person has been adjudged in contempt of court and committed to jail for failure to make payments for support of wife required by court order, and has since become unable to make the required payments. Code Civ.Proc. §§ 1143–1154.

2. Habeas corpus 🔑22(2)
Mandamus 🔑60

Where a person has been adjudged in contempt of court and committed to jail for failure to make payments for support of wife required by court order, and he subsequently becomes unable to make the required payments, discharge from custody may be sought under statute either through habeas corpus proceeding or by mandamus. Code Civ.Proc. §§ 1143–1154.

Appeal from Superior Court, City and County of San Francisco; Twain Michelsen, Judge.

Proceeding in the matter of the application of Andrew Johnson for a writ of habeas corpus. From judgment denying the application and returning petitioner to custody, petitioner appeals.

Petitioner discharged from custody and his bail exonerated.

John D. Harloe, San Francisco, for appellant.

Harry Gottesfeld, San Francisco, for respondent.

PETERS, Presiding Justice.

Petition for a writ of habeas corpus.

On November 30, 1948, in the action of Bessie Johnson versus Andrew Johnson, there was entered an amended and modified order requiring Andrew to pay Bessie $50 a month for her support, $150 counsel fees, and $25 costs. Andrew failed to make the payments, and, on January 18, 1949, he was adjudged guilty of contempt for willfully failing to comply with the order. He was committed to the county jail until he did so. This order of commitment has not been attacked, and constitutes an adjudication that on January 18, 1949, Andrew had the ability to comply with the order and willfully refused to do so.

On February 4, 1949, Andrew, purporting to act under §§ 1143 to 1154 of the Code of Civil Procedure, applied to the Superior Court for his release from custody upon the ground that he did not, on such date, then have the ability to comply with the order. The application came on for hearing on February 8th and was continued from then to February 21st, and finally to February 25th. On this last date he was examined as to his then ability to comply with the order, and written interrogatories were signed by him. From his evidence, given under oath, it appears that his last regular full-time employment terminated in November, 1948; that from that date until January 16, 1949, he worked but one day a week in a garage; that he owns no real or personal property of any kind; that he has no money in the bank; that he has no interest in any life insurance policy; that he owns no stocks or bonds; that no one holds any money or property for him, nor does any one owe him any money; that he does not have a safe deposit box. Andrew was the only witness who testified, and his testimony is uncontradicted and unimpeached. The Superior Court, without explanation, denied the application for release from jail, and returned him to custody. This petition was then filed.

Petitioner contends that, under such circumstances, he is entitled to his release under §§ 1143 to 1154 of the Code of Civil Procedure. These sections constitute the chapter of that code that is entitled "Discharge of Persons Imprisoned on Civil Process." Section 1143 provides that: "Any person confined in jail, on an execution issued on a judgment rendered in a civil action, *must be discharged* therefrom upon the conditions in this chapter specified." (Italics added.)

Sections 1144 and 1145 provide for notice to and service upon the opposing party. Section 1146 provides: "At the time and place specified in the notice, such person must be taken before such judge or justice, who must examine him under oath concerning his estate and property and effects, and the disposal thereof, and his ability to pay the judgment for which he is committed; and such judge or justice may also hear any other legal and pertinent evidence that may be produced by the debtor or the creditor."

Section 1147 provides for written interrogatories to be submitted to the prisoner, and § 1148 provides: "If, upon the examination, the judge or justice is satisfied that the prisoner is entitled to his discharge, he must administer to him the following oath, to wit: 'I ———, do solemnly swear that I have not any estate, real or personal, to the amount of fifty dollars, except such as is by law exempted from being taken on execution; and that I have not any other estate now conveyed or concealed, or in any way disposed of, with design to secure the same to my use, or to hinder, delay, or defraud my creditors, so help me God.'"

Section 1149 provides: "After administering the oath, the judge or justice must issue an order that the prisoner be discharged from custody, and the officer, upon the service of such order, must discharge the prisoner forthwith, if he be imprisoned for no other cause." The other sections of the chapter have no direct application to the present proceeding.

Counsel for Mrs. Johnson contends that these sections are not at all applicable to an imprisonment based upon a contempt for failing to pay alimony or support, arguing that sections only apply where the prisoner has been committed on an execution issued on a judgment in a civil action, and not to criminal or quasi criminal contempts. The opinion in the case of In re Pillsbury, 69 Cal.App. 784, 232 P. 725, contains language, by way of dicta, that supports this view. 69 Cal.App. at page 790, 232 P. at page 728, it is stated:

"Finally, it is contended that the petitioner made application under section 1143 of the Code of Civil Procedure to purge himself of the contempt for which he had been imprisoned, but that the trial court, upon the date set for hearing said application, declined to hear any evidence, and dismissed the application. It appears that counsel for respondent objected upon the ground that there was no issue before the court, and that this objection was sustained.

"Section 1143, Code of Civil Procedure, relates to persons confined in jail on an execution issued on a judgment in a civil action, and, where his ability to comply with an order of court has previously been determined by the trial court, this section is not applicable * * *."

On its face this reasoning is palpably unsound. If the code sections have no application where the prisoner's ability to comply with the order has previously been determined, it would mean that a prisoner who had the ability to pay when committed, but who becomes unable to pay after his commitment, would have to stay in jail for life for failing to pay alimony. Such cannot be the law. Not only was the quoted portion of the Pillsbury opinion not necessary to the decision, but the holding is directly contrary to that of several other cases and has been expressly disapproved in at least one later case. In Ellery v. Superior Court, 25 Cal.App.2d 222, 77 P.2d 280, a husband was committed for contempt for failure to pay a maintenance award. He unsuccessfully attempted to challenge his commitment by a habeas corpus petition. Shortly after he had been placed in custody he filed an application under § 1143 et seq. of the Code of Civil Procedure for an order of discharge. The trial court entertained the application and admitted the applicant to bail pending the hearing. The wife thereupon brought a proceeding in mandamus to compel dismissal of the pending application and to have the husband remanded to jail, it being her contention that the code sections mentioned have no application to a contempt imprisonment predicated on failure to pay alimony for the reason that a judgment for maintenance is not a debt. In disposing of this contention the Court stated, 25 Cal.App.2d at page 223, 77 P.2d at page 281.

"It is well settled that such a judgment is not a debt within the meaning of section 15 of article 1 of the Constitution, which secures a citizen against imprisonment for debt. Nevertheless the duty of support, though not technically a debt, is an obligation which may be enforced by the process of contempt. [Citing cases.] In Re Application of Wilson, 75 Cal. 580, 17 P. 698, the question here presented was determined. There it was held that the petitioner, who in a divorce action had been ordered to pay alimony and committed for contempt on his failure to pay, was in custody under an execution, and would be entitled to his discharge under the code sections cited upon proof establishing his subsequent inability to comply with the order. The rule thus declared was referred to with tacit approval in Spencer v. Lawler, 79 Cal. 215, 21 P. 742; Ex parte Batchelder, 96 Cal. 233, 31 P. 45; and Ex parte Levin, 191 Cal. 207, 215 P. 908. See, also, 1 Cal. Jur., Alimony and Maintenance, § 108, p. 1061.

"In this connection In re Pillsbury, 69 Cal.App. 784, 785, 232 P. 725, is cited and relied upon by petitioner; but an examination of the case shows that what was said to the contrary was unnecessary to the decision. We think it clear that the code sections apply to cases of this character; and if it be established that Ellery since his commitment has become unable to comply with the order of court, respondent has jurisdiction to entertain his application for discharge."

In the Wilson case, referred to in the Ellery case, the petitioner, after eight months of confinement, applied to the trial court for a discharge under § 1143 et seq. of the Code of Civil Procedure. The Court took evidence and denied the writ, on two grounds, one of which was that the sections have no application to contempt imprisonment predicated on the failure to pay alimony. The Supreme Court upheld the trial court for the first reason given by it for its denial, but, in view of the possibility of a new application being filed, undertook to determine the correctness of the second reason, and held it to be invalid. The Supreme Court first held that a contempt for failing to pay alimony is a "civil contempt" and the person imprisoned is in custody "under an execution." [75 Cal. 580, 17 P. 700.] After citing several cases to support these conclusions, the Court stated, 75 Cal. at page 583, 17 P. at page 700: "We think, therefore, that if the petitioner shall make another application for discharge, under the sections of the Code above mentioned, it will be the duty of the superior judge to whom it shall be made to consider the case as coming within the provisions of those sections; to hear evidence touching his property and effects; to discharge the petitioner if he be satisfied, from the evidence, of his inability to pay; and to remand him, if he be not so satisfied. To hold that the petitioner, though utterly penniless, must suffer a life imprisonment for debt because of the particular form in which the imprisonment was imposed, would be a gross violation of the plain intent of the Code."

[1] Based on these cases, and for the reasons therein set forth, we conclude that the sections in question apply to one imprisoned for contempt predicated on a failure to pay alimony.

[2] Counsel for Mrs. Johnson also contends that habeas corpus is not the proper remedy, and that if petitioner is entitled to any relief it must be by way of writ of mandamus to compel the trial court to ad-

minister the oath and to discharge the prisoner. While mandamus would undoubtedly be an appropriate remedy, it is not necessarily the exclusive one. Here the petitioner has made a proper application. According to his uncontradicted and unimpeached testimony he is presently unable to pay the alimony award. There is no contention made that any other evidence but that of petitioner was introduced. On the face of the record the petitioner was entitled to his discharge. The present restraint of his person is illegal. He is being presently illegally restrained of his liberty. This being so, the petitioner should not be relegated to the remedy of mandamus, but is entitled to the much more expeditious remedy of habeas corpus.

There being no legal justification for petitioner's further imprisonment, he is ordered discharged from custody and his bail is ordered exonerated.

WARD and BRAY, JJ., concur.

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92 Cal.App.2d 490

SPENCER v. ATCHISON, T. & S. F. RY. CO.

Civ. 16662.

District Court of Appeal, Second District, Division 3, California.

June 20, 1949.

Hearing Denied Aug. 18, 1949.

1. Judgment 🔑199(3.9)
Master and servant 🔑284(1)

In actions under the Federal Employers' Liability Act, when evidence is such that without weighing credibility of witnesses there can be but one reasonable conclusion as to the verdict, court should determine proceeding by nonsuit, directed verdict, or otherwise in accordance with applicable practice without submission to jury, or by judgment notwithstanding verdict. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

2. Master and servant 🔑265(3, 9)

To recover under the Federal Employers' Liability Act, plaintiff must prove affirmatively that defendant was negligent and that such negligence was approximate cause of injury; and liability cannot be based on mere speculation, and negligence must be proved whether charge is that equipment is defective or insufficient. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

3. Master and servant 🔑101(9)

"Negligence" as used in the Federal Employers' Liability Act is the violation by a carrier of its duty to use reasonable care in furnishing its employees with a safe place to work, and safe tools and appliances with which to work. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Negligence".

4. Master and servant 🔑265(6)

Fact of an accident does not carry with it any presumption of negligence on part of a railroad in action by employee under the Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

5. Master and servant 🔑265(6)

Where brakeman brought action against railroad under the Federal Employers' Liability Act for back injury allegedly sustained when brakeman threw spring switch, mere proof of insufficiency of switch at time of accident did not establish negligence on part of railroad. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

6. Master and servant 🔑101(9), 265(9)

Railroad under the Federal Employers' Liability Act need not anticipate misuse of equipment or guard against consequences of misuse; and, where an otherwise sufficient piece of equipment has been rendered insufficient and dangerous to an employee, employee must prove actual or constructive notice of condition to employer before he can recover damages. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

7. Master and servant 🔑125(1, 8)

Where brakeman claimed back injury resulted when he threw spring switch, brakeman could recover under Federal Employers' Liability Act only if railroad knew, or by ordinary care should have known, of alleged defective condition of switch in sufficient time to have corrected it before accident, and whether railroad had constructive notice depended upon whether switch was in same condition for sufficient length of time so that it reasonably could be inferred that railroad had notice. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

8. Master and servant ⚿112(4)

Where there was no evidence that railroad spring switch ever required more than one man to throw it before alleged accident or that any single person in employ of railroad knew that prior to accident switch could not be thrown by one man, and switch was inspected daily and had been used before injury and thereafter without difficulty, railroad was not liable for wrenched back suffered by brakeman in attempting to throw switch, on theory of negligence of maintenance under the Federal Employers' Liability Act. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

◆

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by G. Dale Spencer against the Atchison, Topeka & Santa Fe Railway Company, a corporation, brought under the Federal Employers' Liability Act, for personal injuries allegedly sustained while working on defendant's railroad. From the judgment, plaintiff appeals.

Judgment affirmed.

Hildebrand, Bills & McLeod and Booth B. Goodman, Oakland, for appellant.

Robert W. Walker, H. K. Lockwood, Parker, Standbury & Reese, and Raymond G. Stanbury, Los Angeles, for respondent.

VALLÉE, Justice.

Plaintiff appeals from a judgment entered on the granting of a motion for a directed verdict in an action under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., providing that every common carrier by railroad engaged in interstate commerce shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, * * * or other equipment." Sec. 51.

Plaintiff claims to have been injured while throwing a spring switch on defendant's road in Daggett, California, situate in a desert country. A spring switch is one which holds the switch points against the rail by a spring. The ordinary rigid switch holds the switch points against the rail by means of rods. Each type of switch is operated with a lever handle. To throw the switch the handle is lifted and pulled on a stand until it locks. By pulling the lever of a spring switch a piston is forced through a cylinder of oil about the consistency of coal oil. The oil passes through a tiny hole in the collar of the piston. The only way the oil can pass from one side of the piston to the other is through the tiny hole. For this reason it is necessary to give the lever a slow, steady pull. If the lever is jerked or pulled suddenly the result is a rebound or a hard jerk.

A spring switch is standard equipment and made for one man operation. It requires daily inspection. It has to be tested once a week because the spring tension has to be watched. To work properly it has to be cleaned and oiled so that the mechanism will slide smoothly. If a spring switch is neglected it is difficult to throw. If properly maintained and oiled it can be thrown by one man of ordinary strength. It is the duty of section foremen to see that spring switches are in proper condition and to keep them clean and oiled. A spring switch is a little harder to throw than a rigid switch. Some of them are very hard to throw and require quite a bit of muscular effort. Whether a spring switch throws harder one time than another depends upon the condition of the plates.

Plaintiff went to work for defendant as a brakeman on May 10, 1945. He was on student trips until May 25, when he made his first run. He was instructed how to throw a spring switch. On June 23, 1945, while on a freight run he was injured. He testified: "I unlocked the switch and attempted to throw it and I was unable to throw the switch. I had to call for help and there was another brakeman on the train and he came up and helped me to throw the switch." The two together threw the switch. In endeavoring to throw it, he followed the instructions which had been given him. When he first tried to throw it, he wrenched his back. He was not able to budge the switch then. When the other man helped him it required all of their strength. When he first went to throw the switch he "merely lifted the switch lever and attempted to pull the switch around" and it did not throw. He "didn't jerk." He did not give it "a jerk but a quick pull." Plaintiff worked out the run after the train left Daggett and continued working for defendant as a brakeman until July 9, 1945, when he sought medical aid.

The Track Supervisor oiled the switch in question daily. He tested it daily by trying it on the reverse side, seeing that it was free from dirt, sand, any articles that might drop from trains and by seeing that it had oil in it. If it needed cleaning he cleaned it. We never heard of anything wrong with the switch except on August 11, 1945, when plaintiff's accident was first reported. The switch was not repaired between the day plaintiff claims to have been injured and August 11, 1945. On August 11, 1945, he inspected the switch and found it in good condition. The switch was also inspected once a week by the Signal Maintainer because the signal circuit comes through the switch box. In making the inspection he threw the switch. He testified that any spring switch is hard to throw. He had never found anything wrong with the switch during the year before or the year after June, 1945. He made a special inspection of the switch on August 11, 1945, after plaintiff had reported his accident and did not find anything wrong with it or the way it operated. A section gang was assigned to every 8 or 10 miles of track.

[1] The rule governing the duty of the court on a motion for a directed verdict in actions under the Federal Employers' Liability Act is that "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims." Brady v. Southern R. Co., 320 U.S. 476, 64 S.Ct. 232, 234, 88 L.Ed. 239, 243; Patton v. Texas & P. R. Co., 179 U.S. 658, 21 S.Ct. 275, 45 L.Ed. 361, 363. The foregoing narration of the facts states the evidence and all inferences therefrom viewed in a light most favorable to plaintiff.

[2-5] To recover under the Act it was incumbent upon plaintiff to affirmatively prove that defendant was negligent and that such negligence was a proximate cause of the injury and liability cannot be predicated on mere speculation. Eckenrode v. Pennsylvania R. Co., 335 U.S. 329, 69 S.Ct. 91, 93 L.Ed. 41; Reynolds v. Atlantic Coast Line R. Co., 336 U.S. 207, 69 S.Ct. 507, 93 L.Ed. 618; Tennant v. Peoria & Pekin Union R. Co., 321 U.S. 29, 32, 64 S.Ct. 409, 88 L.Ed. 520, 524; Brady v. Southern R. Co., 320 U.S. 476, 64 S.Ct. 232, 88 L.Ed. 239, 243. "Negligence" as used in the Act is the violation by the carrier of its duty to use reasonable care in furnishing its employees with a safe place to work and safe tools and appliances with which to work. Bailey v. Central Vermont R. Co., 319 U.S. 350, 352, 63 S.Ct. 1062, 87 L.Ed. 1444, 1447. Plaintiff says his theory is that he was injured by reason of the insufficiency of the switch due to negligence of maintenance, not upon the theory of defect. Negligence must be proved whether the charge is that the equipment is defective or insufficient. 45 U.S.C.A. § 51; Seaboard Air Line Ry. Co. v. Horton, 233 U.S. 492, 501, 34 S.Ct. 635, 639, 58 L.Ed. 1062, 1069, L.R.A.1915C, 1, Ann.Cas. 1915B, 475. In the latter case the court, referring to the clause of section 51 quoted ante, said 233 U.S. at page 501, 34 S.Ct. at page 639, 58 L.Ed. at page 1069: "This clause has two branches; the one covering

the negligence of any of the officers, agents, or employees of the carrier, which has the effect of abolishing in this class of cases the common-law rule that exempted the employer from responsibility for the negligence of a fellow employee of the plaintiff; and the other relating to defects and insufficiencies in the cars, engines, appliances, etc. But, plainly, with respect to the latter as well as the former ground of liability, it was the intention of Congress to base the action upon negligence only, and to exclude responsibility of the carrier to its employees for defects and insufficiencies not attributable to negligence. The common-law rule is that an employer is not a guarantor of the safety of the place of work or of the machinery and appliances of the work; the extent of its duty to its employees is to see that ordinary care and prudence are exercised, to the end that the place in which the work is to be performed and the tools and appliances of the work may be safe for the workmen. [Citations.] To hold that under the statute the railroad company is liable for the injury or death of an employee resulting from any defect or insufficiency in its cars, engines, appliances, etc., however caused, is to take from the act the words 'due to its negligence.' The plain effect of these words is to condition the liability upon negligence; and had there been doubt before as to the common-law rule, certainly the act now limits the responsibility of the company as indicated." The fact of accident does not carry with it any presumption of negligence on the part of the carrier, Patton v. Texas & P. R. Co., 179 U.S. 658, 21 S.Ct. 275, 45 L.Ed. 361, nor does mere proof of insufficiency of the switch at the time of the accident establish negligence.

[6] There is no duty on the carrier under the Federal Employers' Liability Act to anticipate the misuse of equipment or to guard against the consequences of misuse. Brady v. Southern R. Co., 320 U.S. 476, 64 S.Ct. 232, 88 L.Ed. 239, 243; Lowden v. Bowen, 199 Okl. 180, 183 P.2d 980. It is settled that where an otherwise sufficient piece of equipment has been rendered insufficient and dangerous to an employee the plaintiff must prove actual or constructive notice of the condition to the employer before he can recover damages. Patton v. Texas & P. R. Co., 179 U.S. 658, 21 S.Ct. 275, 45 L.Ed. 361, 365; Matthews v. Southern Pac. Co., 15 Cal.App.2d 36, 42, 59 P.2d 220; Wilson v. Missouri Pac. R. Co., 319 Mo. 308, 5 S.W.2d 19, 21, certiorari denied 278 U.S. 622, 49 S.Ct. 25, 73 L.Ed. 543; Winslow v. Missouri K. & T. Ry. Co., Mo.App., 192 S.W. 121; 56 C.J.S., Master and Servant, § 244, page 1000.

[7] Plaintiff could recover only in case the defendant knew, or by the exercise of ordinary care should have known, of the condition of the switch as described by him in sufficient time to have corrected it before the accident. Unless there is evidence tending to show that defendant had actual or constructive notice of the condition of the switch, negligence has not been proved. There is no evidence of actual notice. Whether defendant had constructive notice of the condition of the switch on the day of the accident depends upon whether it was in that same condition for a sufficient length of time that it reasonably could be inferred that defendant had such notice. There is no evidence that the switch was in the condition described by plaintiff at any time other than on the occasion he says he was injured. The evidence is that it was in good operating condition at all times. There is no evidence that a single person in the employ of defendant knew prior to the accident that the switch could not be thrown by one man. The switch was inspected daily. It had been used for some time before plaintiff's injury and was used thereafter without difficulty. Manifestly defendant had no reason to anticipate that because the spring switch was harder to throw than a rigid switch, the use of the spring switch would result in an injury to an employee throwing the switch. Defendant was not negligent in failing to foresee such possible injury. There is no evidence of "negligence of maintenance."

In Lowden v. Bowen, 199 Okl. 180, 183 P.2d 980, it was held that negligence was not proved because a flat car pushed by the plaintiff was worn and harder to push than other flat cars in better condition. In Matthews v. Southern Pac. Co., 15 Cal.App. 2d 36, 59 P.2d 220, the plaintiff was injured in throwing a switch. He testified that after sustaining the injury he found a large rusty railroad nut lying on the plate of the switch. A judgment of nonsuit was affirmed on the ground that there was no evidence that the railroad had actual or constructive notice of the condition of the switch and hence no proof of negligence.

In the case at bar there is no evidence and no inference that can reasonably be drawn from the evidence that defendant knew or in the exercise of ordinary care should have known of the insufficiency of the switch.

Plaintiff relies on the following cases for reversal: Tennant v. Peoria & Pekin Union R. Co., 321 U.S. 29, 64 S.Ct. 409, 88 L.Ed. 520; Bailey v. Central Vermont R. Co., 319 U.S. 350, 63 S.Ct. 1062, 87 L.Ed. 1444; Lavender v. Kurn, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916; Baltimore & Ohio R. Co. v. Kast, 6 Cir., 299 F. 419; Baltimore & Ohio R. Co. v. Flechtner, 6 Cir., 300 F. 318; Haskins v. Southern Pacific Co., 3 Cal.App.2d 177, 39 P.2d 895, and Thomas v. Southern Pacific Co., 116 Cal.App. 126, 2 P.2d 544. No one of these cases is analogous. In each negligence was affirmatively proved.

Judgment affirmed.

SHINN, P. J., and WOOD, J., concur.

Hearing denied; CARTER, J., dissenting.

34 Cal.2d 105

In re BRUNET'S ESTATE.

FREYERMUTH et al. v. SPECKTER et al.

S. F. 17639.

Supreme Court of California, in Bank.

June 28, 1949.

1. Wills ⚷555(1)

Where testator devised property to a named individual or his estate, the testator's use of the disjunctive "or" denoted an intention to substitute an alternative taker in event the named individual predeceased testator. Probate Code, § 92.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Or".

2. Wills ⚷555(1)

Under statute providing that if a devisee, who is not kindred of testator, dies during testator's lifetime, testamentary disposition to him fails unless intention appears to substitute another in his place, the word "another" implies another devisee or legatee capable of taking the property. Probate Code, § 92.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Another".

3. Wills ⚷439, 440

The objective in interpretation of a will is to ascertain intention of testator as disclosed by language he used.

4. Estates ⚷1

In its technical sense, the term "estate" signifies the degree, quantity, nature, and extent of interest which a person has in real property.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Estate".

5. Wills ⚷448

Whenever a disputed word or phrase may be reasonably given either of two meanings, that meaning should be given which will prevent intestacy.

6. Wills ⚷555(1)

Will devising property to a named individual or his "estate" meant that, if the named individual predeceased testator, the property should go to the persons entitled to succeed to the devisee's estate, namely, his heirs or devisees. Civ.Code, § 761 et seq.; Probate Code, §§ 27, 92, 102, 106.

7. Wills ⚷555(1)

Under statutory provision that, if a devisee who is not kindred of testator dies during testator's lifetime, testamentary disposition to him fails unless an intention appears to substitute "another" in his place, devise to named individual or his estate did not lapse by reason of the named individual's death before death of testator. Probate Code, § 92.

SHENK, J., dissenting.

◆

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Proceedings in the matter of the estate of Gaston J. Brunet, deceased. O. G. Freyermuth and Lars Grundwick appeal from a decree of distribution awarding proceeds of sale of realty to Mary Speckter, individually and as administratrix of the estate of Otto Speckter, deceased, and others.

Affirmed.

Prior opinion 200 P.2d 59.

Marion Vecki, San Francisco, for appellants.

W. S. Solari and Albert Picard, San Francisco, for respondents.

TRAYNOR, Justice.

By a holographic will dated October 1, 1941, the testator devised "To Otto Speckter or his Estate The Property at Clear Lake & Improvements on same." Speckter, who was not related to the testator, died on July 1, 1943. The testator died on May 14, 1945. In the course of administration the property at Clear Lake was sold, and the decree of distribution awarded the proceeds of the sale "to the heirs or devisees of Otto Speckter, deceased, subject to the administration of his estate." Appellants, executors and legatees under the will, appeal from the decree of distribution.

The only question presented on this appeal is whether the devise to "Otto Speckter or his Estate" lapsed by reason of Speckter's death before the death of the testator. If a devisee who is not kindred of the testator dies during the testator's lifetime, "the testamentary disposition to him fails, unless an intention appears to substitute another in his place." Prob.Code, § 92. The determination whether the devise lapsed therefore depends upon whether the testator intended to substitute another for Speckter in the event he predeceased the testator and, if the testator had such intention, whether he substituted another in Speckter's place by designating Speckter's "Estate" as the substitutional beneficiary.

[1] Relying upon Estate of Sessions, 171 Cal. 346, 153 P. 231, 232, appellants contend that the phrase, "or his Estate," does not indicate an intention by the testator to substitute an alternative taker in the event Speckter predeceased him. In that case, the court held that a bequest to "William E. Jackson [who predeceased the testator], *and to his heirs and assigns forever*" lapsed on the ground that the italicized phrase was merely technical language customarily used to pass the fee to property. See also, Estate of Barton, 196 Cal. 508, 515, 238 P. 681; Estate of Minor, 59 Cal.App. 616, 211 P. 807. In the present case, however, the words "or his Estate," are words, not of limitation defining the estate that Otto Speckter was to receive, but of donation to designate the recipient or recipients of the devise. The testator's use of the disjunctive "or" clearly denotes an intention to substitute an alternative taker in the event Speckter predeceased him. See, Estate of Coleman, 189 Cal. 612, 619, 209 P. 571; Estate of Minor, supra, 59 Cal.App. 616, 619, 211 P. 807; Atkinson on Wills, p. 728; 4 Page on Wills [Lifetime Edition], p. 172.

[2] The question remains, however, whether the testator's designation of Speckter's estate constitutes the substitution of *another* in the place of Speckter as required by section 92 of the Probate Code. The word "another" as used in that section necessarily implies another devisee or legatee capable of taking the property. Appellants contend that the estate of a named devisee is not another for the purpose of substitution, on the ground that an estate is not a natural person or entity capable by law of taking under a will within the meaning of section 27 of the Probate Code. Respondents contend, however, that the word "Estate" was used by the testator to designate Speckter's heirs or devisees as the substitutional beneficiaries and that therefore natural persons have been substituted in the place of Speckter to prevent the lapse of the devise. This contention is challenged by appellants on the ground that the meaning of the word "Estate" is too indefinite to denote the recipients of the devise.

[3, 4] The objective in the interpretation of a will is to ascertain the intention of the testator as disclosed by the language he has used. Estate of Young, 123 Cal. 337, 345, 55 P. 1011; Estate of Henderson, 161 Cal. 353, 357, 119 P. 496; Estate of Ottoveggio, 64 Cal.App.2d 388, 391, 148 P.2d 878. In its technical sense, the term "estate" signifies the "degree, quantity, nature and extent of interest which a person has in real property." 1 Bou. Law Dict., Rawle's 3d Rev., page 1075. See also, Civ.Code, § 761 et seq.; Rest., Property, § 9. Section 106 of the Probate Code provides that "technical words in a will are to be taken in their technical sense, unless the context clearly indicates a contrary intention, or unless it satisfactorily appears that the will was drawn solely by the testator, and that he was unacquainted with such technical sense." The will before us was drawn by the testator, a layman, and it is evident from the context of the devise that he did not use the term "Estate" in its technical sense. See, Estate of Gracey, 200 Cal. 482, 491–492, 253 P. 921; Estate of Peabody, 154 Cal. 173, 177, 97 P. 184; Estate of Coleman, supra, 189 Cal. 612, 620, 209 P. 571; Estate of Thramm, 80 Cal.App.2d 756, 762, 183 P.2d 97; Estate of Olsen, 9 Cal.App.2d 374, 379, 50 P.2d 70. When the technical meaning of the term is substituted for the term itself, there can be no doubt that the testator was not referring to the interest Otto Speckter was to have in the property devised.

The question therefore arises, what did the testator mean by "Estate" when he used that term in the devise? Appellants rely principally upon Estate of Glass, 164 Cal. 765, 130 P. 868, to support their contention that "Estate" cannot be construed to mean Speckter's heirs or devisees. In that case the will contained the provision, "The balance to go to father Glass' estate." Since Father Glass was alive at the time of the execution of the will, the term "estate" was used with reference to a living person. In recognition of this fact this court stated: "The language of the testatrix thus being referred to the date of her will and not to the date of her death, by the plain terms of the will Nellie Glass attempted to leave the residue of her estate, not to Thomas Glass, but to Thomas Glass' estate. Thomas Glass' estate is not a person or entity which can take under the will. (Civ.Code, §§ 1275, 1313 [now, Prob.Code §§ 27, 41–43]). When used with reference to a living man, 'estate' may either mean all of his property and property interests, as, colloquially, 'upon his death he will leave a large estate,' or it may refer specifically to a particular property in land, as his 'estate in Sonoma County.' But, however used as to a living man no property can pass to it by descent, devise or bequest." 164 Cal. at page 767, 130 P. at page 869. In the present case, however, since the will provided that the property was to go to "Otto Speckter or his Estate," the term was used with reference to a deceased person. The testator's intention to provide for two contingencies is clear: if Otto Speckter survived the testator, the property was to go to Speckter, but if Speckter predeceased the testator the property was to go to Speckter's estate. Thus the testator's will itself provides for the very disposition of the property that the court in Estate of Glass said it could not read into the words "to father Glass' estate": "The construction contended for by appellants, namely, that the will is to be read as though it declared that the balance should go to Thomas Glass, if alive, and, if not, then to his estate, by 'his estate' meaning his legal heirs, or his devisees or legatees, as the case may be, is too strained to be permissible." 164 Cal. at page 767, 130 P. at page 869. By reason of the use of the alternative in the will before us, "To Otto Speckter or his Estate," that construction in this case is not strained at all. It is the natural one.

[5, 6] Moreover, such a construction is compelled by the rule that "The words of a will are to receive an interpretation which will give to every expression some effect, rather than one which will render any of the expressions inoperative * *." Prob.Code, § 102, and by the rule that "Whenever a disputed word or phrase may be reasonably given either of two meanings, that meaning should be given which will prevent intestacy * * * constructions which lead to either total or partial intestacy are not favored." Estate of Olsen, supra, 9 Cal.App.2d 374, 379, 50 P.2d 70, 72; Estate of Lawrence, 17 Cal. 2d 1, 7; Estate of Gracey, supra, 200 Cal. 482, 492, 253 P. 921; Estate of O'Gorman, 161 Cal. 654, 658, 120 P. 33. See also, Prob.Code, § 102. The application of these rules to the devise in question leads to the conclusion that the testator meant that if Speckter predeceased him, the property was to go to the persons entitled to succeed to Speckter's estate, namely his heirs or devisees. This construction is not only a reasonable and natural one, but is supported by decisions of courts of other jurisdictions. Leary v. Liberty Trust Co., 272 Mass. 1, 5, 171 N.E. 828, 69 A.L.R. 1239; Clark v. Payne, 288 Ky. 819, 157 S.W.2d 63; Reid v. Neal, 182 N.C. 192, 108 S.E. 769; Bottomley v. Bottomley, 134 N.J.Eq. 279, 287, 35 A.2d 475; Rogers v. Walton, 141 Me. 91, 39 A.2d 409; Arnett v. Trust Co., 70 W.Va. 296, 73 S.E. 930; In re Billman's Estate, 175 Misc. 334, 24 N.Y.S.2d 43, 47–48. Contra: Gardner v. Anderson, 114 Kan. 778, 227 P. 743, affirmed on rehearing, 116 Kan. 431, 227 P. 743; Martin v. Hale, 167 Tenn. 438, 71 S.W.2d 211; Downing v. Grigsby, 251 Ill. 568, 96 N.E. 513. See also, Rest., Property, § 314, Comment a, wherein it is stated: "Where a person makes a gift in remainder to his own heirs * * * [he] intends the same thing as if he had given the remainder 'to my estate.'" Accord: Bixby v. California Trust Co., 33 Cal.2d 495, 202 P.2d 1018.

In Reid v. Neal, supra, 182 N.C. 192, 108 S.E. 769, the will provided: "I lend to my daughter, Laura Reid, 59½ acres, the remainder of my land * * * to her during her natural life, and at her death, I give it to her bodily heirs, if any, and if none, to return to my estate." It was there contended that the devise over was void on the ground that the term "estate" did not refer to persons, but to the condition or circumstances in which the testator stood with reference to his property, and for the further reason that there was confusing uncertainty as to the persons who might succeed to the property upon failure of bodily heirs. In holding that the phrase "to return to my estate" should be construed to mean that the property was to go to the testator's heirs or next of kin upon failure of bodily heirs and that therefore the devise over was valid, the court stated: "In construing this clause: 'If any, and if none, to return to my estate' —the intent of the testator must be sought unless we hold as a matter of law that the clause is void upon its face. If the words referred to are susceptible of any construction which is consistent with the validity of the will in its entirety, we cannot declare them void. * * * It cannot be successfully urged that the word 'estate' makes the last limitation void for uncertainty. This word has more than one meaning, and is susceptible of more than one construction. Anciently confined to land, it has been enlarged so as to embrace property of every description. Enumerated with words which are descriptive of personal or chattel interests, it may exclude real estate altogether. It may denote the quantity of interest, or the thing devised, or the condition or circumstances in which the owner stands in regard to his property. [Citation omitted.] Also, it has been construed as meaning a person. Bennett v. State, 62 Ark. 516, 36 S.W. [947], 948. Its legal signification must be ascertained from the context, or an examination of all the provisions of the instrument in which it appears." 182 N.C. at pages 198–199, 108 S.E. at page 772.

[7] As in Reid v. Neal, supra, we cannot hold as a matter of law that the devise to Speckter's "Estate" is void on its face, since the word "estate" is susceptible of more than one construction according to its context. It is clear from the context of the devise that the term "estate" was not used in its technical sense to describe Speckter's interest in the property devised, and was not used to refer to any particular property Speckter might have or to the aggregate of property he might leave upon his death. It is more reasonable to conclude, in the light of the rules that the provisions of a will must be construed to give them effect and to avoid intestacy, that the testator, a layman, in using the term "estate" with reference to a deceased person and to describe the alternative takers of the devise, intended that Speckter's heirs or devisees should take the devise in the event that Speckter died in the testator's lifetime.

The decree is affirmed.

GIBSON, C. J., and EDMONDS and SPENCE, JJ., concur.

CARTER, Justice (concurring).

I concur in the result but believe that Estate of Glass, 164 Cal. 765, 130 P. 868, is inconsistent therewith and should be overruled. The essence of the holding in that case is that a devise to a named person's estate is not proper because the word "estate" cannot be construed to mean "heirs or devisees." In the case at bar the majority determines, and I believe properly so, that the word "estate" should and must be interpreted to mean "heirs or devisees."

SCHAUER, Justice (concurring).

I concur in the judgment solely on the ground that upon the record the trial court was warranted in finding as a fact that the testator in using the language, "To Otto Speckter or his Estate," intended to make an alternative devise—a devise to Mr. Speckter if he survived the testator but in the event of his demise prior to the death of the testator, then to the heirs at law of Speckter.

SHENK, Justice (dissenting).

I agree with the majority opinion of the District Court of Appeal of the First Appellate District, Division Two, Estate of Brunet, Cal.App., 200 P.2d 59, 60, in holding that an "estate is not a person or entity which can take under the will" as contemplated by the provisions of section 92 of the Probate Code and the decisions in this state construing that section. The majority opinion cannot be reconciled with the holding in the Estate of Glass, 164 Cal. 765, 130 P. 868. I would therefore reversed the judgment.

* * *

92 Cal.App.2d 562

PEOPLE v. BROWER.

Cr. 2533.

District Court of Appeal, First District,
Division 1, California.

June 24, 1949.

Hearing Denied by Supreme Court
July 21, 1949.

1. Indictment and Information 🔑161(9)

An amended information charging a prior conviction had no place in record and was not legally filed in absence of permission by court for filing of it, and, hence, setting aside of purported amended information did not affect original information. Pen.Code, § 1008.

2. Indictment and information 🔑161(1)

Under statute, trial court was not required to grant permission for filing of amended information charging a prior conviction upon learning that defendant had a prior conviction. Pen.Code, § 969a.

3. Criminal law 🔑273, 1186(4)

Refusal to accept codefendant's plea of guilty and compelling him to stand trial was error, where it appeared that only purpose of so doing was to get before jury evidence inadmissible against defendant if defendant had been tried alone, consisting of codefendant's confession which implicated defendant, but such error did not require reversal, where disregarding codefendant's confession case was very strong against defendant. Const. art. 6, § 4½.

4. Criminal law 🔑1166(1)

Delay of over four months from filing of information charging forgery to date of trial did not establish prejudicial error, where record showed that defendant's attorney either asked for the continuances, acquiesced in, or consented to them.

5. Criminal law 🔑372(12)

In prosecution for forgery based on charge of forging signature to stolen American Express money order, testimony as to defendant cashing another stolen money order was admissible as tending to show general scheme to forge money orders stolen in blank.

6. Criminal law 🔑26

Prosecution must establish that a crime has been committed, but identity of person who committed it is not a part of the corpus delicti.

7. Forgery 🔑44

Evidence sufficiently established corpus delicti of offense of forgery of signature on stolen American Express money order.

PETERS, P. J., dissenting.

◆

Appeal from Superior Court, City of San Francisco; Preston Devine, Judge.

Walter Brower was convicted of forgery, and he appeals.

Affirmed.

Fred N. Howser, Atty. Gen., David K. Lener, Deputy Atty. Gen., for plaintiff and respondent.

Walter Brower, in pro. per.

BRAY, Justice.

Defendant was tried by a jury and found guilty of the crime of forgery. After denial of his motion for a new trial, he appealed from the judgment. At the trial and here defendant acted in propria persona.

He makes five contentions: (1) The information became void. (2) The court refused to let the codefendant Gross plead guilty. (3) He was not brought to trial within the time prescribed by law. (4) Errors in introduction of evidence. (5) The corpus delicti was not proved.

1. *Information Was Not Void.*

[1, 2] In the original information defendant was charged jointly with one Gross with the crime of forgery. On October 20, 1947, both defendants pleaded not guilty thereto. On December 4 both defendants were in court, represented by Attorney Klein. The clerk proceeded to arraign them on an amended information which apparently had been filed previously. (The record does not show when.) This information was the same as the original one except that a prior conviction against Brower alone had been added. To this amended information Gross pleaded guilty, Brower not guilty, admitting the prior conviction. The district attorney then asked the court to refuse to accept Gross' plea of guilty. In the discussion which ensued the court set aside the amended information on the ground that it was filed after plea to the original information, without leave of court. While the court used the language "set the whole thing aside" it is obvious from the discussion and the proceedings thereafter, including the fact that Brower at no time during the trial contended that the original information had been set aside, that the court was referring to the amended information and not to the original information. Defendant now contends that the amended information superseded the original information and when the court set it aside the original information was set aside also, and there was left no information upon which to try him. This contention is not well founded. Section 1008 of the Penal Code allows amendment of an information any time before plea without leave of court, but requires such leave to be obtained for an amendment after plea. The filing of the amended information without leave of court in no wise affected the original information, nor did its setting aside. This is elementary. Until the court had granted permission that it be filed, the amended information had no place in the record and was not legally filed. In People v. Gates, 214 Cal. 175, 4 P.2d 541, an information charging forgery was properly amended pursuant to section 969a of the Penal Code to set up a prior conviction. "This amendment was later withdrawn and the original information remained. The defendant suffered no prejudicial error through such action and the original information did not lose its efficacy." This case, likewise, answers defendant's contention that once the court learned that defendant had a prior conviction, it had no right to refuse to allow the amendment. This contention is based upon the language of section 969a: "Whenever it shall be discovered that a pending * * * information does not charge all prior" convictions, said "information shall be forthwith amended to charge" such convictions. See also People v. Grimes, 94 Cal.App. 238, 270 P. 1000, where the court struck out of the information two of the three charges of prior conviction.

2. *The Codefendant's Plea.*

[3] As stated, Gross pleaded not guilty to the original information. He pleaded guilty to the amended information before the court set it aside. When the court set aside the amended information, the district attorney announced that he would file an amended information later. Apparently this was not done, although at the end of the presentation of evidence by the prosecution, the following occurred: "Mr. Mullins [for the prosecution]: That is all. That is the People's case, except on a motion for the amended information, which is under submission. The Court: That will remain under submission." The court did not act further on this matter and the judgment made no mention of the prior conviction. The record shows that on more than one occasion before trial, Gross asked that he be permitted to change his plea from not guilty to guilty. To this the district attorney objected and the court refused to allow the change. Brower contends that thereby he was forced to trial with an admittedly guilty man and that the jury was influenced by evidence admissible against Gross alone, which could not have been before the jury had Brower been tried alone. Thus, Gross' confession, which was not admissible against Brower, was admitted. Although the court specifically instructed several times that this confession was not to be used against Brower, the district attorney in his argument read it to the jury, emphasizing the parts implicating Brower. The

court erred in forcing Gross to stand trial where the only purpose of so doing was to get before the jury evidence inadmissible against Brower. This practice is highly reprehensible. However, in this case we are forced to the conclusion that under section 4½ of article VI of the constitution, the error was not prejudicial and did not result in a miscarriage of justice. Disregarding the confession entirely, the case is very strong against Brower. The facts will be discussed later on. They leave no reasonable doubt of defendant's guilt.

When Brower called Gross to the stand to testify, he stood on his constitutional rights and refused to do so. It is doubtful if this can be blamed on the prosecution. However, were there any reasonable doubt of Brower's guilt, the fact that Gross was compelled to stand trial against his own wish, so that his confession could be indirectly used against Brower, and that Gross then refused to give Brower an opportunity to examine him concerning the matters mentioned in the confession, would be important. But in view of the facts of the case, no miscarriage of justice resulted.

3. *Delay in Bringing Defendant To Trial.*

[4] Approximately 4 months and 11 days elapsed from the filing of the information to the date of trial. A portion of this time defendant was confined in jail serving a 60 day term. During all the time up to the day before the case went to trial, defendant was represented by an attorney who also represented the codefendant. The record shows that while on one or two occasions the attorney complained of the delay in setting the case, he either asked for the continuances, acquiesced in, or consented to them. The information was filed on October 14. Defendants were arraigned October 17. At defendant's request the matter was continued to October 20, to plead. October 20, defendants pleaded and at defense attorney's request the case was continued to October 27 to be set. The record fails to show what, if anything, happened between October 20 and November 20. On the latter date, when the case was called, the defense attorney stated that he had consulted with the district attorney and offered to plead both defendants guilty provided Brower was sentenced to the county jail for six months instead of being given a prison sentence. Some discussion ensued between counsel on this subject, the district attorney refusing to recommend the jail sentence. The district attorney stated that Gross was charged with one Brick on another charge and he desired to try that case, to be followed by the case against Gross and Brower. The district attorney asked that this case be continued to December 4. Defense counsel then stated: "December the 4th is rather a long time—all right." The case was continued to that date. On December 4, defense counsel stated that the district attorney had elected to try the Gross and Brick case that day, to be followed by this case. The proceedings before mentioned concerning the amended information then took place. After it was set aside by the court, the district attorney stated that he would file an amended information and asked that the matter be continued to December 9. After some discussion concerning bail the court continued the matter to December 9. Defendant made no objection. On that date, the court stated that the district attorney was asking that the matter be continued to December 12 and then asked defense counsel if that was agreeable. The latter then said: "Better continue it until the 15th." This the court did. On the 15th when the case was called, defense counsel was not present. After waiting some time for him to appear, the court continued the matter until the next morning. On December 16, defense counsel announced that defendants were ready for trial. The district attorney announced that he was not. A discussion then followed as to whether the district attorney had ever filed the amended information which on December 4 he stated he would file. The district attorney then asked that the trial be set for December 29. Defense counsel said he was "not trying any cases on the 29th." The court then asked what date he would suggest. Counsel then said: "What about the 22nd?" and further stated: "I was relying on the understanding that we were going to dispose of this matter," to which the district attorney replied: "You were relying upon something upon which you had no basis to rely." Defense

counsel then asked what day the probation officer's report would be received. (This referred to the conviction of Gross in the Gross and Brick case.) On being told that the date was January 9 he said: "Put this on for the 12th of January. That's the following Monday." The case was continued to January 12. On that date the court transferred the case to another department. Defense counsel called attention to the fact that it was understood the case would be tried that day and that Brower had been in jail for a long time. The court stated that it was engaged in impaneling a jury in a murder case started the week before. Again there was a discussion concerning bail and the case was transferred to department 20, without any objection being made by defendants. On January 14 the case was called in that department to be set. Discussion of the condition of the court's calendar ensued and the length of time it would take to try this case. Defense counsel suggested that the case be put over to the next day to be set. At this point, the district attorney who was to try the case came in and stated that defense counsel had told him that "he had in mind to plead and * * * would let me know"—evidently referring to a suggestion of defense counsel that the defendants would plead guilty. Defense counsel did not reply to this statement. The case was then continued to the next morning, January 15, without any objection being made. On that morning the case was called to be set. A discussion ensued concerning Gross' offer to plead guilty. It then developed that Brower had been serving time in the county jail on another charge for 60 days prior to November 28. The court asked the district attorney what the earliest date he could try the case was. The latter stated, February 16. The court then asked defense counsel, "How about that?" Counsel said, "That is a month." There then ensued considerable discussion concerning defense counsel's offer to plead Brower guilty provided he would get a one year county jail sentence. The court suggested the case be set for trial for February 2. Defense counsel then suggested that he and the district attorney confer and then tell the situation to the court; the court could then determine whether it would be willing to impose the county jail sentence. The court suggested that counsel and the police inspectors come in together and talk the matter over with the court. Defense counsel agreed to make the appointment for this meeting, and the case was then continued to February 2. On that date defense counsel announced that he had been unable to arrange the proposed meeting. The court suggested that counsel meet that day with the police inspectors and report later to the court. Further discussion ensued concerning defense counsel's offer to plead the men guilty if Brower were to receive a county jail sentence. It was then agreed that an informal meeting would be had with the court and the police inspectors that afternoon at 4 o'clock. The case was continued to February 11 for trial. On that date defense counsel related the failure of the proposed meeting to take place. Thereupon the court suggested that it contact one of the police inspectors and counsel agreed that that should be done. Defense counsel stated that he could not go to trial until February 24 and then suggested that as Judge Shoemaker had received a probation report on Gross' conviction in the other case if Gross pleaded guilty his sentence should be given by that judge. The court then agreed to talk to the inspector concerning Brower, and asked defense counsel what date the case should be given for trial. The district attorney suggested February 16. Defense counsel stated that he would be there on the 16th but not for trial, but merely for the judge's determination as to whether he would be willing to consider a county jail sentence for Brower. With that understanding the matter was continued to the 16th. On the 16th, the judge stated that he had seen the inspector. Apparently the judge was unwilling to impose a jail sentence. Defense counsel asked that the case be set for trial. The 24th was suggested by the district attorney. Defense counsel asked that the case be set for the 25th, and it was set for trial for that day. On the 24th, defense counsel stated that Brower wished to discharge him and that Gross desired to plead guilty. On the objection of the district attorney theretofore made, the court declined to accept Gross' plea. Brower stated he wished to defend himself, but the court appointed the public defender to represent him in any capacity he might like. Brower insisted that he act merely in an advisory capacity. The case was continued to the next morning, and then tried. It is clear from this brief statement of the record that the delay was at least consented to, if not actually caused, by the defendant. See People v. George, 91 Cal.App.2d 537, 205 P.2d 464, and cases therein discussed. Defendant was in no hurry to go to trial, for he was trying to persuade the court to agree to give him a county jail sentence if he should plead guilty.

Facts.

Before discussing the next two points, it is advisable to set forth the facts established at the trial. The charges against Gross and Brower were the aftermath of a burglary at Longview, Washington. The facts concerning that crime were not contradicted. Brower admittedly had no part in the commission of that crime, as he was actually in the San Francisco county jail at the time. On a night in June, 1947, the safe was removed from the Longview Western Union office. It was later found at the city dump with a hole burned in it. The inventory the night before had included unused American Express money orders AQ-8188400 to AQ-8188499 inclusive. (Hereafter these money orders will be referred to by their last three respective numbers only.) To be valid, these money orders must be signed by an authorized subagent of Western Union on a place left on each order for that purpose. Money orders 487, 486 and 483 were definitely identified as having been in the safe the night it was removed. In addition to the numbers they were identified by the Longview, Washington, address stamped on them. When the safe was found, the money orders were gone. Some time after the burglary, the above three orders were cashed in San Francisco. The name "William Cole" was filled in as subagent. The company had no such subagent. Each money order of this type has a remitter's receipt and subagent's stub. When issued in the regular manner, the subagent retains the stub and the buyer of the order receives the receipt. On August 13th, defendant was taken by two police inspectors to his room in San Francisco. Defendant admitted them to the room. In his presence, they seized certain torn pieces of paper which they found in a wastebasket. Piecing them together they were found to be the remitter's receipts and subagent's stubs of orders 487, 486 and 483.

Order 483 was cashed at the Zanzibar Tavern. The owner identified Brower as the person who presented and cashed it, saying that he was cashing it for a friend. Order 486 was cashed at a liquor store by Gross. The clerk who cashed it, testified Gross came in alone and that he had never seen Brower before the trial. Order 487 (the one set forth in the information) was cashed at a night club by Gross but Brower was not present. The money orders were signed either "Ida Stearns" or "Davis Stearns" as payee. These money orders were of the type made payable to a named payee and which the payee does not sign on purchase, but must sign when they are cashed. The handwriting expert of the San Francisco Police Department testified that after comparing certain exemplars written and signed by Brower with the handwriting and signatures on the orders, he was convinced that the filled in matter and the signatures were in Brower's handwriting and had been written by him. A police inspector testified that when he asked Brower to compare his own exemplars with the signatures on the money orders, Brower said, "That finishes me * * * I will cop a plea to petty theft if you will give me a county jail sentence"; also, that when confronted with a statement given by Gross incriminating Brower, the latter stated to Gross, "You put the noose on my neck, Joe. Why did you give that statement?"

Defendant did not deny the admissions claimed to have been made to the police inspector, did not take the stand, nor did he offer any evidence even purporting to contradict the fact that the money orders were stolen, the circumstances of their fraudulent cashing, the discovery of the torn stubs in Brower's room, nor the testimony of the handwriting expert that the date and the "Stearns" signatures were written by Brower. The latter, in cross-examining the expert, tried to suggest that someone else, in filling out the money orders, was imitating Brower's handwriting. Thus, it appears from the record, without considering, and entirely disregarding, the Gross confession, that a conclusive case of guilt was made out against Brower.

4. *No Error In Admission Of Evidence.*

[5] Defendant contends that the court erred in admitting testimony that Brower cashed order 483, inasmuch as the order he was charged with forging was 487, cashed by Gross. Defendant contends that this was evidence of an independant and unrelated crime. The evidence was admitted prior to proof that Brower had any connection with order 487. The evidence was admissible, as it, together with the other evidence concerning the other two orders which were cashed the same day, shows a general pattern, scheme or plan to forge orders stolen in blank from the Western Union office. Admissibility of such evidence is well established. People v. Selk, 46 Cal.App.2d 140, 115 P.2d 607; People v. Cassandras, 83 Cal.App.2d 272, 188 P.2d 546. See also discussion in 8 Cal.Jur. p. 69.

In People v. Albertson, 23 Cal.2d 550, at page 578, 145 P.2d 7, 21, in discussing the admissibility of evidence of other crimes, the court says: "Hence: (a) Ground must first be laid implicating the accused in the charge under trial, and unless sufficient evidence of this has been, in the opinion of the trial judge, first adduced, all evidence of other offenses must be excluded; (b) the collateral offense cannot be put in evidence without proof that the accused was concerned in its commission * * *." Although in the order of proof in our case, the court admitted this character of evidence before it had received evidence complying with this rule, such evidence was later received. Where sufficient evidence to meet the requirements above set forth actually appears in the case, the fact that it came later is not important.

5. *Corpus Delicti.*

[6, 7] Defendant contends that the corpus delicti was not established against him. The rule is that the prosecution must establish that a crime has been committed, but the identity of the person who committed it is not a part of the corpus delicti. People v. Garcia, 101 Cal.App. 213, 281 P. 508. Defendant maintains that the order (487) described in the information was not admitted in evidence, basing his contention on some confusion in the use of the terms "checks" and "money orders." Both the district attorney and the witnesses used these terms interchangeably. In addition to the money order blanks stolen at Longview, there were also some blank traveler's checks taken at the same time. The difference between a "check" and a "money order" is that on the latter the payee's name is not signed until the time of the cashing, while on the "check" the purchaser signs at the time of purchase and then when cashing, signs again as a means of identification. While the orders 487, 486 and 483 were frequently referred to as "checks," the record clearly indicates that the witnesses and counsel were not referring to the stolen "checks" but to these particular orders. When these three were marked for identification, they were referred to as "checks," but when they were actually introduced into evidence they were properly called. Defendant is in error in contending that they were not admitted in evidence. The record clearly shows that all three of them were.

The judgment is affirmed.

WARD, J., concurs.

PETERS, Presiding Justice.

I dissent.

The majority opinion fully and fairly sets forth the facts. That opinion concedes that the only purpose in forcing Gross to stand trial and in refusing to accept his plea of guilty "was to get before the jury evidence inadmissible against Brower." The majority concede that this was error and that "This practice is highly reprehensible." Nevertheless, the majority state that they are "forced" to hold that the error was not prejudicial under Art. VI, § 4½ of the Constitution, because the other evidence in the record shows guilt. The inadmissible evidence, being a confession of a supposed co-actor, was highly persuasive and could not help but be convincing to a jury. I concede that the other evidence in the record is sufficient to sustain a finding of guilt, but that evidence is by no means conclusive on the issue. I cannot say, with certainty, that, had the inflammatory confession not been admitted and not been read to the jury and emphasized during the argument, the jury would have convicted. That conviction, aside from the confession, rests primarily on the testimony of a handwriting expert, and such experts have frequently been disbelieved by juries.

Article VI, § 4½, serves a most important purpose, and that is to prevent all errors resulting in a reversal. But that section does not require that all errors, no matter how great, must be held to be nonprejudicial simply because, independently of error, guilt may be spelt out of the record. The fundamental requirement in every case, guaranteed under the state and federal Constitutions, is that the defendant must be accorded a fair trial. The Constitution guarantees that a defendant is entitled to have his guilt or innocence determined according to law, and is entitled to the protection of his substantial rights. Here the defendant was not accorded that protection. How can this court say, as a matter of law, from the cold record that, had defendant been separately tried, as the majority admit he should have been, and had the confession of Gross implicating defendant not been admitted into evidence and read and emphasized to the jury, this jury nevertheless would have convicted him on the testimony of the expert? It is not necessary, in order to require a reversal, that the appellate court be convinced that the defendant was prejudiced by the error. Whenever it appears that such error could have prejudiced him, it is the duty of an appellate court to reverse. Otherwise, the rule that a defendant is entitled to a fair trial will have completely disappeared from our law.

These principles are not new. They are the principles that have frequently been stated by the Appellate Court, by the Supreme Court of California and by the Supreme Court of the United States. One quotation from each of these courts demonstrates that this is so.

In People v. Adams, 76 Cal.App. 178, 186, 244 P. 106, 109, a frequently cited case, the District Court of Appeal declared: "The evidence is sufficient to support the judgment. It is perfectly clear, however, that section 4½ of article 6 of the Constitution was not intended to mean that the mere fact that the evidence may support the judgment is a sufficient reason in all cases for refusing to set it aside. To give the section that meaning would often lead to gross miscarriages of justice, as where evidence vital to the case of a party is rejected *or evidence vitally damaging to his case is erroneously admitted*, or where the court erroneously instructs or refuses to instruct the jury as to the law applicable to an essential issue. The courts have not attempted to frame a definition of 'miscarriage of justice' which can be applied to the varying circumstances of the many cases where the constitutional provision is invoked, and obviously it would be impossible to do so. [Citing case.] The quotations which follow, however, taken from cases in which the question has arisen, are elucidating: 'The central or all-important purpose of said constitutional provision is, obviously, to legally justify the courts in refusing to interfere with or disturb verdicts of guilty in criminal cases in the trial of which error has been committed and in which the evidence amply supports such verdicts, when such interferences may justly be withheld consistently with a just and proper regard for the substantial rights of persons tried for public offenses.' People v. Tomsky, 20 Cal.App. 672, 683, 130 P. 184, 189. 'We do not understand that the amendment in question was designed to repeal or abrogate the guaranties accorded persons accused of crime by other parts of the same constitution or to overthrow all statutory rules of procedure and evidence in criminal cases. When we speak of administering "justice" in criminal cases, * * * we mean something more than merely ascertaining whether an accused is or is not guilty. It is an essential part of justice that the question of guilt or innocence shall be determined by an orderly legal procedure, in which the substantial rights belonging to defendants shall be respected.' People v. O'Bryan, 165 Cal. 55, 65, 130 P. 1042, 1046. 'The phrase, "miscarriage of justice," does not simply mean that a guilty man has escaped, or that an innocent man has been convicted. *It is equally applicable to cases where the acquittal or the conviction has resulted from some form of trial in which the essential rights of the people or of the defendant were disregarded or denied.*' People v. Wilson, 23 Cal.App. 513, 524, 138 P. 971, 975. 'We are unable to determine whether the defendants would or would not have been convicted by the jury had this erroneously admitted testimony been withdrawn from their consideration. This being so, we do not feel that section 4½ of article 6 of the Constitution can be given application to uphold the judgment.' People v. MacPhee, 26 Cal.App. 218, 226, 146 P. 522, 525. * * * 'Nor is it a matter for consideration * * * that another jury upon a new trial might upon such conflicting evidence and proper instructions render a verdict of guilty.' People v. Roe, 189 Cal. 548, 561, 209 P. 560, 566. [See, also, 7 other cases cited.]" (Italics added.)

The Supreme Court of California, in People v. Sarazzawski, 27 Cal.2d 7, 10, 161 P.2d 934, 936, stated the proper rule as follows: "There is no question that the evidence amply supports the verdict and judgment but, regrettably, we find in the record several incidents which should not have occurred in a fair and orderly trial. At least two of such incidents are matters of such grave moment as to amount to substantial departures from the established elements of a fair trial, to which every person charged with crime, no matter how rich or poor, virtuous or debased, is entitled. *When a defendant has been denied any essential element of a fair trial or due process, even the broad saving provisions of section 4–1/2 of article VI of our state Constitution cannot remedy the vice and the judgment cannot stand.* [Citing cases.]" (Italics added.)

The federal statute on the subject is substantially similar to Art. VI, § 4½. The leading case interpreting the federal statutes is Bollenbach v. United States, 326 U.S. 607, at page 614, 66 S.Ct. 402, 406, 90 L.Ed. 350, appears the following:

"In view of the Government's insistence that there is abundant evidence to indicate that Bollenbach was implicated in the criminal enterprise from the beginning, *it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedures and standards appropriate for criminal trials in the federal courts.* * * *

"The 'technical errors' against which Congress protected jury verdicts are of the kind which led some judges to trivialize law by giving all legal prescriptions equal potency. * * * From presuming too often all errors to be 'prejudicial,' the judicial pendulum need not swing to presuming all errors to be 'harmless' if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty. In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be." (Italics added.) See, also, Bihn v. United States, 328 U.S. 633, 66 S.Ct. 1172, 90 L.Ed. 1485; Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557.

The rules announced in these cases have been violated by the majority opinion. Such a violation of defendant's constitutional rights cannot be justified on the ground that a majority of this court honestly believe that defendant is guilty. The point is that defendant has not been found guilty in the manner required by law. This defendant, under our law, is presumed innocent until found guilty by a jury after a fair trial. The right to a fair trial is as important as the right to a jury trial. It is not sufficient to substitute for the constitutionally protected right to a fair trial the honest belief of a majority of an appellate court that the jury could, and probably would, have convicted without the inadmissible evidence. We cannot and should not substitute trial by appellate court for trial by jury.

The judgment, in my opinion, should be reversed.

92 Cal.App.2d 501

LUCKHARDT v. MOORADIAN.

Civ. 16710.

District Court of Appeal, Second District,
Division 3, California.

June 21, 1949.

1. International law 🔑12

United States citizens' claims against foreign governments are usually determined by international law, and federal and state courts have no jurisdiction over such claims unless so provided by Congress.

2. International law 🔑12

Ordinarily, validity and amount of claims by United States citizens as against foreign government are determined by a commission appointed pursuant to treaty, and decision of commission is final on all matters within commission's jurisdiction but not as to rights of different claimants among themselves, and ordinary judicial tribunals can adjust such rights after commission determines amount and validity of claim.

3. International law 🔑12

An heir having interest at time of loss is entitled to his proportionate share of fund which American Mexican Claims Commission awarded to "the heirs of Jose Francisco Arguello as their interests may appear", but an heir having no such interest is not entitled to share in award. Settlement of Mexican Claims Act of 1942, § 1 et seq., as amended, 22 U.S.C.A. § 661 et seq.

4. International law 🔑12

The American Mexican Claims Commission did not have jurisdiction to, and did not purport to, determine conflicting rights between American nationals to fund awarded to "the heirs of Jose Francisco Arguello as their interests appear", and commission's decision and award was not res judicata as to such conflicting rights or as to ownership of the award, and superior court had jurisdiction to adjudicate heirs' conflicting claims to the award. Settlement of Mexican Claims Act of 1942, §§ 1 et seq., 5(e), as amended, 22 U.S.C.A. §§ 661 et seq., 664(e); Administrative Procedure Act, § 1 et seq., 5 U.S.C.A. § 1001 et seq.

5. Executors and administrators 🔑38

Legally, executor is not owner of assets of estate he is administering, and title is in legatees and devisees subject to possession by executor.

6. Descent and distribution 🔑71(6)

In action for declaratory judgment as to ownership of fund which American Mexican Claims Commission awarded as damages for expropriation of Mexican land of American nationals by Mexican government to heirs of son of original grantee of land "as their interests may appear", evidence warranted finding that son's daughter was owner of land, so that executor administering deceased daughter's estate at time of expropriation held award for daughter's legatees. Settlement of Mexican Claims Act of 1942, § 1 et seq., as amended, 22 U.S.C.A. § 661 et seq.

7. Declaratory judgment 🔑318

In action for declaratory judgment as to ownership of funds which American Mexican Claims Commission awarded as damages for expropriation of Mexican land of American nationals by Mexican government to heirs of son of original grantee of land "as their interests may appear", complaint, alleging ownership by son's daughter at her death and thereafter by her executor of all of interest of son in land and that executor was owner of award and that administratrix of estate of deceased son claimed award but had no right therein, showed actual controversy and stated cause of action for declaratory relief. Settlement of Mexican Claims Act of 1942, § 1 et seq., as amended, 22 U.S.C.A. § 661 et seq.; Code Civ.Proc. § 1060.

8. Pleading 🔑36(3)

A defendant filing disclaimer was estopped from asserting that complaint did not state cause of action for declaratory relief, in that actual controversy did not exist between parties where defendant went to trial on merits.

9. Judgment 🔑688

Where American Mexican Claims Commission awarded fund as damages for expropriation of Mexican land of American nationals by Mexican government to heirs of son of original grantee of land "as their interests may appear", and award was claimed in action for declaratory relief by executor of estate of son's deceased daughter to whom title to land allegedly passed in daughter's lifetime and by administrator of estate of deceased's son, judgment in favor of executor was binding on heirs of son dying intestate even though heirs were not parties to action, since administratrix and heirs were in privity in respect to award. Settlement of Mexican Claims Act of 1942, § 1 et seq., as amended, 22 U.S.C.A. § 661 et seq.

10. Descent and distribution ⚷8
Executors and administrators ⚷49

Claim for loss by reason of expropriation of Mexican land of American nationals by Mexican government is right attached to ownership of land, and on death of landowner is personal property which is asset of estate, and legal owners of claim are heirs of landowner dying intestate subject to administratrix' possession, which is exclusive of heirs and good as against all the world until distribution, and heirs' title to fund awarded by American Mexican Claims Commission as damages for expropriation goes to heir by descent and not by purchase and vests by succession and must be administered by administratrix. Probate Code, § 300; Settlement of Mexican Claims Act of 1942, § 1 et seq., as amended, 22 U.S.C.A. § 661 et seq.

11. International law ⚷12

Funds awarded by American Mexican Claims Commission as damages for expropriation of Mexican land of American nationals by Mexican government was not a gift or donation. Settlement of Mexican Claims Act of 1942, § 1 et seq., as amended, 22 U.S.C.A. § 661 et seq.

12. Partition ⚷116(1)

Partition among heirs does not create new title in heirs or change character of title from one of descent to title by purchase.

13. Executors and administrators ⚷38

Anything that passes by succession must be administered. Civil Code § 1000.

14. Judgment ⚷688

Judgment entered in action in which administratrix of deceased person is party is binding not only on administratrix but also on heirs of deceased person even though heirs have not been made parties to action.

15. Judgment ⚷678(1)

A judgment concludes not only adverse party but also all those claiming under the title he represents.

16. Appeal and error ⚷934(2)

If one or more of findings supported by substantial evidence sustain the judgment, it is presumed that trial court predicated judgment on such findings, and questions relative to other findings are immaterial.

◆

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Action for declaratory relief by Frank R. Luckhardt, as executor of the estate of Pilar Arguello de Luckhardt, deceased, against Gwendolyn Lucero Mooradian, as administratrix of the estate of Francisco Arguello, deceased. The defendant filed a cross-complaint. From the judgment, the defendant appeals.

Affirmed.

See, also, Cal.App., 207 P.2d 590.

John L. Mace, Los Angeles, for appellant.

Wallace, Cashin & Arrington, and W. W. Wallace, Los Angeles, for respondent.

VALLÉE, Justice.

Appellant here, defendant below, appeals from a judgment adjudging respondent to be the owner of an award made by the American Mexican Claims Commission for lots B and K in Rancho Tijuana, Baja California, Mexico, to "The heirs of Jose Francisco Arguello as their interests may appear." The American Mexican Claims Commission was created by an Act of Congress, Settlement of Mexican Claims Act of 1942, pursuant to treaties between the United States and Mexico, to hear and render final decisions on claims of American nationals against the government of Mexico for loss of, and damage to, property located in Mexico. 56 Stat. 1058, 59 Stat. 50, 22 U.S.C. § 661 et seq., 22 U.S.C.A. § 661 et seq.

Jose Francisco Arguello, also known as Francisco Arguello, died intestate in the County of Los Angeles, August 6, 1880. His estate was duly administered and a decree of distribution entered August 23, 1881. In 1946 the estate was reopened on petition of one of his 12 children, Concepcion Arguello Lucero, who alleged after-discovered property, consisting of a claim against the government of Mexico for the expropriation of lands belonging to her intestate. She was appointed special administratrix. Later she resigned and appellant, Concepcion's daughter, was appointed administratrix. Pilar Arguello de Luckhardt, respondent's decedent, was one of the children of Jose Francisco Arguello. Pilar died testate in the County of Los Angeles, June 15, 1900. Respondent Frank R. Luckhardt, her son, was appointed executor of her estate. Administration of the estate is still pending.

Santiago Arguello, in 1829, received a grant of a large tract of land in Mexico, known as "Rancho Tijuana," sometimes called "Tia Juana," situate in Baja California, Mexico. Santiago married Marie Pilar Ortega. Nine children were born to them, one of whom was Jose Francisco Arguello. Jose married Tomasa Lugo and among the 12 children of this union were Pilar and Concepcion, two daughters. Santiago Arguello died November 9, 1862. In 1864 Pilar Arguello married Caesar Luckhardt. On March 7, 1870, Jose and his wife Tomasa conveyed to Caesar Luckhardt, their son-in-law, in consideration of $2000, all of their "right, share, claim, demand, interest, and inheritance whatsoever" in Rancho Tijuana. The deed was recorded in Ensenada, Mexico. Caesar Luckhardt in turn on July 1, 1870, conveyed all the rights he had received under the latter deed to his wife Pilar Arguello de Luckhardt, daughter of Jose and Tomasa. This deed was likewise recorded.

Marie Pilar Arguello (widow of Santiago) died in 1878. After her death, litigation concerning the Rancho ensued among the heirs. On January 30, 1889, to settle the litigation, the 9 children of Santiago and Marie Pilar Arguello, individually and by their representatives or successors, including Pilar Arguello de Luckhardt, represented by "lawyer Ramirez," as purchaser of her father's interest, made an agreement dividing the Rancho. This agreement, approved July 6, 1889, by decree of court of Baja California, settled the rights which all the children had in the property as a result either of inheritance or conveyance. What was known as the northern part of the Rancho was set aside for the descendants of five of the children, one of whom was designated as "the Zamorano interest," the other four being the heirs of Jose Antonio Arguello, Jose Francisco Arguello, Ramon Arguello, and Santiago Emidio. The decree approving the agreement stated that formal possession of the northern portion of the ranch and of the "Oriental portion" of the town was given to and accepted by the five interests, including "Ricardo Ramirez for the senora Pilar Arguello de Luckhardt," and "the lawyer Ramirez adding that the possession that he receives in the name of the senora Luckhardt is for the purchase of the heritage right of her father Don Jose Francisco Arguello."

In 1890 these five named interests entered into two partition agreements. One of these agreements divided the townsite into blocks. Pilar Arguello de Luckhardt was the only heir of Jose Francisco Arguello, a party to this agreement. The other divided the acreage into tracts described by letters. It was agreed that lots B and K were owned by Jose Francisco Arguello. It contained this provision: "We also explain that the name of Jose Francisco Arguello which appears in the transaction is the common name of the heirs, recognized by this court at the session of October 12, 1888: Francisco Arguello Jose having died, and his rights are represented by the heirs who are represented by Ramon Arguello." Pilar Arguello de Luckhardt was the only heir of Jose recognized by the court and by the parties "at the session of October 12, 1888," which was the "day set aside for the declaration of heirs." The decree at that hearing provided that Pilar Arguello de Luckhardt "shall have the same rights and portions as the others." The word "others" referred to the children of Santiago Arguello who were then living and children of deceased children. Jose Francisco Arguello had been deceased for almost ten years and the only one of his twelve children listed was Pilar Arguello de Luckhardt. In other words, Pilar Arguello de Luckhardt, as purchaser of her father's interest, stood in the place of her father Jose Francisco Arguello. It appears from the agreement of January 30, 1889, that the "rights and portions" referred to in the quoted provision were vested in Pilar Arguello de Luckhardt. All of the agreements were approved by decree of the Judicial District of Ensenada, Northern Territory of Baja California, Mexico.

In 1929 the Republic of Mexico nullified the original grant to Santiago Arguello. In 1938 the nullification was declared void by the Supreme Court of Mexico which declared that title was in the Arguello family and those deriving title through them.

The Settlement of Mexican Claims Act of 1942, as amended in 1945, 56 Stat. 1058, 59 Stat. 50, 22 U.S.C. § 661 et seq., 22 U.S.C.A. § 661 et seq., adopted pursuant to treaties between the United States and Mexico, established the American Mexican Claims Commission and authorized it "to examine and render final decisions" in specified categories of claims on behalf of American nationals against Mexico. One of the categories of claims was that which arose between January 1, 1927, and October 6, 1940, "as a consequence of damage to, or loss or destruction of, or wrongful interference with, property of American nationals," with exceptions not pertinent here. The Act provided that all decisions by the Commission with respect to claims "shall be based upon such evidence and written legal contentions as may be presented * * *, and upon the results of such independent investigation with respect to such claims as the Commission may deem it advisable to make." It provided that the reasons for the decisions should be stated and that each decision "shall constitute a full and final disposition of the case in which the decision is rendered." In any case in which an award was entered the Commission was required to certify such award to the Secretary of the Treasury. The Act also provided that payments of awards should be made "in accordance with such regulations as the Secretary of the Treasury may prescribe" and "shall be made only to the person or persons on behalf of whom the award or appraisal is made," and the "decisions of the Secretary of the Treasury in making such payments shall be final and conclusive and shall not be subject to review by any other officer of the Government."

One hundred thirty-eight individuals and estates, referred to by the Commission as the "Arguello heirs and assignees (Rancho Tijuana)," filed claims. Appellant filed a claim on behalf of the estate of Jose Francisco Arguello and on behalf of the heirs of his estate for the townsite of Tijuana. In her claim she stated: "No claim is made herein on behalf of the estate of the deceased Jose Francisco Arguello for lots B and K, outside of the limits of the Town of Tiajuana, * * * for the reason that it is believed that under the decision of the Supreme Court of Mexico * * * it will be possible for the administratrix of the estate of said deceased to take possession of said property." Respondent filed a claim on behalf of the estate of Pilar Arguello de Luckhardt, including claim for lots B and K. On April 4, 1947, the Commission made its award to various named claimants, including the sum of $21,646 to "The heirs of Jose Francisco Arguello as their interests may appear." The authority of the Commission terminated on April 5, 1947.

The decision of the Commission in part states that "A number of statements of claims have been filed. These have been amended and revised, and upon the whole the record is very unsatisfactory. * * * Additional evidence has been filed at various times and this Commission has received evidence as late as possible in an endeavor to determine accurately the ownership of the property of the various interests involved. This has not been completely successful." The decision says: "The Commission is unable to determine from the record with certainty the ownership of some of the property. No complete record of conveyances has been furnished. Instead, an index of conveyances has been submitted." The Commission continued "Because of the uncertainty as to ownership, this Commission specifically disallows all claims herein except such portions hereinafter specifically found to be subjects of award. This Commission makes no finding that any claimants are not the owners of the property alleged but merely that their ownership has not been established to its satisfaction and the disallowance of such items of claim is without prejudice."

With respect to lots B and K—outside of the townsite (the award in controversy was for lots B and K)—the Commission found that the value of Lot B in 1929 was $11,042 and that the loss of use of lot K was $8,204. No award was made for the townsite. Appellant's claim was only for loss of lands in the townsite. The Commission concluded: "Upon the basis of the entire record the Commission concludes that the claimants to whom awards are made herein have shown that they or their respective predecessors in interest were, on November 7, 1929, the rightful owners of various portions and parcels of Tijuana Ranch, outside of the townsite, or of undivided interests therein." The parties to whom awards were made are listed with the amount each is entitled to receive, including $21,646 "without any deductions being made for assignment" to "The heirs of Jose Francisco Arguello as their interests may appear." The total for the loss of lot B and the loss of use of lot K is $19,246, not $21,646. Respondent explains this discrepancy as an error in addition made in the rush of the Commission to file its decision before its powers expired.

The complaint in the present action alleged the ownership in Pilar Arguello de Luckhardt of the interest of Jose Francisco Arguello in Rancho Tijuana, the expropriation of the land, the creation of the Commission, the filing of a claim by respondent, the decision and award, that respondent is the owner of the award, and that appellant claims some interest therein. The answer denied that respondent is the owner of the award. It alleged that Pilar Arguello de Luckhardt was a party to the partition agreements and that she and her heirs and successors, including respondent, at all times thereafter have held themselves out to be the sole owners of the lands assigned to them by those agreements. It admitted that the award "to the heirs of Jose Francisco Arguello as their interests may appear" was for lots B and K. It alleged that the award was to appellant and that she claimed "the whole thereof." Four affirmative defenses were pleaded: 1. Failure to state a cause of action. 2. Want of jurisdiction. 3. Estoppel to deny the validity of the agreements of 1889 and 1890, and that by the agreements of 1889 plaintiff's decedent received title to lands described therein and defendant's decedent and his heirs received title to other lands. 4. That the award of the Commission was to defendant, that it granted the claim of defendant's predecessor to the extent of the loss of the value of the use of lots B and K, that lots B and K were distributed to defendant's deceased by the agreement of 1889, that plaintiff has no interest in lots B and K or in the award, that the decision of the Commission is a final judgment and plaintiff is bound thereby and estopped to attack or change it. Appellant filed a cross-complaint in which she alleged that she was the owner of the award, praying that her title thereto be quieted. At the trial appellant filed an amendment to her answer, reading as follows: "Said defendant as administratrix as aforesaid, and the estate of Jose Francisco Arguello, deceased, claim no right, title or interest in or to said award of the American Mexican Claims Commission, and that said award is vested in the heirs of Jose Francisco Arguello as their interests may appear and is not made to the estate of Jose Francisco Arguello or to this defendant as administratrix thereof."

The court found the facts as alleged in the complaint; that respondent is the owner of and should be paid the award; that it is not vested in the heirs of Jose Francisco Arguello, or any of them, other than the estate of Pilar Arguello de Luckhardt; and that appellant has no interest in the award. Judgment followed accordingly.

Appellant's major contention is that the decision and award of the Commission was res judicata; that ownership of the award was conclusively settled by that decision; and that, therefore, the court was without jurisdiction. She also claims that the complaint does not state facts sufficient to constitute a cause of action for the reason that it does not allege facts showing the existence of an actual or justiciable controversy between the parties. She claims further that certain essential findings are not supported by any evidence and are contrary to the evidence.

[1,2] Claims of citizens of the United States against foreign governments usually are determined by international law, not by municipal law. Unless so provided by Congress the courts of this country, federal and state, have no jurisdiction thereover. Butler, Treaty Making Power of the United States, Vol. 2, p. 298, sec. 444. Claims of citizens against foreign governments have ordinarily been submitted to commissioners or some tribunal of arbitration to determine their validity and amount. Ibid. p. 304. Where a commission has been appointed to determine the amount and validity of claims pursuant to or as a result of a treaty, its decision is final and conclusive upon all matters within its jurisdiction and the scope of its authority whether of law or fact. Butler v. Goreley, 146 U.S. 303, 13 S.Ct. 84, 36 L.Ed. 981, 984; Comegys v. Vasse, 1 Pet. 193, 26 U.S. 193, 7 L.Ed. 108, 116. Ordinarily, the authority of the commission is limited to determining the amount and validity of claims as against the other government, and its decision is not conclusive as to the rights of different claimants among themselves. The ordinary judicial tribunals have jurisdiction of the adjustment of conflicting rights of different claimants after the amount and validity of the claim has been established by some other tribunal. Comegys v. Vasse, 1 Pet. 193, 26 U.S. 193, 7 L.Ed. 108, 116; Frevall v. Bache, 14 Pet. 95, 39 U.S. 95, 10 L.Ed. 369, 370; Meade v. United States, 9 Wall. 691, 76 U.S. 691, 19 L.Ed. 687, 690; Wiliams v. Heard, 140 U.S. 529, 11 S.Ct. 885, 35 L.Ed. 550, 554; Butler v. Goreley, 146 U.S. 303, 13 S.Ct. 84, 36 L.Ed. 981; Dutilh v. Coursault & Campbell, 8 Fed.Cas. page 159 No. 4,206, 5 Cranch C.C. 349; Ridgway v. Hays, 20 Fed.Cas. page 766, No. 11,817, 5 Cranch C.C. 23; Delafield v. Colden, 1 Paige, N.Y., 139, 142; New York Insurance Co. v. Roulet, 24 Wend., N.Y., 505, 509; Radcliff v. Coster, 1 Hoff. Ch., N.Y., 98; Lee v. Thorndike, 2 Metc. 313, 43 Mass. 313.

The Supreme Court of the United States has settled these questions in cases arising under a number of treaties and legislation pursuant thereto. On February 22, 1819, the United States concluded a treaty with Spain (Florida treaty) which provided for the appointment of commissioners to "receive, examine, *and decide* upon the amount and validity of," all claims described. 8 Stat. 252, 260. (Italics added.) By Act of March 3, 1821, the Congress provided for carrying the treaty into execution and for the appointment of three commissioners to carry out its stipulations. 3 Stat. 637. The commissioners made an award to Comegys and Pettit. Vasse sued them claiming ownership of the award. Comegys and Pettit, who claimed as assignees of Vasse, contended that the decision awarding the fund to them was conclusive in their favor and against Vasse. In Comegys v. Vasse, 1 Pet. 193, 26 U.S. 193, 7 L.Ed. 108, 116, Mr. Justice Story stated that one of the questions before the court was: "Whether the award of the commissioners, under the treaty with Spain, directing the money to be paid to the defendants, as assignees of Vasse (which is assumed to be the true state of the fact), is conclusive, upon the rights of Vasse; so as to prevent his recovery in the present action," and wrote: "It has been justly remarked, in the opinion of the learned judge who decided this cause in the Circuit Court, that it does not appear from the statement of facts, who were the persons who presented or litigated the claim before the board of commissioners; nor whether Vasse himself was before the board; nor who were the parties to whom, or for whose benefit, the award was made. We do not think that the fact is material, upon the view which we take of the authority and duties of the commissioners. The object of the treaty was to invest the commissioners with full power and authority to receive, examine, and decide upon the amount and validity of the asserted claims upon Spain, for damages and injuries. Their decision, within the scope of this authority, is conclusive and final. If they pronounce the claim valid or invalid, if they ascertain the amount, their award in the premises is not re-examinable.

The parties must abide by it, as the decree of a competent tribunal of exclusive jurisdiction. A rejected claim cannot be brought again under review, in any judicial tribunal; an amount once fixed, is a final ascertainment of the damages or injury. This is the obvious purport of a language of the treaty. But it does not necessarily or naturally follow that this authority, so delegated, includes the authority to adjust all conflicting rights of different citizens to the fund so awarded. The commissioners are to look to the original claim for damages and injuries against Spain itself, and it is wholly immaterial for this purpose, upon whom it may, in the intermediate time, have devolved; or who was the original legal, as contradistinguished from the equitable owner, provided he was an American citizen. If the claim was to be allowed as against Spain, the present ownership of it, whether in assignees or personal representatives, or bona fide purchasers, was not necessary to be ascertained, in order to exercise their functions in the fullest manner. Nor could they be presumed to possess the means of exercising such a broader jurisdiction, with due justice and effect. They had no authority to compel parties, asserting conflicting interests, to appear and litigate before them, nor to summon witnesses to establish or repel such interests; and under such circumstances, it cannot be presumed that it was the intention of either government, to clothe them with an authority so summary and conclusive, with means so little adapted to the attainment of the ends of a substantial justice. The validity and amount of the claim being once ascertained by their award, the fund might well be permitted to pass into the hands of any claimant; and his own rights, as well as those of all others, who asserted a title to the fund, be left to the ordinary course of judicial proceedings in the established courts, where redress could be administered according to the nature and extent of the rights or equities of all the parties. We are, therefore, of opinion, that the award of the commissioners, in whatever form made, presents no bar to the action, if the plaintiff is entitled to the money awarded by the commissioners." See, to the same effect, Delafield v. Colden, 1 Paige, N.Y., 139, under the Florida treaty.

In Ridgway v. Hays, 20 Fed.Cas. page 766, No. 11,817,5 Cranch C.C. 23, it was held that "the commissioners [under the French Treaty, 8 Stats. 430, and the Act of July 13, 1832, 4 Stats. 574] had no jurisdiction to decide ultimately between two or more conflicting American claimants," the court saying: "The claims, of which the board had cognizance, were claims against the French government; not against the owners of the property claimed, nor against the property itself. In each case, the great question for them to decide was, whether the property of American ctiizens had been unlawfully seized, &c., by the French government. So far as it was necessary to decide the national character of the property seized, they [the commissioners] had authority to ascertain the legal owner; but if all the conflicting claimants were citizens of the United States, there was no necessity of their deciding the question of ownership between them. They might select the name of the person who seemed to them to be the legal owner, or they might name all the conflicting claimants, and leave them to litigate their rights in the municipal courts of the country; or they might award in favor of 'the legal owners,' without naming them, as they did in several cases * * *." Also, under the Act of Congress enacted pursuant to the French treaty: Dutilh v. Coursault, 8 F.Cas. page 159 No. 4,206, 5 Cranch C.C. 349; Varet v. New York Insurance Co., 7 Paige, N.Y., 560; Lee v. Thorndike, 2 Metc. 313, 43 Mass. 313; New York Insurance Co. v. Roulet, 24 Wend., N.Y., 505. To the same effect, Frevall v. Bache, 14 Pet. 95, 39 U.S. 95, 10 L.Ed. 369, under the treaty of 1831 with France, 8 Stat. 430, and the Act of Congress enacted pursuant thereto, 4 Stat. 574, which contained this provision: "That the said commissioner shall report to the Secretary of State a list of the several awards made by them; a certified copy whereof shall be by him transmitted to the Secretary of Treasury, who shall thereupon distribute, in rateable proportions, among the persons in whose favor the award shall have been made, such monies as may have been received into the Treasury in virtue of this act.

* * *" Appellant relies upon similar provisions of the Settlement of Mexican Claims Act of 1942 in support of her contention that the decision of the Commission is conclusive as to ownership. On July 4, 1868, a convention was concluded between the United States and Mexico, 15 Stat. 679; 17 Stat. 861; 18 Stat. 760; 18 Stat. 833; 19 Stat. 642, for the adjustment of claims of citizens of either country against the other. The Act of Congress pursuant thereto, 20 Stat. 144, imposed like powers and duties on the Secretary of State. See, Porter v. White, 127 U.S. 235, 8 S.Ct. 1217, 32 L.Ed. 112. In Bayard v. United States, 127 U.S. 246, 8 S.Ct. 1223, 32 L.Ed. 116, it was held that mandamus would not lie to compel the Secretary of State to pay an award so long as litigation was pending as to ownership of the award.

By Act of June 23, 1874, the Congress established the "Court of Commissioners of Alabama Claims" for the adjudication and disposition of monies received by the United States under an award made by the tribunal of arbitration constituted by virtue of the treaty of May 8, 1871, between the United States and Great Britain. 18 Stat. 245. The members of the Court were denominated judges and required to take an oath of office. The Court was "vested with the same powers now possessed by the circuit and district courts of the United States to compel the attendance and testimony of parties, claimants, and witnesses, to preserve order, and to punish for contempt"; to compel the production of material, books and papers, to administer oaths and to take depositions. Section 11 of the Act provided: "That it shall be the duty of said court to receive and examine all claims * * * and to decide upon the amount and validity of such claims. * * *" Section 14 provided: "That the said court shall report to the Secretary of State a list of the several judgments and decisions made by it, a certified copy of which shall, upon the conclusion of the business of the said court, be by him transmitted to the Secretary of the Treasury, who shall thereafter * * * pay the said judgments * * * unto the persons, respectively, in whose favor the same shall have been made, or to their respective legal representatives, in full satisfaction and discharge of said judgments * * *."

Williams v. Heard, 140 U.S. 529, 11 S.Ct. 885, 887, 35 L.Ed. 550, was a contest as to an award which the court said "was made by the court of commissioners in December, 1886, that court finding that the assignees of the defendants in error were entitled to such award." It was urged that the finding was final and irrevocable both as to the amount and those entitled to receive that amount. The court held: "We are not impressed with this view. In our opinion it is unsound. The object for which the court of commissioners of Alabama claims was established was to pass upon the claims which were presented to it for adjudication, and determine the amount to be paid by the United States on each claim. Questions respecting the ownership of the respective claims did not concern the court. Its function was performed when it rendered its judgment on the merit of the claims. Its judgments were final upon all parties as respects the validity of the claim and the amount to be paid in satisfaction of it, but there is nothing in the acts of congress relating to this matter, or in the reason of things, to indicate that the judgment of the court as to who were the owners of the respective claims submitted should be considered final and irrevocable." To the same effect with respect to awards of the Court of Commissioners of Alabama Claims: Butler v. Goreley, 146 U.S. 303, 13 S.Ct. 84, 36 L.Ed. 981; Leonard v. Nye, 125 Mass. 455.

All that is said in the foregoing cases applies with like force to the powers of the American Mexican Claims Commission. Appellant, in effect, concedes that its powers were so limited when she says: "The powers of the Commission are delineated and limited to the determination of the validity of claims 22 U.S.C.A. § 661. The Commission's decision does no more than that."

[3] It is manifest from the language of the award itself that the Commission did not determine the question of ownership. The award was not made to the heirs of Jose Francisco Arguello, but to "the heirs of Jose Francisco Arguello as their interests may appear." The clause "as their interests may appear" is one of restriction. It

postulates whatever interests, if any, the heirs may be able, by proper proof and in the proper manner, to prove they possess. It refers to such interests in lots B and K, if any, as it may appear they had at the time of the loss. If an heir then had an interest he is entitled to his proportionate share of the award. If he had no interest he is not entitled to share in the award. See, Fenton v. Cascade Mut. Fire Ass'n. 60 Wash. 389, 111 P. 343, 344; Atlas Reduction Co. v. New Zealand Ins. Co., 8 Cir., 138 F. 497, 9 L.R.A.,N.S., 433; Eagle Star & British Dominions v. Tadlock, D.C., 22 F.Supp. 545.

There is another and compelling reason why it may not be held that the decision of the Commission is final and conclusive as to ownership of the award. The Commission stated that the record as to the Arguello claims was very unsatisfactory, that its endeavor to determine accurately the ownership of the various interests involved had not been completely successful. It said that it was "unable to determine from the record with certainty the ownership of some of the property." Because of the uncertainty as to ownership it made "no finding that any claimants are not the owners of the property alleged but merely that their ownership has not been established to its satisfaction and the disallowance of such items of claim is without prejudice." It seems clear that the Commission did not determine the ownership of lots B and K. Had it done so, there is no reason why it could not have specifically made the award to the estate of Jose Francisco Arguello, the estate of Pilar Arguello de Luckhardt, or to the heirs of Jose Francisco Arguello without the qualifying or restrictive clause. With respect to every other award the Commission made on claims of Arguellos it specifically named the person or estate to whom the award was made. It cannot be said, as appellant asserts, that the Commission rejected or disallowed respondent's claim. It does not so appear from the decision. The Act provided that the Commission upon completion of its work transmit to the Secretaries of State and of the Treasury "a list of all claims disallowed." 22 U.S.C.A. § 664(e). There is no evidence that respondent's claim was included in that list.

Appellant argues that the Administrative Procedure Act of 1946, 5 U.S.C.A. § 1001 et seq., is applicable to proceedings before the American Mexican Claims Commission, and that it provides the exclusive method of reviewing the decision of the Commission. Respondent is not seeking review of the decision. He is asking only a determination of ownership of the award, a question the Commission was not authorized to, and did not, decide.

[4] We conclude that the American Mexican Claims Commission did not have jurisdiction or authority to, and did not purport to, determine conflicting rights between American nationals to the fund awarded to "The heirs of Jose Francisco Arguello as their interests may appear"; that the decision and award is not res judicata as to such conflicting rights or as to ownership of the award; and that the court below had jurisdiction to adjudicate the conflicting claims of the parties to the award.

[5, 6] The evidence fully supports the findings of the trial court that "Pilar Arguello de Luckhardt, at the time of her death, was the owner of all of the right, title and interest that Jose Francisco Arguello had or acquired in the Tijuana Ranch, and that plaintiff has been the owner thereof at all times subseqeunt to her death * * *"; that respondent at the time of expropriation and at the time of the making of the award was the owner of lots B and K; that respondent is the owner of the entire award; and that neither appellant nor any heir of Jose Francisco Arguello, "other than the Estate of Pilar Arguello de Luckhardt," has any interest in the award; and that it should be paid to respondent as executor. Legally an executor is not the owner of the assets of the estate he is administering. Title is in the legatees and devisees subject to possession by the executor. 11b Cal.Jur. 238, secs. 834, 835. However, the finding that the executor is the owner is clearly one that he holds for the legatees and devisees and a matter of which appellant does not and cannot complain. The deed of March 7, 1870, from Jose Francisco Arguello and Tomasa Lugo, his wife, conveyed to Caesar A. Luckhardt for a valuable consideration all of their "interest, and in-

heritance whatsoever" in Rancho Tijuana. By deed of July 1, 1870, Caesar A. Luckhardt conveyed to Pilar Arguello de Luckhardt "all his rights or inheritance, ownership, possession or interests in inheritance," in Rancho Tijuana. Pilar Arguello de Luckhardt appeared in the partition proceedings in Baja California, and was awarded the property, including lots B and K, which her father would have inherited had he not conveyed his rights to Caesar Luckhardt in 1870. She was given, and accepted, possession. Thereafter during her lifetime Pilar claimed lots B and K. Her executor has claimed them since her death in 1900. So far as appears, neither appellant nor any other heir of Jose except Pilar made claim to them until 1946.

[7] The complaint states facts sufficient to state a cause of action for declaratory relief. It alleges ownership by Pilar Arguello de Luckhardt, at her death, and by respondent since, of all of the interest of Jose Francisco Arguello in Tijuana Rancho and that respondent is the owner of the award; that appellant claims the award; that she has no right therein. These allegations are sufficient. They show an actual controversy relating to rights in respect to property. Code Civ.Proc., sec. 1060; Lord v. Garland, 27 Cal.2d 840, 851–852, 168 P.2d 5; Wollenberg v. Tonningsen, 8 Cal.App.2d 722, 726, 48 P.2d 738; James v. Hall, 88 Cal.App. 528, 264 P. 516. The award is property. Phelps v. McDonald, 99 U.S. 298, 25 L.Ed. 473; Butler v. Goreley, 146 U.S. 303, 13 S.Ct. 84, 36 L.Ed. 981, 985. The complaint did not seek a declaration of rights in land in Mexico as appellant asserts. The declaration of rights sought was in the award. Neither did the complaint seek to annul, modify, review, or reverse the award as appellant argues. It sought only a declaration of rights in the award as made, a justiciable controversy of which the court had jurisdiction. The court did not abuse its discretion in entertaining the complaint for declaratory relief.

[8] There is likewise no merit in the contention that the complaint does not state a cause of action for declaratory relief in that no actual controversy existed because appellant at the beginning of the trial filed an amendment to the answer in which she stated that neither she, as administratrix, nor the estate of Jose, claimed any interest in the award, and that the award was vested in the heirs of Jose as their interests may appear. The answer admitted that appellant, as administratrix, "claims said award and the whole thereof," and denied that respondent is the owner. Appellant filed a cross-complaint praying that all adverse claims to the award be determined and that she be decreed the owner. At the opening of the trial she filed the amendment, dismissed the cross-complaint, objected to the introduction of any evidence, and moved for judgment on the pleadings. The objection was overruled and the motion denied. The following colloquy then took place:

"Mr. Wallace: [Attorney for plaintiff] As soon as Mr. Mace has filed that amendment to the answer I suppose I can make just very formal proof.

"Mr. Mace: [Attorney for defendant] No, I am going to try it on the merits.

"Mr. Wallace: I do not know how you are going to try it on the merits when you have disclaimed.

"Mr. Mace: You go ahead with your proof."

In proving her case appellant was called to the stand to prove the heirs of Jose. Respondent objected. Whereupon the attorney for appellant said: "The award is to the heirs and I am proving who the heirs are, your Honor." He then proceeded to and did prove Jose's heirs. The case was tried on its merits. Evidence was introduced by appellant with respect to all issues in an attempt to negative the allegations of the complaint and to prove the affirmative allegations of her answer. All issues made by the complaint and the answer, without the amendment, were found upon. Apparently the parties introduced all evidence available with respect to those issues. At the oral argument in this court appellant's counsel stated that the amendment did not withdraw the affirmative defenses of the answer. Appellant is estopped from asserting here that an actual controversy did not exist between the parties. As said in Wollenberg v. Tonningsen, 8 Cal.App.2d 722, 725, 48 P.2d 738, 740, where it was claimed that the complaint did not state a cause of action for declaratory relief because no real controversy existed: "The point would have presented a question of debatable interest if the appellant had stood upon his demurrer, but having answered and gone to trial and the evidence having disclosed the manifest equities incorporated in the judgment the question of the sufficiency of the complaint becomes academic."

[9-13] We are of the opinion, contrary to appellant's contention, that the judgment binds the heirs of Jose Francisco Arguello. The basis of the claimed right of the heirs to the award is that Jose in his lifetime owned land which had been expropriated. Upon his death, if he owned the land, it passed to his children. It is in evidence that upon Jose's death whatever land he owned in Mexico passed to his children. Everything he owned at death passed by succession if not disposed of by will. He died intestate. Under treaty with Mexico and legislation enacted pursuant thereto, American nationals asserting ownership of land were given the right to make claim for land expropriated. The claim here existed solely because of the contention that title to the land had passed to the heirs of Jose upon his death. Appellant said in her claim: "The title to the lands thus expropriated are [sic] claimed by the estate of said deceased [Jose Francisco Arguello] * * *" The claim for the loss by reason of the expropriation of the land was a right attached to the ownership of the property itself. Comegys v. Vasse, 1 Pet. 193, 26 U.S. 193, 7 L.Ed. 108, 118. It was personal property (see cases cited supra), an asset of the estate. In making the claim the administratrix represented whatever title Jose had in the land at the time of his death. The legal owners of the claim made by appellant were, of course, the heirs, but subject to the possession of the administratrix. The possession of the administratrix is exclusive of the heirs and good as against all the world until distribution. Probate Code, sec. 300; 11b Cal.Jur. 243, sec. 836. The administratrix and the heirs are in privity. 11b Cal.Jur. 243, sec. 836. The claim ripened, so appellant asserts, into an award. The award was not a gift or donation. Phelps v. McDonald, 99 U.S. 298, 25 L.Ed. 473, 474. Title to the award, if it is in the heirs, came to them by operation of law, by descent; not by purchase. The partition did not create a new title in the heirs or change the character of the title from one of descent to a title by purchase. 16 Am.Jur. 845, sec. 73; anno. 103 A.L.R. 231. Property passing by descent vests by succession. 9 Cal.Jur. 447, sec. 1. Civil Code section 1000 provides: "Property is acquired by: 1. Occupancy; 2. Accession; 3. Transfer; 4. Will; or, 5. Succession." If Jose owned the land at death, neither the land nor the claim nor the award came to the heirs by any manner enumerated except succession. Anything that passes by succession must be administered. 11a Cal.Jur. 58, sec. 11. The title which the heirs of Jose assert in the award is represented by appellant as administratrix. 11b Cal.Jur. 240, sec. 835.

[14, 15] A judgment entered in an action in which an administratrix of an estate of a deceased person is a party, is binding not only upon the administratrix but also upon the heirs of the deceased person, even though the heirs have not been made parties to the action. The rule in this state is that the judgment concludes not only the adverse party but also all those claiming under the title he represents. Estate of Clark's Estate, 190 Cal. 354, 359, 212 P. 622; Walker v. Hansen, 218 Cal. 619, 24 P.2d 764; Dickey v. Gibson, 121 Cal. 276, 278, 53 P. 704; Finger v. McCaughey, 119 Cal. 59, 51 P. 13; McLeran v. Benton, 73 Cal. 329, 342, 14 P. 879, 2 Am.St.Rep. 814; Fredericks v. Judah, 73 Cal. 604, 608, 15 P. 305; Bayly v. Muehe, 65 Cal. 345, 348, 3 P. 467, 4 P. 202, 486; De La Ossa v. Oxarast, 58 Cal. 101; Cunningham v. Ashley, 45 Cal. 485; Meeks v. Olpherts, 100 U.S. 564, 25 L.Ed. 735, 737; Lloyd v. Ball, D.C., 77 F. 365, 368; cf. Cutting v. Bryan, 206 Cal. 254, 258, 274 P. 326; Yearout v. American Pipe & Steel Corp., 74 Cal.App.2d 139, 143, 168 P.2d 174.

[16] Any errors in the making of findings without evidentiary support and contrary to the evidence are not of consequence or prejudicial. The criticized findings are not necessary to sustain the judgment. The

findings we have previously referred to fully support the judgment. If one or more of the findings, supported by substantial evidence sustains the judgment, as in this case the findings previously referred to do, it is presumed that the trial court predicated its judgment on those findings, and questions relative to other findings are immaterial. Mershon Co. v. Pachmayr, 88 Cal. App.2d 901, 199 P.2d 687.

Judgment affirmed.

SHINN, P. J., and WOOD, J., concur.

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92 Cal.App.2d 520

In re ARGUELLO'S ESTATE.

MOORADIAN v. LUCKHARDT.

Civ. 16935.

District Court of Appeal, Second District, Division 3, California.

June 21, 1949.

Descent and distribution 🔑71(1)

Where American Mexican Claims Commission awarded fund as damages for expropriation of Mexican land of American nationals by Mexican government to heirs of son of original grantee of land "as their interests may appear", any interest of heirs of deceased son in award was by succession, and hence heirs of son could not be determined in statutory proceeding to determine heirship. Probate Code, § 1190; Settlement of Mexican Claims Act of 1942, § 1 et seq., as amended, 22 U.S.C.A. § 661 et seq.

Appeal from Superior Court, Los Angeles County; Kurtz Kauffman, Judge.

Proceeding in the matter of the estate of Jose Francisco Arguello, deceased, wherein Gwendolyn Lucero Mooradian filed a petition in the probate court to determine heirship under Probate Code, § 1190, opposed by Frank R. Luckhardt, as executor of the estate of Pilar A. de Luckhardt, deceased. From a decree of the superior court determining heirship, the executor appeals

Reversed.

Wallace, Cashin & Arrington and W. W. Wallace, Los Angeles, for appellants.

John L. Mace, Los Angeles, for respondent.

VALLÉE, Justice.

This case arose out of the same award as did Luckhardt v. Mooradian, Cal.App., 207 P.2d 579.

The judgment in the Luckhardt case was signed March 24, 1948. On the following day Gwendolyn Lucero Mooradian, not as administratrix of the estate of Jose Francisco Arguello but individually, filed a petition in the probate court of the County of Los Angeles labeled "To Determine Heirship." The petition alleged the expropriation of the lands in Rancho Tijuana, the creation of the American Mexican Claims Commission, the presentation of a claim by her mother as predecessor administratrix of the estate of Jose, the award of the Commission "to the heirs of Jose Francisco Arguello as their interests may appear, $21,646.00." The petition also alleged that the award constitutes personal property which vests other than by succession in the heirs of Jose without other description or means of identification; that petitioner's mother assigned her interest to the petitioner; and that certain named persons were the heirs of Jose and that they were entitled to receive the award of the commission. The prayer was for a decree "determining and establishing the identity of the persons embraced in the award."

Frank R. Luckhardt as executor of the estate of Pilar Arguello de Luckhardt filed an "opposition" to the petition. Among other things he alleged the judgment in Luckhardt v. Mooradian; that it adjudged that petitioner, as executrix of the estate of Jose Francisco Arguello, and the heirs of Jose had no interest in the award; that insofar as the petition sought to determine title to the award in the heirs of Jose, said matter had been adjudicated.

The court found the facts as alleged in the petition; that the Commission disallowed the claim of Frank R. Luckhardt, as executor; that the award constitutes personal property; that the heirs of Jose designated in the award were certain named persons; that the award vested in those persons other than by the laws of succession apportioned in accordance with the laws of intestate succession of the State of California; that neither the estate of Pilar Arguello de Luckhardt pending in California, nor her executor, suffered any damage by the expropriation of lands in Mexico for the reason that said estate and said executor had no right, title or interest therein; that the judgment (in Luckhardt v. Mooradian, ante) did not determine or decree that the heirs of Jose Francisco Arguello have no interest in said award for the reason that none of his heirs were parties to said action.

The decree was that the identity of the heirs "in whom the award of the American Mexican Claims Commission, dated April 4, 1947, made pursuant to the settlement of Mexican Claims Act of 1942 [22 U.S.C.A. § 661 et seq.], vested" was certain named persons. Frank R. Luckhardt, as executor of the will of Pilar Arguello de Luckhardt, appeals.

The principal points urged for reversal are that the award did not vest in the heirs of Jose Francisco Arguello "other than by the laws of succession" and that the probate court did not have jurisdiction to try title.

Probate Code section 1190 provides: "When title to real or personal property, or any interest therein, vests, other than by the laws of succession, in the heirs, * * * of any person, without other description, or means of identification of the persons embraced in such description, any person interested in such property as such heir, * * * may file a verified petition in the superior court of the county in which the property or any part thereof is situated, setting forth * * * and requesting that a decree be entered determining and establishing the identity of the persons embraced in such general description." The power of the court under section 1190 is to determine and establish the identity of the heirs only if title to property vests, "other than by the laws of succession."

Inasmuch as we have held in the Luckhardt case that if the heirs of Jose Francisco Arguello acquired any interest in the award of the American Mexican Claims Commission it was by succession, it follows that the court was without jurisdiction to determine the heirs in this proceeding.

Upon the authority of Luckhardt v. Mooradian, Cal.App., 207 P.2d 579, the decree is reversed.

SHINN, P. J., and WOOD, J., concur.

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92 Cal.App.2d 698

McCLELLAND v. ACME BREWING CO. et al.

Civ. 16795.

District Court of Appeal, Second District, Division 1, California.

July 1, 1949.

Hearing Denied Aug. 25, 1949.

1. Trial 🔑139(1), 165

A motion for a nonsuit may not be granted where there is evidence of sufficient substantiality to support a finding for the plaintiff, and in arriving at conclusion on such question, the evidence should be viewed most favorably to plaintiff with every legitimate inference drawn in her favor and conflicts disregarded.

2. Negligence 🔑121(3)

Evidence disclosing manner in which brewing company inspected and filled beer bottles, and disclosing that case of beer containing exploding bottle suffered no damage at any stage of transportation from time of company's delivery to distributor until accident occurred, presented prima facie case of negligence sufficient to permit bartender to rely on res ipsa loquitur doctrine in his action against brewing company for loss of eye as result of explosion of bottle which bartender was transferring from case to tub of ice-cooled water.

◆

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Personal injury action by Buyd H. McClelland against Acme Brewing Company, a corporation, and others. From a judgment of nonsuit in favor of Acme Brewing Company, the plaintiff appeals.

Reversed.

George C. Bliss, Beverly Hills, for appellant.

Crider, Runkle & Tilson, Los Angeles, for respondent.

DRAPEAU, Justice.

This action arises out of injuries sustained by plaintiff when a bottle of beer exploded.

Plaintiff was a bartender employed by a catering company which had a concession at the Bonelli Ranch at Saugus. He was transferring a bottle of beer from its case to a tub of ice-cooled water when the bottle broke with a pop, or flash, resulting in the loss of plaintiff's left eye.

Defendant Acme Brewing Company was the manufacturer and bottler of the beer, and defendant Bohemian Distributing Company had exclusive distributing rights of all beer made by Acme.

At the close of plaintiff's case, the trial court granted motions for nonsuit of both defendants, made on the ground that there was no proof of negligence on their part which caused or contributed to the accident.

This appeal is directed against the judgment of nonsuit in favor of Acme Brewing Company, it being contended that the evidence was sufficient to raise an issue of fact for the jury's determination.

[1] It is well established that "A motion for a nonsuit may not be granted where there is evidence of sufficient substantiality to support a finding for the plaintiff, and in arriving at a conclusion on the question the evidence should be viewed most favorably to the plaintiff with every legitimate inference drawn in her favor and conflicts disregarded. Barnett v. LaMesa Post No. 282, 15 Cal.2d 191 (99 P.2d 650), and cases there cited." Milana v. Credit Discount Co., 27 Cal.2d 335, 342, 163 P.2d 869, 873, 165 A.L.R. 621.

On the subject of exploding bottles the following appears in Gordon v. Aztec Brewing Company, 33 Cal.2d 514, 203 P.2d 522, 524: "In Escola v. Coca Cola Bottling Co., 24 Cal.2d 453 (150 P.2d 436), it was pointed out that a sound bottle of carbonated liquid does not ordinarily explode if it is carefully handled. Where a bottle containing liquid under pressure does explode causing injury the plaintiff is entitled to the benefit of the doctrine of res ipsa loquitur to supply an inference that the bottler was negligent, either in excessively charging the liquid, or in failing to discover a flaw in the bottle, if it is probable under the evidence that the defendant was negligent in either respect."

The court in the Gordon case held that the doctrine of res ipsa loquitur applied only where the instrumentality causing the injury was subject to the control of the defendant, and quoted from the Escola case, supra, that "the doctrine may be applied upon the theory that defendant had control at the time of the alleged negligent act, although not at the time of the accident, provided plaintiff first prove that the condition of the instrumentality had not been changed after it left the defendant's possession." Further, "that a plaintiff may rely on the doctrine of res ipsa loquitur 'if there is evidence permitting a reasonable inference that it (the exploded bottle) was not accessible to extraneous harmful forces and that it was carefully handled by plaintiff or any third person who may have moved or touched it.' (Escola v. Coca Cola Bottling Co., supra, 24 Cal.2d 453, 458, 150 P.2d 436.)"

In the Gordon case there was evidence showing that defendant was negligent in failing to make any of the standard tests for the detection of flaws in the bottles it distributed.

In the Escola case, the court held that plaintiff was entitled to rely on the doctrine of res ipsa loquitur to supply an inference of defendant's negligence for the reason that, while it did not clearly appear whether the explosion was caused by an excessive charge or a defect in the glass, it was shown "that neither cause would ordinarily have been present if due care had been used" [24 Cal.2d 453, 150 P.2d 440]; defendant having exclusive control over both the charging and inspection of the bottles.

In the instant cause there was evidence that in 1945 about 60 per cent of the bottles used in bottling Acme beer were old or used bottles returned to Acme by Bohemian. It was also shown that the following method of inspection is customary: Employees of Bohemian examine the bottles at the Acme plant before they are placed in the machinery there; three men then inspect the bottles as they go into the washing machine called a "soaker," where the bottles are kept separate. They are there tempered in tanks of caustic solution at 110, 170, 150 and 90 degrees Fahrenheit, respectively, flushed with clear water, scrubbed with nylon brushes and then sprayed with fresh water. As they come out of the washing machine, the bottles are checked by an operator for flaws, after which they "go before a light, a fluorescent light that lights up the bottle for a man who sits in front of this particular light and inspects those bottles." Thereafter the bottles proceed to the filling machine where they are filled with beer and capped; they are again inspected and the filled bottles placed in the pasteurizing machine. The bottles come out of the washer at 90 degrees and are pasteurized at 140 degrees. Next they are labeled and packed in wooden cases with wooden dividers, placed on conveyor belts and sent to the end of the production line for delivery to Bohemian Distributing Company.

The assistant bottle shop superintendent for Acme testified that from fifty to sixty bottles per month blow up after they are filled, and three, four or five bottles a day after they come out of the pasteurizer; that the workers on the production line and the men handling the cases at the end of the line are all required to wear safety glasses; and that in marketing the beer, it is anticipated that it will be cooled before consumed and that the bottles probably will be warm when put into a cold temperature for such cooling. In answer to the question "Do they test the bottles to see if they could go through that process and still have a nick in them? Did you ever know of them to make such a test?" this witness stated: "Yes, we have made many tests and have had glass experts test them. * * *

"Q. You don't do that as a regular procedure, do you, Mr. Keane? A. You mean every bottle?

"Q. You don't pick out every three hundredth bottle and make a test? * * * Or fifty or every three thousand, do you? A. We are selling beer at twenty cents a bottle. We couldn't take out every bottle and examine it."

Mr. William W. Harper, a consulting physicist, testifying as an expert stated that stretching of glass is the basic cause of failure; that a sound bottle of beer would not fracture if taken from ordinary weather temperature on a reasonably hot day and placed in cold water that had come from ice melting; that the conditions of temperature change, as outlined in the hypothetical question based on testimony produced by plaintiff, were not sufficient to cause a normally sound bottle to explode; and that in his opinion there was a latent defect of some type which was triggered off by the change of temperature; that the tests used at the Acme plant as described by the bottle shop superintendent were not sufficient to fracture every bottle that was not perfectly sound; and that the inspection described by such superintendent by means of fluorescent lights was not sufficient to discover each and all defects in the glass; that cordiness in glass cannot be discovered by the fluorescent lamp; and that each individual bottle would have to undergo tests and examination for possibly five or six minutes to be reasonably certain there was not some serious defect present. This witness also testified "There is no single test or combination of tests in my opinion which are absolutely infallible in diagnosing or predicting ultimate failure of glass."

Plaintiff presented evidence to the effect that the case of beer containing the bottle which exploded suffered no damage at any stage of its transportation from the time of its delivery to Bohemian at the Acme plant until the accident occurred, to-wit:

The case in question was one of 200 cases transported from the Acme plant to Bohemian's Burbank warehouse in trucks operated by the Wade Transportation Company during the month of September, 1945. The cases were delivered by the conveyor at Acme directly to the trucks of the Wade Company acting as transportation agent, and were loaded on the trucks by employees of Wade without removal of the bottles from their compartments in the cases. The trucks were backed to a platform and unloaded by the Wade Company employees onto a conveyor into the Burbank warehouse; once in a while bottles were broken. The warehousemen, employees of Bohemian, would stack the cases and would also place the cases on trucks for delivery to purchasers. During all the time cases remained in the warehouse, the bottles were in the divided partitions and on occasions, bottles exploded. The average turnover of beer at the Burbank warehouse was from three to four days.

The Wade Transportation Company had no record of any accident to its trucks in transporting the beer prior to September 7, 1945, and Bohemian employed a safety supervisor whose duty was to instruct the drivers and warehousemen in the use of care in handling beer in cases. The purpose of wooden dividers in the cases was to keep the bottles from knocking together.

Defendant Roy. D. Galvez, a driver for Bohemian, delivered the 200 cases of beer from the Burbank warehouse to the Bonelli Ranch, where he unloaded it and placed it in the open warehouse, from which place plaintiff obtained the beer. Galvez testified that in delivering and unloading the beer, he had no accident; there was no rough handling; that he was careful in handling the cases and they were not bumped together. During the time he handled the beer, the bottles remained in their cases.

Plaintiff went to Bonelli's Ranch on September 9, 1945, and prior to the accident, he had taken several cases of Acme beer by means of a truck from the warehouse, a screened building 25 to 30 feet square, to the cooling tubs which was a distance of about 300 feet; that no one moved any of the beer from the warehouse except himself and no one helped him unload it or place it in the tub of ice-cooled water. The bottle broke under the following circumstances, in the words of the plaintiff: "I had the case setting there. It had two bottles in it. I took one in each hand. I went over to the tub and put them in the water, and as I did one of the bottles broke as I hit the water. * * * it just popped. * * * Kind of flash. * * * Something hit me in the eye."

In Gordon v. Aztec Brewing Co., supra, 33 Cal.2d 514, 518, 203 P.2d 522, 524, the course of the beer there involved was traced as follows: "The cases were loaded on trucks of the LaSalle Trucking Company at the defendant's San Diego Plant; LaSalle drivers delivered them to a warehouse of the Associated Brewers Distributing Company in Los Angeles where they remained about three days; on August 22 the case which contained the bottle that exploded was delivered by an Associated driver to the plaintiff. Evidence was presented which showed that LaSalle trucks were not involved in accidents during August, 1944; that no accidents occurred in the Associated warehouse that month which might have affected the beer; that the driver who delivered the case to the plaintiff was not involved in an accident en route and did not bump the case; that it was in excellent condition on delivery, and that the plaintiff handled the case and bottle carefully. While this evidence was not conclusive it was the jury's province to determine, after being properly instructed, whether the plaintiff had sufficiently proved the absence of intervening harmful forces after the defendant shipped the bottle to entitle plaintiff to rely on an inference inherent in the doctrine that the defendant's lack of care was the proximate cause of his injury."

[2] Likewise in the cause here under review, plaintiff presented a prima facie case of negligence sufficient to permit the reliance by him on the doctrine of res ipsa loquitur pursuant to the principles enunciated by the Escola and Gordon cases, supra. As a result, the judgment of nonsuit in fa-

vor of defendant Acme Brewing Company was improper.

The judgment is reversed.

WHITE, P. J., and DORAN, J., concur.

92 Cal.App.2d 582

MURPHY v. TRAVELERS INS. CO. et al.

Civ. 3915.

District Court of Appeal, Fourth District, California.

June 24, 1949.

Rehearing Denied July 21, 1949.

Hearing Denied Aug. 18, 1949.

1. Domicile ⚷4(1)

The domicile of a person is not necessarily affected by his enlistment in civil, military or naval service of his country nor does he necessarily acquire one at the place where he serves.

2. Domicile ⚷4(1)

The fact of being on military duty does not preclude a person, if he so desires from establishing a residence in the state where he is stationed.

3. Domicile ⚷4(2)

The question whether a person has changed his residence from one place to another depends largely upon his intention.

4. Domicile ⚷4(2), 8

A domicile once acquired is presumed to continue until it is shown to have been changed, and to constitute the new domicile, residence in new locality and intention to remain there must exist.

5. Domicile ⚷1

A "domicile" is a place whence a person goes for labor or other temporary purpose and whither he returns in seasons of repose.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Domicile".

6. Domicile ⚷10

In action by insured's widow to recover one-half of proceeds of life policy which named insured's mother as beneficiary, on theory that insured was resident of California and that premiums were paid from community funds, evidence supported finding that insured was resident of California from year 1926 until his death in 1946.

7. Appeal and error ⚷1011(1)

Finding of trial judge based on conflicting evidence could not be disturbed on appeal.

8. Husband and wife ⚷248½

Where seven monthly premium payments were made prior to plaintiff's marriage to insured, finding that all premiums were paid from community funds after marriage and that entire proceeds from policy were community property was erroneous and not supported by evidence.

◆

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by Sally J. Murphy against the Travelers Insurance Company and Mary V. Murphy to recover proceeds of a life insurance policy. From a judgment determining that Sally J. Murphy was entitled to one-half of the proceeds of the life policy, Mary V. Murphy appeals.

Judgment modified and as modified affirmed.

Whelan and Whelan, San Diego, for appellant.

Martin & Mahedy, San Diego, and V. P. Lucas, Los Angeles, for respondent.

GRIFFIN, Justice.

Plaintiff, Sally J. Murphy, wife of the insured John E. Murphy, was adjudged to be entitled to one-half of the proceeds of a life insurance policy issued by defendant company in which the assured's mother, Mary V. Murphy, appellant herein was named beneficiary.

The defendant company deposited into court $10,000, double the face value of the policy, because Mr. Murphy's death was due to accidental means on December 10, 1946, in the State of Virginia.

The plaintiff claimed and the court found that all premiums were paid from community funds of the plaintiff and Mr. Murphy. The contention presented on this appeal is that the judgment and findings are not supported by the evidence for two reasons: (1) That seven monthly payments were paid prior to plaintiff's marriage to the assured from the separate funds of the assured; and (2) That the evidence does not establish that any of the other payments were made from community funds nor that the insured was a resident of California from the year 1926 until his death. It is contended that during the period in question the assured's domicile was in Pennsylvania, in which state the community property law did not apply, and therefore the distribution of one-half of the proceeds of the policy to the wife was erroneous and that the findings in this connection do not support the judgment.

The facts show that the assured, Mr. Murphy, during his boyhood life, lived with his mother in Pennsylvania. He secured an appointment to the United States Military Academy at Annapolis in 1918, graduated in 1922, and was first assigned to duty in New England, thence to San Pedro, California in 1925 or 1926, and was an officer on the U. S. S. Oklahoma. While at San Pedro he met plaintiff. She was then living in an apartment in that city. She had been keeping company with Murphy about a year before their marriage, and according to her testimony she and her husband discussed where they would have their permanent home and had "that decided before we were even married"; that during that year they went to Point Fermin, near San Pedro, and they decided some day they would have their home in that very spot; that they discussed building it then and renting it and "have it pay for itself", and they would have it when he finally retired or was sooner discharged from the Navy; that they, at that time, also discussed buying property in San Diego county; that in 1935 they looked at a house there but that the sale was not consummated; that again in 1944 they decided to build in Coronado and that in 1945 they bought a lot for that purpose and endeavored to secure a loan from a bank in Coronado; (the banker corroborated this testimony); that they also contemplated the purchase of a farm in Wildomar, California, because he soon would be able to retire on three-fourths pay. Pictures and plans of the house in Wildomar, California, and books on raising turkeys and bees were found in Mr. Murphy's personal effects at the time of his accidental death.

Plaintiff exhibited plans of a house and garage apartment drawn in 1945 which were selected by Mr. Murphy for the Coronado lot. Murphy had registered to vote in California in 1935, 1936, 1937 and 1938, and in 1940 his registration was canceled, due to the fact that he failed to vote that year. He had never registered to vote in any other state during their married life. In 1937 he claimed a veteran's exemption from taxes in San Diego County on an affidavit that he had been a resident of that county since 1936.

While in San Diego, on September 29, 1936, he executed a will in which he declared himself a resident of San Diego County, California. The evidence shows that, as to plaintiff, she was and had been a resident of California up to the time of her marriage on November 28, 1926, and at all times looked upon California as her place of domicile and the place to which she intended to return even though she followed her husband about in the course of his military service. She maintained her apartment in San Pedro from six to nine months after her marriage. Her husband was ordered to Florida for duty for six or eight months. He told her to remain in California. He then wired her to meet him in Pittsburgh, Pennsylvania, because he had been ordered to Panama. They visited with Murphy's mother in Wilkinsberg, Pennsylvania, for about one week. Thereafter they went to New York for three or four months. Murphy then went to Panama and plaintiff followed him. They stayed there for about nine months and thence went to Boston, Massachusetts, for two or three months. He was ordered to the Naval Academy for post-graduate work and plaintiff followed him there, where they lived for one and a half years. He then traveled all over the East coast and then went to Columbia University in New York for one full term. They lived there. Their daughter Patricia was born there. Murphy put in for duty in California but was ordered to China. Plaintiff and the child went with him and stayed about three and a half years. In 1933 they returned to California. Plaintiff lived there for about three months. Her husband went on to Washington, D. C. where she later joined him. In 1935, both came to California and lived in San Diego. Mr. Murphy was in command of a destroyer operating out of that city. It was at that time he registered to vote and claimed a veteran's property tax exemption as a resident of California. In 1938, he was assigned to duty in New York. He and his wife then lived in Drexel Hill, Pennsylvania, and both returned to California in 1944, where plaintiff continually resided thereafter. Mr. Murphy was commanding officer at the training base at Coronado for about one and a half years. In 1945, he left for further sea duty, and died in an automobile accident while returning to his ship from a conference in Washington, D. C.

Many witnesses were called who knew Mr. Murphy before and after his marriage to plaintiff. They corroborated plaintiff's testimony that prior to and after they were married they intended making California their home and that it was the place where they intended to return and settle down whenever conditions were such as to allow them some permanency of residence. According to the testimony of their daughter, now 18, in 1945, her father used to drive her by the lot he purchased in Coronado and tell her about his plans and how he was going to build on that lot; that even as late as May 20, 1946, he gave her a check for $2,000 as a down payment to be made on the house to be built; and that her father was working on a model of his contemplated home and that he died before he finished it.

On the other hand, there was evidence produced that Mr. Murphy filed an action for divorce against plaintiff on June 25, 1946, in Allegheny County, Pennsylvania, in which he claimed he had been a resident of Pennsylvania for more than a year (Plaintiff accounts for this action as "just a lovers' quarrel"); that he did, in 1946, execute another will in Norfolk, Virginia, in which he named, according to plaintiff's version, "another woman" as one of his beneficiaries. Mr. Murphy maintained his mother's address in Pennsylvania in connection with his service record.

Upon this evidence Mary V. Murphy, the mother, contends that the plaintiff has not carried the burden of showing that Mr. Murphy ever intended to establish his residence in California or did any act in furtherance of such intent but maintained his residence in Pennsylvania all the time, or, if not, his domicile could only be claimed to have been in California since 1935, when he registered to vote in that state, and therefore, accordingly, the order distributing one-half of the proceeds to plaintiff, as community property, was erroneous, citing such cases as Estate of Warner's Estate, 167 Cal. 686, 140 P. 583; Estate of Frees' Estate, 187 Cal. 150, 201 P. 112; Johnston v. Benton, 73 Cal.App. 565, 239 P. 60; Wise v. Bolster, D.C., 1939, 31 F.Supp. 856; Ex parte White, D.C., 228 F. 88; Briggs v. Superior Court, 81 Cal.App.2d 240, 183 P. 2d 758; Casner v. San Diego Trust & Savings Bank, 34 Cal.App.2d 524, 94 P.2d 65; and Percy v. Percy, 188 Cal. 765, 207 P. 369.

[1-5] Under the authorities cited it is well settled that the domicile of a person is not necessarily affected by his enlistment in the Civil, Military or Naval service of his country, nor does he necessarily acquire one at the place where he serves. On the other hand, the fact of being on military duty does not preclude him, if he so desires, from establishing a residence in the state where he is stationed. The question whether a person has changed his residence from one place to another must depend largely upon his intention. Johnston v. Benton, supra. A domicile once acquired is presumed to continue until it is shown to have been changed, and to constitute the new domicile two things are indispensable: First, residence in the new locality; and second, the intention to remain there. Mitchell v. United States, 21 Wall. 350, 22 L.Ed. 584, 588; Whart. Conflict of Laws, sec. 55, and authorities cited; Sheehan v. Scott, 145 Cal. 684, 690, 79 P. 350. The term "domicile" has been defined as the place whence a person goes for labor or other temporary purpose and whither he returns in seasons of repose. It is the place where a person has his home, or his principal home, or where he has his family residence and principal place of business; that residence from which there is no present intention to remove, or to which there is a general intention to return. (9 Cal.Jur. p. 832, sec. 2.) See, also, secs. 243 and 244, Government Code.

[6] Murphy's domicile of origin was with his parents in Pennsylvania. From the time he left the Academy he never lived there, although he vacationed there, and he and his wife visited there on occasions subsequent to their marriage. There is no evidence that he considered this place as the domicile for his wife, himself and child at any time after the marriage. They never lived there. They were entitled to claim some place or state as their domicile. Their status in the other places to which he was transferred did not indicate the establishment of a domicile. Murphy's wife was born in and domiciled in California at the time of her marriage to him and apparently maintained an apartment there for six or eight months after their marriage. They discussed their intention of making California their home even before their marriage and looked at property they thought they would like to select. This was some overt act indicating their intention at that time. He discussed with his fellow officers, other associates and his insurance agent who sold him the policy, his intention of making California his home, even before marriage. He applied for assignment to California for service and discussed building a home in California in case of such assignment. Subsequently, he registered to vote in California and claimed certain tax exemptions as a resident of that state. He examined ranch property there with the idea of retiring to it and raising turkeys and bees and at the time of his death he still possessed the plans and literature on the subject, all of which was strong evidence that he originally selected California as his domicile at the time of his marriage and that at all times since he intended it as such, and that during his service that was the state to which he intended to return and maintain his permanent domicile.

[7] True, there was evidence opposed to this conclusion. The trial judge was the one to decide this conflict and his determination cannot be disturbed on appeal. Percy v. Percy, supra; Johnston v. Benton, supra; Berger v. Superior Court, 79 Cal. App.2d 425, 179 P.2d 600; De Pier v. Maddox, 87 Cal.App.2d 460, 197 P.2d 87; Estate of Winzeler, 42 Cal.App.2d 246, 108 P.2d 720; District of Columbia v. Murphy, 314 U.S. 441, 62 S.Ct. 303, 86 L.Ed. 329, 337.

[8] A more serious question arises as to appellant's contention that seven months' premiums were paid by Mr. Murphy on the policy in question prior to his marriage to plaintiff and that therefore the court's finding that all premiums accrued were paid from community funds after their marriage and that the entire proceeds therefrom were community property, and the judgment based thereon lack evidentiary support. The evidence on this question is undisputed and shows that the policy was delivered on or about May 25, 1926, and although, upon its face, the policy was stated to be based on an annual premium, there were arrangements made through the Navy Department and the insurance company, to deduct, in advance, $11.01 per month from Murphy's service pay, in payment of the annual premium from the date of the policy.

The finding that this proportionate share of the proceeds of the policy was community property was erroneous and not supported by the evidence. Modern Woodmen of America v. Gray, 113 Cal.App. 729, 299 P. 754.

The findings and judgment should be and are modified accordingly. Since this determination is but a mathematical calculation, that portion of the judgment awarding plaintiff the sum of $5,000 is modified by reducing it to $4,857.72. That portion of the judgment awarding defendant Mary V. Murphy $5,000 is modified by increasing it to $5,142.28. As thus modified the judgment is affirmed. Respondent to recover costs on appeal.

BARNARD, P. J., and MUSSELL, J., concurs.

92 Cal.App.2d 684

TAYLOR v. HEYDENREICH et al.

Civ. 16665.

District Court of Appeal, Second District, Division 3, California.

June 30, 1949.

1. Fixtures ⚷1, 35(3)

Whether article is a fixture is a question of fact, and question is determined not only by manner in which article is annexed to realty but also by relationship between parties.

2. Fixtures ⚷35(2)

Where structures are erected upon land by mere licensee, consent on part of landowner that structure shall remain property of licenses will be implied in absence of evidence showing different intention.

3. Fixtures ⚷35(2)

Evidence that defendant, who was plaintiff's aunt, was licensee on premises, and that improvements were erected thereon pursuant to license, supported finding that defendant was owner of improvements and entitled to remove them from premises upon plaintiff terminating the license.

4. Appeal and error ⚷1056(4)
Fixtures ⚷35(2)

In action to recover value of alleged fixtures and furniture which were removed by defendants from land owned by plaintiff, plaintiff's offered evidence that improvements removed were same type as other improvements in area was material upon issue as to whether it was intended that improvements should become fixtures, so that sustaining defendants' objection thereto was error, but ruling was not prejudicial in view of determination that relationship between plaintiff and one of defendants was that of licensor and licensee.

5. Fixtures ⚷35(2)

In action to recover value of alleged fixtures and furniture which were removed by defendants from land owned by plaintiff, permitting one of defendants to answer question as to whether she had paid expenses involved in making improvements over plaintiff's objection was proper inasmuch as evidence was material upon issue of intent.

6. Appeal and error ⚷1071(1)

In action to recover value of alleged fixtures and furniture which were removed by defendants from land owned by plaintiff, finding respecting intention of parties in constructing improvements was not prejudicially conflicting.

* * *

Appeal from Superior Court, Los Angeles County; William B. McKesson, Judge.

Action by Howard Roy Taylor against Daisy M. Heydenreich, also known as Mrs. Ernest H. Heydenreich, and others, to recover value of alleged fixtures and certain furniture which were removed by defendants from land owned by plaintiff, for conversion of alleged fixtures and furniture and for rent for occupancy of the premises. From insufficient judgment, the plaintiff appeals.

Affirmed.

Warner & Moore, Caryl Warner, Los Angeles, for appellant.

Hampton Hutton, Los Angeles, for respondents.

WOOD, Justice.

Action to recover value of alleged fixtures and certain furniture which were removed by defendants from land owned by plaintiff. There was also a cause of action for damages for conversion of the alleged fixtures and the furniture, and a cause of action for rent for occupancy of the premises. The court found that defendant Mrs. Heydenreich was a licensee on the land; that the said improvements on the land, except the outhouse, were erected by Mrs. Heydenreich pursuant to said license; that the license was terminated when defendants removed the improvements from the premises; that Mrs. Heydenreich was the owner of said improvements, except the outhouse, and she was entitled to remove them from the premises. Judgment was for plaintiff for $10, the value of the outhouse and a dresser. Judgment was entered on February 3, 1948. Plaintiff's notice of appeal states that he appeals from the order and judgment entered on February 2, 1947.

Appellant contends that the evidence does not support the judgment. Defendants

Ernest H., and Daisy M., Heydenreich are husband and wife, and Ernest O. Heydenreich is their son. The plaintiff is the nephew of Mrs. Heydenreich. In 1931 Mrs. Heydenreich learned that the land in question, about 100 acres in San Diego County, was available for homesteading, and as a result of Mrs. Heydenreich's efforts her sister, Mrs. Taylor, settled on the land in 1932. Her sister abandoned the homestead, and in 1932 plaintiff settled on the land, and in 1939 he obtained title thereto. In 1934 Mrs. Heydenreich "with some help from plaintiff" constructed a one-room cabin on the premises, and later it was "expanded" into a 4-room house. All the materials for the house and most of the labor for it were furnished by Mrs. Heydenreich. Plaintiff and his brother did some of the construction work. The rafters of a pergola were attached to the house by nails, and the posts of the pergola extended into a stone wall in the yard and were fastened to that wall by bolts. In 1938 a one-room cabin was built over a stone-lined cellar, and the stucco which covered the walls of the cabin "was carried down below the walls of the cabin and onto the stone foundation" or wall of the cellar. In 1940 a well was drilled, a windmill was constructed and it was anchored in concrete, and waterpipes which extended from the windmill to the house, cabin and other parts of the premises were placed about 2 feet under ground. Two chicken houses with galvanized roofs, were built on the premises.

Mrs. Heydenreich testified that she paid all the costs for the construction of the buildings and the water system, except $15 that had been given to her by plaintiff "to go on his one-half of the cost of the well"; that a lot of material, including the galvanized roofing material, was second-hand and was brought from her house in Lennox, California; that plaintiff furnished some second-hand lumber with which the outhouse was partially constructed. She testified further that when the spring dried up she told plaintiff that she had to have a well and that she did not want to construct it unless she knew she could stay there; that plaintiff did not at that time have any money to contribute toward construction of the well and, in reply to her statement, said: "You can stay here as long as you live and that he would never put her off"; that when plaintiff married (in 1942) his attitude changed, and she requested him "to put something in writing" and give her a deed to the property; that she never agreed to pay rent for the property, but she served as caretaker of the property and protected it from thieves and fire; that she had always treated plaintiff as her son and nursed him when he was sick and fed him when he was grown, and that she felt it was proper that she should have a few acres (3 acres) which she requested that he deed to her; that when he refused to do so, she did the only thing she could do to protect herself and she removed the buildings (to land of Mr. and Mrs. Heydenreich which is about 5 miles from plaintiff's land); that she always considered the buildings as her own; that she never had an understanding with plaintiff that she should get a part of the homestead—such an understanding would be unlawful, but she felt that by reason of all she had done for plaintiff he should have treated her better.

Plaintiff testified that the property which was removed from the premises exceeded $4,000 in value; that until he married in 1942 he never objected to defendants' residing on the property; that at that time Mrs. Heydenreich requested him "to deed a portion of his land," but he refused to do it; that at times after 1942 he told defendants to pay rent or vacate the premises. On June 27, 1946, plaintiff demanded that defendants pay $3,000 as rent, being $50 per month for the past 60 months. On July 19, 1946, plaintiff gave defendants a written notice to pay $600 rent or quit possession of the premises. About July 26, 1946, defendants removed the buildings, windmill, waterpipes, and a dresser from the premises to land owned by Mr. and Mrs. Heydenreich. Plaintiff, who resided in Los Angeles, also testified that he did not know about the removal of the improvements until he visited the place the first part of August, 1946; that the "standards" at the corners of the windmill had been sawed off about 12 inches above the ground; that the well was full of rocks; and that he did not give anyone permission to remove the improvements.

Six witnesses, including Mrs. Heydenreich, testified that the house was "sitting on large boulders, but not put together with concrete."

A witness called by plaintiff said that he heard Mr. Heydenreich say that he was going to throw rocks into the well. Mr. Heydenreich testified that he never threatened to put rocks in the well, that he did not put rocks in it or damage it in any way.

In 1943 Mrs. Heydenreich wrote two letters to plaintiff wherein she sought to adjust their respective claims to the property involved here. In one of those letters, written in January 1943, she said in part: "I am asking you for the last time to come thru in some way so I can stay here. * * * What about this proposition? We were supposed to go 50-50 on this but you don't want to do your part so now if you will sell me your house reasonable and give me the land just beyond the well you can have the rest and have the good homesite. We want to stay friends with you * * * and hope you consider I have earned this much consideration." In the other letter, written in November 1943, she said in part: "I am still waiting for your answer. * * * This is my last offer, so if you would rather let people tear up & carry off your house than be square I guess it will be your wish. I still say you owe me more than what I am asking. I asked you to let me know at once and now I must know while I can get help—Why you do this expensive thing to Ernie & I we do not know." In explanation of the first letter, she testified that by the words "We were supposed to go 50-50" she referred to her deal with plaintiff about drilling the well and about the installation of the water system, and did not refer to the homestead. In explanation of the second letter, she testified that by the words "rather let people tear up & carry off your house than be square" she meant that she would have to move from the premises and vandals would tear up and carry off the house.

[1-3] Whether an article is a fixture is a question of fact to be determined upon the evidence in the particular case, and the question is determined not only by the manner in which the article is annexed to the realty but also by the relationship between the parties. R. Barcroft & Sons Co. v. Cullen, 217 Cal. 708, 711, 20 P.2d 665. The evidence was sufficient to support the finding that Mrs. Heydenreich was a licensee on the premises, and that the improvements (except the outhouse) were erected pursuant to the license. Mrs. Heydenreich and plaintiff were aunt and nephew. A very friendly relationship existed between them when she went to reside upon the land and when the improvements were made. She had been of much assistance to him—she had taken care of him when he was sick, had provided him with food, and had obtained the information that the land was available for homesteading. She went upon the land with his permission, remained there several years with his permission, and there is no evidence that it was contemplated that she should pay rent. She paid no rent. He told her that she could stay there as long as she lived. The materials used for said improvements were furnished by her, and she paid all the construction costs, except $15 which was paid by plaintiff as a part of his one-half of the cost of the well. Some of the construction work was done by plaintiff and his brother. The improvements were of the value of $4,000, according to plaintiff. Under the circumstances here, where she was upon the land by mere permission of the owner and was subject to ouster at any time, it is not reasonable to infer that she intended, or that plaintiff intended, that such valuable improvements, placed upon the land by her at her own expense, should become a part of the real property of plaintiff. Where structures are erected upon land by a mere licensee, consent on the part of the owner of the land that the structures shall remain the property of the licensee will be implied in the absence of evidence showing a different intention. Gosliner v. Briones, 187 Cal. 557, 561, 204 P. 19; City of Vallejo v. Burrill, 64 Cal.App. 399, 407, 221 P. 676. Appellant's contention that the evidence does not support the judgment is not sustained.

[4] Appellant also contends that the court erred in sustaining defendants' ob-

jection to his question as to whether the improvements were the same type as other improvements in the area. The offered evidence was material upon the issue as to whether it was intended that the improvements should become fixtures, but the ruling was not prejudicially erroneous in view of the determination that the relationship of the parties was that of licensor and licensee.

[5] Appellant also asserts that the court erred in overruling his objection to a question as to whether Mrs. Heydenreich had paid the expenses involved in making the improvements. The ruling was correct. The evidence was material upon the issue of intent. Also, if the improvements were not fixtures, it was material to know whether Mrs. Heydenreich or the plaintiff had paid for them.

[6] Appellant asserts that the findings were conflicting. It appears from the original judgment in the office of the county clerk that the findings were prepared by counsel for appellant. He refers to a finding "that certain of said improvements were constructed by the parties with the intention that they would be permanently affixed to the realty and for the mutual benefit of both parties, and not thus constructed with the idea that the improvements would remain a permanent part of the property after the licensee Daisy M. Heydenreich left the property, but only so long as the licensee should remain on the premises." The finding was not prejudicially conflicting. The court also found, as hereinabove stated, that Mrs. Heydenreich was a licensee on the premises, and that the improvements were erected by her pursuant to said license. When all the findings are considered together it is apparent that the court found that the parties intended that said improvements should be "permanently" affixed to the realty for their mutual benefit "only so long as the licensee Mrs. Heydenreich should remain on the premises," and the improvements were not constructed with the intention that they should remain a permanent part of the property after the licensee Mrs. Heydenreich left the property; and that she was the owner of said improvements and was entitled to remove them.

There is a notation, by the county clerk, on the judgment herein, as follows: "Judgment ordered Satisfied, by Court Order dated May 3, 1948." By reason of the above conclusions, it is not necessary to discuss the significance of the satisfaction of the judgment.

The judgment is affirmed.

SHINN, P. J., and VALLEE, J., concur.

HEFFERAN v. FREEBAIRN.

Civ. 16653.

District Court of Appeal, Second District, Division 2, California.
July 1, 1949.

Rehearing Denied July 18, 1949.

Hearing Granted Aug. 25, 1949.*

1. Sales 🔑52(7)

In buyer's action to rescind contract for sale of restaurant business, evidence sustained finding that seller misrepresented length of time lease had to run.

2. Sales 🔑50

Where seller of restaurant business misrepresented to buyer the length of time lease had to run, the acceptance of lease by buyer, with a price reduction based on actual time lease had to run, constituted a waiver of misrepresentation and precluded buyer from rescinding contract for such misrepresentation.

3. Sales 🔑52(7)

In buyer's action to rescind contract for sale of restaurant business, evidence did not justify finding that the business was not free of liens and incumbrances as represented by seller.

4. Sales 🔑50

Where buyer of restaurant business acted in affirmance of contract for sale of restaurant, with knowledge that former partner of seller had filed claim for utensils allegedly sold to seller and which were not paid for, buyer waived alleged fraudulent representation of seller that business was free of liens and incumbrances.

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* Subsequent opinion 214 P.2d 386.

5. Sales 38(7)

Where buyer of restaurant business was given opportunity to examine restaurant books before buying, and buyer noticed that profit and loss statement showed profits substantially smaller than profits seller allegedly represented the business was earning, buyer's duty was to complete his investigation as to the earnings of business, and buyer could not rely upon seller's statement that profit and loss statement did not include rebates, and then rescind contract because of alleged fraudulent representations as to the profits the business was earning.

6. Contracts ⚷262

Any acts indicating an intent to abide by a contract are evidence of an affirmance thereof and a waiver of the right to rescind.

7. Sales ⚷50

Where buyer of restaurant inspected the premises before buying and acted in affirmance of the contract after he knew of faulty condition of equipment, buyer waived any right to rescind contract for alleged misrepresentations of seller relative to the condition of the equipment.

◆

Appeal from Superior Court, of Los Angeles County; Ellsworth Meyer, Judge.

Action by Raymond L. Hefferan against J. Ray Freebairn for rescission of a contract for sale of a restaurant. From an adverse judgment, defendant appeals.

Judgment reversed.

W. I. Gilbert, Jr., Los Angeles, for appellant.

Boller, Suttner & Boller, Arcadia, for respondent.

WILSON, Justice.

This is an action for rescission of a contract for the sale of a restaurant brought by the purchaser upon the grounds of alleged fraudulent representations of the seller. From a judgment in favor of plaintiff, defendant appeals.

The undisputed facts are as follows: Defendant was the owner of a cafe known as the Gilray Coffee Shop. He had known plaintiff for several years. About December 10, 1946, defendant stated that he intended selling the cafe, whereupon plaintiff said he had always wanted to get into the restaurant business and if it was in a good location he might be interested in buying it. The day following this conversation plaintiff "looked the restaurant over" spending about ten minutes in the coffee shop. About a week later the matter of the proposed sale was again discussed at which time defendant told plaintiff he wanted $55,000 for the business. A few days later plaintiff and defendant lunched at the cafe and defendant gave plaintiff the sales figures for the month of December, 1946, taken from the daily sales reports and also the comparative figures for November. After lunch the parties went to the office of defendant's auditor where plaintiff was shown profit and loss statements for the first ten months of 1946. The two men spent about an hour with the auditor, plaintiff going over the figures and making notes. Upon leaving the auditor's office they had a further discussion about the business, terms were agreed upon and plaintiff gave defendant a check for $5,000. The following day they opened an escrow. Plaintiff took possession of the cafe on January 1, 1947, before the escrow was closed. He paid into the escrow for defendant an additional $14,000 plus prepaid rent and other charges and signed and delivered a chattel mortgage on the equipment for $35,000. Prior to the opening of the escrow defendant did not have possession of the lease but negotiations between the parties were upon the basis that the lease had 57 months to run. During the course of the escrow the lease was obtained and upon discovering it would expire in 55 months an adjustment of $1,000 was made in the purchase price and the escrow instructions amended accordingly. The escrow was closed on January 7, 1947. Plaintiff gave defendant a check for the inventory about January

27 and served notice of rescission on January 28. A certificate of business under a fictitious name was filed by plaintiff on January 29, 1947, and thereafter he continued to operate the cafe and made two payments of $1,000 each on February 1 and March 1 on the promissory note. Defendant did not accept the offer of rescission and plaintiff filed this action on March 17, 1947.

As grounds for rescission plaintiff alleges that defendant represented the Gilray Coffee Shop would net $20,000 for 1946; the equipment was all in first class condition with the exception of the dishwasher, which needed $12 in repairs; defendant owned all the equipment which was free and clear of liens and encumbrances; the lease had 57 months to run and the only reason defendant was selling the business was because he intended going to Europe for two years. Plaintiff alleged that all the representations were false and fraudulent and that he relied upon them and was thereby induced to enter into the agreement.

The court found that in order to induce plaintiff to purchase the cafe defendant made the following representations: That the only reason he desired to sell the business was because he had lost his lease on his dental office and was closing it; he desired to take a trip to Europe and did not care to leave the business in the hands of a manager and he was closing out all his business activities; the business was free and clear of liens and encumbrances; the equipment was in first class condition and working order except for the dishwasher which needed about $12 in repairs; the lease had 57 months to run; the business would earn $20,000 for the year 1946 and he, defendant, had already taken $16,000 out of the business up to and including October, 1946; The profits of the business had been kept down by price control; price ceilings had just been removed but defendant had not raised his menu prices and if plaintiff raised prices he would make greater profits. The court further found that plaintiff relied on the representations and would not have purchased the cafe had he not believed them to be true; that the representations were untrue; defendant desired to sell the cafe because it was losing money; the cafe earned only $5,666.25 during the first eleven months of 1946, $387.19 during December, and defendant had taken only $10,115 out of the business up to and including October, 1946; the business was not free of liens in that the counter stools were not paid for and certain pots and pans were claimed by a former partner of defendant; some of the equipment was not in first class condition and proper working order but was in a run down and deteriorated condition and required replacement; the counter stools were in need of repair and some had been nailed to prevent them from falling apart; the grill was defective and nearly burned out; the lease had only 55 months to run; defendant had raised his menu prices more than one month prior to representing to plaintiff that he had not raised them and the business lost money in November despite the increase in prices; plaintiff discovered the falsity of the representations after taking possession of the business; plaintiff made a casual inspection of the cafe premises and equipment prior to taking possession but such inspection did not and could not reveal the true condition of the equipment and latent defects and plaintiff was relying upon the representations of defendant as to the condition of the equipment and not upon his own inspection; the two payments of $1,000 on account of the purchase price after giving notice of rescission were made for the purpose of preventing a default on the note and mortgage pending negotiations concerning plaintiff's notice of rescission and were not intended by him as a waiver of his rights under the notice.

Appellant contends: (1) The findings of the court as to misrepresentation and waiver in connection with (a) the length of the lease, (b) the liens and encumbrances and (c) the profits and the equipment are not supported by the evidence; (2) even assuming fraud the court committed reversible error in permitting rescission where the complaint fails to allege and the evidence fails to prove damage; (3) there is reversible error in finding against waiver.

[1, 2] *Lease.* There is substantial evidence to justify the finding that defendant

represented the lease as having 57 months to run. However, plaintiff's subsequent acceptance of the lease with a price reduction constituted a waiver and he concedes that such acceptance removed the misrepresentation as a basis for judgment in his favor.

[3, 4] *Liens and Encumbrances.* There is no evidence to support the court's finding that the business was not free of liens and encumbrances. A representative of the Bieger Showcase & Fixture Company approached plaintiff and demanded $155 for payment on the counter stools. Plaintiff testified he tried unsuccessfully to reach defendant. Nevertheless he paid the amount of the demand without having consulted defendant, who advised him later on the same day that he had paid for the stools. There is no evidence that there was any money owing on the stools and no evidence of any lien. Nor is there any evidence of a lien or encumbrance on the pots and pans. A former partner of defendant claimed to have sold him certain pots and pans and placed his claim in escrow in the amount of $92.90. Plaintiff continued to act in affirmance of the contract after knowledge that the claim had been filed and he gave defendant a check for the inventory after having paid the $155 on the stools. Having acted in affirmance of the contract with knowledge of the claims plaintiff waived the fraud, if any there was.

Profits. There is substantial evidence that defendant falsely represented the business would earn $20,000 for the year 1946. However, plaintiff testified defendant told him he would like to have him (plaintiff) examine the books and determine for himself what the restaurant was making. Plaintiff accompanied defendant to the auditor's office and was shown the profit and loss statements. Plaintiff testified he noted the statements indicated a profit of only about $8,000 rather than the $16,000 defendant had told him the cafe had made and that upon inquiry defendant told him those statements did not include the rebates. Plaintiff made no demand to see any figures on the alleged rebates. There is no evidence that plaintiff was refused access to any of the books. The auditor testified that he asked plaintiff if he wished to look at the books themselves; that plaintiff replied he thought if he just copied the balance sheet and the profit and loss statements that would be all he would require; that plaintiff sat about fifteen inches away from him on his left and was at perfect liberty to look at anything there; that they started with the month of January, 1946, and plaintiff copied the sales, purchases, payroll, depreciation, certain major expense items and other items of income for each month of the year up to the end of October or November. Plaintiff admitted having taken down figures but testified he no longer had the paper on which they were written.

[5] If plaintiff had exercised ordinary care and diligence he could have had full knowledge as to the profits of the business. An ordinarily prudent person upon discovering that the profit and loss statements showed a profit of only one half that claimed by defendant would have pursued his investigation. Plaintiff contends defendant advised him that the reason the profit and loss statements showed less profit was because they did not include the rebates. Defendant then gave plaintiff some examples of rebates. He made no representation as to how much those rebates totaled except for one or two of the items, which together did not exceed a maximum of $200 a month. Under such circumstances plaintiff had no right to assume they would equal the difference between the $8,000 profit shown by the profit and loss statements and the $16,000 profit alleged to have been represented by defendant. With reasonable diligence he could have ascertained that the figures as shown on those statements included the rebates and he cannot now excuse his lack of assiduity by the fact that he relied upon defendant's representations. Having undertaken an investigation of the books and having proceeded with it without hindrance it will be assumed that plaintiff acquired all the knowledge he desired and was satisfied with what he had learned. If he became aware of facts which tended to arouse his suspicion, or if he had reason to believe that the representations made to him were false or only partially true, it was his legal duty to complete his investigation and he had no right to rely on statements of de-

fendant. Carpenter v. Hamilton, 18 Cal.App.2d 69, 71–72, 75, 62 P.2d 1397; Cameron v. Cameron, 88 Cal.App.2d 585, 199 P.2d 443, 447.

Insofar as the representation as to the raise in prices is concerned, plaintiff testified that there was an increase in gross business in the cafe in December over the same period in November and that defendant stated the cause of the increase was the raise in prices. Plaintiff contends the increase was because of the Christmas holidays and was not due to the increase in prices. But he testified defendant gave him the comparative figures for November and December on the day he inspected the books, which was the 19th of December, and further that the comparative figures were up to about the 18th of the month. There is no evidence that the prices were increased prior to November 8th and it would therefore follow that the increase in the gross business in the first eight days of December over the first eight days of November would be due to the price increase rather than the holiday business.

Equipment. There is substantial evidence to support a finding that defendant asserted the equipment was in good working condition with the exception of the dishwasher which needed repairs. However, plaintiff inspected the restaurant before purchasing it and saw the equipment in use. Furthermore he knew the day after he took possession that the dishwasher was not functioning properly and discussed the purchase of a new machine on the second or third of January. He discussed the grill with the manager before he took possession and stated he wanted to serve steaks and chops. At that time the manager told him it would be impossible to cook such meats on the grill. The fact that the grill was warped could have been seen when defenddant made his inspection of the premises had he taken the trouble to look at it.

There is evidence that the backs of the stools had fallen off and had to be nailed but there is no evidence that the stools needed repair when plaintiff took possession. Their condition was observable to plaintiff prior to that time.

[6] *Waiver.* Plaintiff was in the restaurant every day between December 19th and the day he took possession. He was aware of the condition of the grill and the dishwasher at the time he entered into the agreement with defendant to adjust the purchase price because of the term of the lease and at the time he paid into escrow the balance of the money owing. Thereafter he paid for the inventory and filed a certificate of doing business under a fictitious name. Plaintiff contends that since he entered into a binding contract to purchase the cafe on December 20, 1946, when he opened the escrow, there could be no waiver of fraudulent representations which came to his knowledge after that date. Obviously if there were fraudulent representations which were grounds for rescission plaintiff had the same right to rescind the contract when he became aware of the same prior to the close of escrow as he now claims upon the same grounds. Any acts indicating an intent to abide by a contract are evidence of an affirmance thereof and a waiver of the right to rescind. Ruhl v. Mott, 120 Cal. 668, 677, 53 P. 304; Frankish v. Federal Mortgage Co., 30 Cal.App.2d 700, 708, 87 P.2d 90; LeClercq v. Michael, 88 Cal.App. 2d 700, 199 P.2d 343.

[7] Plaintiff, having undertaken to examine the books, and not having been hindered in his inspection, had no right to rely upon the representations made by defendant and cannot complain that he did not learn the truth or that he was misled. And having inspected the premises and having acted in affirmance of the contract after he knew the condition of the equipment, he waived any right he might have had to rescind.

In view of the above stated conclusions it is not necessary to discuss appellant's second ground for reversal that damage was not alleged or proved.

Judgment reversed.

MOORE, P. J., and McCOMB, J., concur.

J. Ray FREEBAIRN, Plaintiff and Appellant, v. Raymond L. HEFFERAN, Defendant and Respondent.

Civ. 16654.

District Court of Appeal, Second District, Division 2, California.
July 1, 1949.

Rehearing Denied July 18, 1949.
Hearing Granted Aug. 25, 1949.*

Appeal from Superior Court, Los Angeles County; Ellsworth Meyer, Judge.

Reversed.

W. I. Gilbert, Jr., Los Angeles, for appellant.

Boller, Suttner & Boller, Arcadia, for respondent.

WILSON, Justice.

This is an action for foreclosure of the chattel mortgage which was given in part payment of the purchase price of the cafe referred to in Hefferan v. Freebairn, Cal. App., 207 P.2d 602. Judgment was rendered in favor of defendant cancelling the note and mortgage. Plaintiff appeals.

This action was consolidated for the purposes of trial with that of Hefferan v. Freebairn. Defendant contends that even though he might not be entitled to rescission, as the alleged defrauded party he is entitled to set up the same fraudulent representations as a defense to the foreclosure as were alleged as grounds for rescission. Defendant did so plead in the instant action but in our opinion in the rescission case we have determined adversely to the contentions of plaintiff in that action, defendant herein. The same reasoning is applicable to both actions.

Judgment reversed.

MOORE, P. J., and McCOMB, J., concur.

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* Subsequent opinion 214 P.2d 386.

In re PETERSON'S ESTATE.
PETERSON v. AMERICAN TRUST CO.

Civ. 14018.

District Court of Appeal, First District, Division 1, California.
June 30, 1949.

1. Wills ⚿684(7)

Under gift of residue to trustee to pay income to widow for life, widow was entitled to income from date of death of decedent.

2. Wills ⚿684(7)

Income accruing prior to distribution of decedent's estate is distributable along with corpus in hands of executor to testamentary trustee regardless of whether life beneficiary may be entitled to receive that income from trustee.

3. Executors and administrators ⚿406

Where will created trust in residue with income payable to widow for life, and after death executor sold testator's interest in a partnership, and widow sought distribution of portion of proceeds directly to her on theory that if she could prove portion to be income rather than corpus it would be distributable directly to her, probate court was not required to decide whether fund was income or corpus and properly ordered entire proceeds distributed to trustee.

◆

Appeal from Superior Court, Alameda County; A. T. Shine, Judge.

Proceeding in the matter of the settlement of the account of the American Trust Company, as executor of the estate of Adolph Peterson, deceased, and in the matter of the executor's petition for partial distribution, wherein Hilma Peterson, widow, filed a petition for partial distribution and objections to the first account and the executor's petition. From an order denying her petition for partial distribution, and from the decree of partial distribution and settlement of the executor's account in so far as they conflicted with the distribution sought by her, the widow appeals.

Order and decree affirmed.

Breed, Robinson & Stewart, Oakland, for appellant.

Ben F. Woolner, Oakland, Donahue, Richards, Rowell & Gallagher, Oakland, for respondent.

PETERS, Presiding Justice.

Hilma Peterson, life beneficiary of a testamentary trust, appeals from an order denying her petition for partial distribution, and from the decrees of partial distribution and settlement of the executor's account "in so far as said decrees are in conflict with the partial distribution sought by Hilma Peterson in her petition for partial distribution."

We are of the opinion that the orders and decrees appealed from must be affirmed, and that the main point discussed by appellant in her briefs cannot be considered on this appeal.

There is no dispute over the facts. Hilma Peterson is the surviving wife of Adolph Peterson, whose will was admitted to probate on June 28, 1946. By that will the American Trust Company was named executor, and also trustee of the trust created by the will. By the terms of that testamentary trust the trustee was devised the residue of the estate, and was required to "pay to my said wife, Hilma M. Peterson, monthly and during the term of her natural life, the entire net income of said trust estate."

The American Trust Company was, in due course, appointed executor. On May 2, 1947, the executor petitioned the Probate Court for an order confirming the sale of a ⅜ partnership interest in Peterson Manufacturing Company, an asset of the Peterson estate, to Nels P. Peterson. Attached to the petition is a copy of the proposed purchaser's bid of $209,380.49 [sic $209,280.49], which describes the interest sought to be purchased as follows: "The three-eighths (⅜ths) interest of the estate of said decedent in that certain partnership known as Peterson Manufacturing Co., * * * of which the undersigned, Nels P. Peterson and Richard B. Mortimer and said decedent were co-partners, said interest to be exclusive of all undistributed profits, or earnings, accrued to, or payable to said decedent prior to the date of the death of said decedent, May 21, 1946, but expressly inclusive of the undistributed profits, or earnings on said interest from the date of the death of said decedent, to and inclusive of the date of the confirmation of sale contemplated to be made by the above-entitled Court * * * said profits or earnings on said interest from the date of death of said decedent, to and inclusive of the 31st day of December, A. D. 1946, to be free and clear of all income taxes; but the profits or earnings on said interest from and inclusive of the 1st day of January, A. D. 1947, to and inclusive of the date of confirmation of sale (contemplated to be made as a result of this offer) to be subject to income taxes on said profits or earnings for said last mentioned period and payable by the undersigned bidder, whether or not assessed against the undersigned bidder, or the estate of said decedent, with the understanding that if said income taxes are assessed against the estate of said decedent and made payable by the estate of said decedent, that the undersigned will pay to the estate of said decedent, prior to delinquency, the pro rata portion of all the income taxes payable by the estate of said decedent for the year 1947, according to the ratio of the taxable income on the profits, or earnings of said partnership to the total taxable income of said estate."

The appellant approved the petition for confirmation, and a copy of her approval was also attached to the petition. It reads as follows: "I, Hilma Peterson, widow of said decedent, hereby acknowledge that I have read the foregoing Petition for Order Confirming sale of Partnership Interest and the exhibit attached thereto, and, having been fully advised as to my rights in connection therewith by independent counsel, namely the law firm of Breed, Robinson & Stewart, hereby fully approve and ratify said petition."

The Probate Court confirmed this sale by an order containing the following language: "It Is Further Ordered, Adjudged And Decreed that said Executor be, and it is, hereby authorized and directed to allocate said sum of $209,280.49 as follows:—$105,546.49 thereof to earnings of said three-eighths interest in said partnership from May 21st, 1946, the date of the death of said decedent, to and including the 31st day of December, 1946, and $103,734.00 thereof to the remaining value of the said estate's three-eighths interest in the real and personal property owned by said partnership at the date of the death of said decedent."

The $209,280.49 was paid to the American Trust Company as executor, and the executor was reimbursed for a portion of the taxes, the final computation for that item not being complete.

On January 30, 1948, two petitions were filed by the executor, one the "Executor's First Account, Report Accompanying Same and Petition for Decree Settling Account and Approving Report," and the other a "Petition for Partial Distribution of Estate." The first document, among other items, sets forth that Hilma Peterson was paid on March 5, 1947, the sum of $52,319.37 "the same being her alleged share of the community earnings of decedent and herself during their married life," and further, that she was paid "as family allowance the sum of $30,600.00," at the rate of $1,800 per month. With reference to the sale of Adolph's interest in the partnership the report states: "That among the assets of said estate was a three-eighths interest in Peterson Manufacturing Company, a copartnership, of Los Angeles, California; that said three-eighths interest was duly sold to Nels Peterson for the sum of $209,280.40 [sic $209,280.49], and, by proceedings duly had and taken to the end, on the 13th day of May, 1947, said sale was duly confirmed by said Court."

By the petition for partial distribution the executor prayed for a decree distributing all of the estate described in an exhibit to the petition to the American Trust Company as trustee of the testamentary trust.

On March 16, 1948, Hilma Peterson filed a petition "For Partial Distribution of Estate, Objections to Executor's First Account, and Executor's Petition for Partial Distribution." This is one of the key pleadings involved on this appeal inasmuch as it is the denial of this petition that appellant now seeks to have reversed. By this petition appellant "requests distribution to her of the income derived from the devise and bequest contained in Paragraph Fourteenth of the last will and testament of the above named decedent, and objects to the approval of the first account and the granting of the petition of the executor for partial distribution only to the limited extent that said account and said petition are in conflict with this petition for partial distribution." For this limited purpose, after setting forth that appellant was a beneficiary under the will of Adolph Peterson, it is averred that income derived from the property devised under Paragraph Fourteenth of the will includes the items of income described in the executor's first account, certain other items, and "Income received from that certain three-eighths interest in Peterson Manufacturing Company"; that "Your petitioner is unable to determine the amount of income received" from the interest in that company, but that "the petition for order confirming sale" sets forth "That the sum of $105,546.49, a portion of said cash bid of the said Nels P. Peterson, represents the earnings of said three-eighths interest, in said partnership for the period from May 21st, 1946, to and including December 31st, 1946, which said sum was included in the income tax return, which was required to be filed by your petitioner, and upon which the appropriate tax was paid."

It is further averred that Mrs. Peterson "expressly consents to the distribution to American Trust Company, as trustee" as prayed for by the executor "except only to the extent that the assets described in said petition for partial distribution and in said account might be required for partial distribution of income pursuant to this petition, and to that extent, and that extent only, your petitioner objects to the approval of said account and the granting of said petition for partial distribution of estate."

It will be noted that there is no suggestion in this pleading that the assets should be distributed to the trustee subject to instructions. The theory of the pleading is that the questioned fund should be distributed to Mrs. Peterson. That this was her theory is demonstrated not only by the quoted portions of her pleading, but by the prayer of her petition. It reads as follows: "Wherefore, your petitioner prays that partial distribution be made to her of income derived from the assets described in Paragraph Fourteenth of the last will and testament of the above named decedent, * * *; that the remaining assets distributable under said Paragraph Fourteenth * * * be distributed in accordance with the executor's petition for partial distribution * * *; that except as inconsistent herewith, said executor's first account on file herein be approved."

On April 7, 1948, the American Trust Company, as executor, filed its objections to the granting of the petition of Mrs. Peterson for partial distribution. It alleges that the accounts of the executor are correct and that Mrs. Peterson is not entitled to have the $105,546.49 distributed to her because she has waived, in writing, her claim thereto. The circumstances of the sale to Nels Peterson are fully set forth.

On April 29, 1948, there was a hearing before the Probate Court on these matters. The hearing was very brief. F. H. LaVigne, trust officer of the American Trust Company, was the sole witness. The total reporter's transcript of that hearing is 7½ pages in length. For the most part, the testimony deals with proof of the correcness of the submitted accounts. Thereafter, on June 15, 1948, the Probate Court filed its decree to the effect that the submitted accounts of the executor "be, and they are, hereby settled and allowed and approved as rendered, and that said Report and Petition, and all of the acts of said Executor therein set forth, including all sales of personal property, be, and they are, hereby ratified, confirmed and approved." Mrs. Peterson's objections to the executor's accounts were overruled. The court also ordered partial distribution to the bank as trustee, finding that because of tax problems, final distribution cannot be had until some uncertain time in the future, but that, in order to protect Mrs. Peterson in her rights to monthly income, partial distribution should now be had. The trustee was specifically ordered to pay Mrs. Peterson, monthly during her lifetime "the entire net income of said trust estate." Not one word was said in the orders of the court as to whether the fund here involved was to be treated as income or corpus by the trustee.

Mrs. Peterson has appealed from the order denying her petition for partial distribution, and from the decree of partial distribution "in so far as said decrees are in conflict with the partial distribution sought by Hilma Peterson in her petition for partial distribution."

[1] Appellant contends that, as the widow of the testator and as life beneficiary under the trust, she is entitled to income from the date of the death of decedent. This is undoubtedly the law In re Estate of Platt, 21 Cal.2d 343, 131 P.2d 825, and is not disputed by respondent. Appellant next urges that the Probate Court, by its order confirming the sale to Nels Peterson, finally and conclusively determined that $105,546.49 of the purchase price should be allocated to income, and that, even if that order did not determine this point, as a matter of law such amount should have been allocated as income and distributed to her as such income. The question as to whether the $105,546.49 is income of the decedent's estate or part of the corpus, presents a very interesting legal question, but that question was never before the Probate Court, was not decided by it, and is not before this court on this appeal. We have reviewed the record at some length in order to demonstrate that the issue that was before the Probate Court was whether this fund should be distributed to appellant or to the trustee. The pleadings, the oral testimony, the orders of the Probate Court and the notice of appeal demonstrate that this is so. At the time of oral argument counsel for respondent stipulated that the Probate Court has never decided whether the fund in question is income or corpus.

[2, 3] The question as to whether the disputed fund should be distributed to the trustee or to appellant does not involve in any way a determination of whether the fund is income or corpus. That is so because whether or not that fund is income or corpus, it had to be distributed to the trustee. It has long been the law of this state that income accruing prior to distribution is distributable along with the corpus in the hands of the executor to the trustee regardless of whether or not the life beneficiary may be entitled to receive that income from the trustee. In re Mackay's Estate, 107 Cal. 303, 40 P. 558; In re Estate of Dare, 196 Cal. 29, 235 P. 725; In re Estate of Marré, 18 Cal.2d 184, 114 P.2d 586; In re Estate of Platt, 21 Cal.2d 343, 131 P.

2d 825; In re Estate of Hardy, 62 Cal.App. 2d 958, 145 P.2d 910. It therefore follows that the questioned fund was properly distributed to the trustee whether or not it was income. Throughout this proceeding it has been appellant's theory that if she could prove the fund to be income, it would be distributable to her. At this late date she cannot change that theory upon which the case was tried and decided. Under the law, the fund, whether income or corpus, had to be distributed to the trustee. It follows that the question whether it was income or corpus was not and could not have been decided in this proceeding. On the record before it, the Probate Court could have made no other orders than those from which this appeal is taken. The appellant, in a proper proceeding, may have the issue she desires to raise, decided on a proper record.

The order and decree appealed from are affirmed.

WARD and BRAY, JJ., concur.

92 Cal.App.2d 718

BARON et al. v. LANGE et al.

Civ. 16764.

District Court of Appeal, Second District, Division 3, California.

July 5, 1949.

Hearing Denied Sept. 1, 1949.

1. Frauds, statute of ⚷38

The representation that if plaintiffs would accept promissory note of another for purchase of interest in business the defendant and other alleged trustees would distribute to maker sufficient money to pay the note, concerned the "credit of a third person" and where not in writing could not be made the basis of a cause of action against person making such representation. Code Civ.Proc. § 1974.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Credit of a Third Person".

2. Frauds, statute of ⚷38

In determining whether a representation is within the operation of the statute requiring that a representation as to the credit of a third person shall be in writing, the intent and purpose which prompted the making of the particular representation is material. Code Civ.Proc. § 1974

3. Frauds, statute of ⚷38

Where the primary purpose in making representation as to the credit of a third person is to procure credit for another the representation comes within the purview of the statute even though in making it the person also makes false representations concerning himself or derives an incidental benefit therefrom. Code Civ.Proc. § 1974.

◆

Appeal from Superior Court, Los Angeles County; Paul Nourse, Judge.

Action for fraud and deceit by Rudolph F. Baron and Emrys J. Ross against Harold Lange and E. J. Lange. From an order sustaining without leave to amend the demurrer of E. J. Lange to the second count of plaintiffs' amended complaint, the plaintiffs appeal.

Judgment affirmed.

John W. Holmes, Pasadena, and Kenneth A. Millard, Pasadena, for appellants.

Robert F. Diekman, Los Angeles, for respondents.

VALLÉE, Justice.

In an action for damages for fraud and deceit, plaintiffs appeal from a judgment entered following an order sustaining, without leave to amend, the demurrer of defendant E. J. Lange to the second count of plaintiffs' amended complaint, after plaintiffs had informed the court they could amend no further. The demurrer of defendant Harold Lange to the amended complaint was overruled.

Harold Lange is the son of E. J. Lange. On April 3, 1947, Harold purchased from plaintiffs a one-third partnership interest in a business owned and operated by plaintiffs, giving in payment a promissory note in the sum of $20,000, due September 27, 1947. On September 30, 1947, plaintiffs filed this action against defendants. The amended complaint is in two counts. The first count is directed only against defendant Harold Lange, The second count, directed against both defendants, is one for damages for fraudulent misrepresentations.

The second count alleged that on March 31, 1947, Harold was unemployed and a financial burden and responsibility to his father, who was anxious and desirous of securing a gainful occupation for his son, and that the representations hereinafter appearing were made to accomplish this desire and for his own benefit. On March 31, 1947, Harold offered to purchase a one-third interest in the business owned by plaintiffs for $15,000. The offer was accepted upon condition that the purchase price be paid in cash. Defendants represented to plaintiffs that Harold was the beneficiary of a trust amounting to more than $500,000, the principal of which would be payable to him at the age of 35 years; that the trustees thereof were defendant E. J. Lange and Harold's mother and aunt; and that the trustees were empowered in their discretion to distribute $15,000 to Harold immediately for the purchase of a one-third interest in plaintiffs' business. Harold then gave plaintiffs his personal check, dated April 1, 1947, which was duly presented to the bank on that day and payment refused "for lack of sufficient funds." On April 2, 1947, defendants repeated the representations and further represented that E. J. Lange and Harold's mother were in favor of the distribution but that their attorney desired further information, which information was supplied by plaintiffs.

It further alleged that on April 3, 1947, Harold informed plaintiffs that the attorney had decided no funds could be distributed from the trust at that time; that the trustees were empowered in their discretion to distribute to him accumulated income in excess of $180,000 on September 27, 1947, his 29th birthday, and offered to give plaintiffs for a one-third interest in the business his promissory note due September 27, 1947. Plaintiff Baron then accompanied Harold to his father's office, at which time E. J. Lange repeated the representations just made regarding the power of the trustees to distribute accumulated income to Harold on his 29th birthday, and promised plaintiff Baron that *"if plaintiffs would accept the promissory note of defendant Harold Lange in payment for said interest in said business payable September 27, 1947, he, defendant E. J. Lange, his wife and his wife's sister, as trustees of said trust * * * would distribute to defendant Harold Lange on September 27, 1947, accumulated income from said trust in an amount sufficient to enable payment of said note."* (Italics added.) Plaintiffs accepted Harold's note for $20,000 in reliance upon the promises and representations and Harold became the owner of a one-third interest in the business.

The second count further alleged that in making the promises and representations defendants intended that plaintiffs should rely thereon in accepting the note in lieu of cash and that plaintiffs would not have accepted the note but for the making of them; that all of the promises and representations were, and known by defendants to be, false and were made with no intention to perform; that there was no trust in existence nor any accumulated income with which to pay the note. On May 14, 1947, Harold informed plaintiffs that there was no trust and that he and his father had been untruthful "in order to acquire said interest in said business"; that Harold is insolvent and unable to pay the note; that by reason of the fraudulent misrepresentations and promises plaintiffs have been damaged in the sum of $20,000.

Defendant E. J. Lange demurred to the second count on the ground that it did not state facts sufficient to constitute a cause of action against him because the alleged oral representations made by him were "for the guaranty of a debt of another, and no evidence with respect thereto is admissible in accordance with Section 1974 of the Code of Civil Procedure." That statute provides: "No evidence is admissible to charge a person upon a representation as to the credit of a third person, unless such representation, or some memorandum thereof, be in writing, and either subscribed by or in the handwriting of the party to be charged."

The gist of appellants' argument, as we understand it, when reduced to its essential elements, is that because respondent promised that he would do something to enable Harold Lange to pay his obligation to appellants, and appellants acted in reliance upon that promise, the representation was not one as to the credit of another person. They impliedly concede that if respondent represented that said Harold Lange would receive a certain cash distribution on September 27, 1947, the representation would come within the provisions of section 1974; but that because respondent promised that he would do or cause to be done, certain things if appellants would take the action desired by respondent, the promise or representation is not within the scope of that section.

[1] The representation allegedly made by respondent and relied upon by appellants is clearly one concerning the financial status and ability of Harold Lange to meet his debt when due and is, therefore, one relating "to the credit of a third person." Being an oral representation, it comes within the purview of section 1974 and, since no evidence is admissible to charge a person upon oral representations as to the credit of a third person, it cannot be made the basis of a cause of action against him. Carr v. Tatum, 133 Cal.App. 274, 24 P.2d 195; Cutler v. Bowen, 10 Cal.App.2d 31, 51 P.2d 164; Beckjord v. Slusher, 22 Cal. App.2d 559, 71 P.2d 820; 22 Cal. L. Rev. 358; 49 Am.Jur. 370, sec. 8 et seq.; 37 C.J.S., Frauds, Statute of, § 32, page 549 et seq.

[2, 3] In determining whether a representation is within the operation of a statute such as section 1974, the intent and purpose which prompted the making of a particular representation is material. 49 Am.Jur. 371, sec. 9; 37 C.J.S., Frauds, Statute of, § 36, page 551. The complaint alleges that in making the representations defendants intended that plaintiffs should rely thereupon in accepting the note in lieu of cash. Where the primary purpose in making the representation is to procure credit for another, the representation comes within the purview of the statute, even though in making it the person also makes false representations concerning himself or derives an incidental benefit therefrom. See, Brown v. Kimball, 84 Me. 280, 24 A. 847; Hunter v. Randall, 62 Me. 423, 426, 16 Am.Rep. 490; Williams v. Ravanna Bank, 221 Mo.App. 887, 289 S.W. 34, 37; Keene Lumber Co. v. Leventhal, D.C., 71 F.Supp. 598, same case on appeal, 1 Cir., 165 F.2d 815, 820–821; 49 Am.Jur. 373, sec. 11; Anno.: 9 A.L.R. 545; 13 L.R.A.,N.S., 214; 1 Ann.Cas. 690.

Carr v. Tatum, 133 Cal.App. 274, 24 P.2d 195, was an action for damages for false oral representations made with respect to the credit of a third person. A demurrer was sustained without leave to amend. The court, after an exhaustive review of the common law and cases in other jurisdictions, held that the weight of authority supported a strict interpretation of the section, that since the statute did not except fraudulent representations as to the credit of a third person, no exception could be considered by the court, and that the statute was a bar irrespective of the fact that such representations were fraudulently made with intent to deceive and defraud the plaintiffs. In holding that the representations made the basis of the action were within section 1974, Code of Civil Procedure, the court said, 133 Cal.App. at page 277, 24 P.2d at page 196: "* * * the representations in question fall squarely within the requisite precedent conditions demanded by the terms of the statute for its operation. That statements made by one person to a second individual to the effect that a third person with whom the second individual was negotiating with reference to a business transaction was 'a responsible business man'; that the first person had 'looked up' the third person and found that 'he was rated A-1'; that the third person 'was a very responsible New York business man'; that he was 'financially responsible and was a man with plenty of money'—constituted representations 'as to the credit' of such third person is so clear that it would seem a useless task to attempt to establish the correctness of such a conclusion (Nevada Bank [of San Francisco] v. Portland National Bank, C.C., 59 F. 338; Cook v. Churchman, 104 Ind. 141, 3 N.E. 759), and that the remaining allegations of the complaint regarding business activities of such 'third person' in the matter of the contemplated construction by him of 'a large apartment house,' together with his ownership of 'certain property * * * worth $25,000,' also constituted representations 'as to the credit of a third person,' is attested by the language that occurs in the opinion in the case of McKee v. Rudd, 222 Mo. 344, 121 S.W. 312, 319, 133 Am.St.Rep. 529."

Cutler v. Bowen, 10 Cal.App.2d 31, 51 P.2d 164, was an action for fraud in which the plaintiff recovered a judgment. In reversing the judgment, the court said, 10 Cal.App.2d at page 33, 51 P.2d at page 165: "The judgment must be reversed for these reasons: The demand for damages rests on the allegations that the brokers represented to plaintiff that their client [Tweedt] 'was financially responsible and was able, and intended, to pay and discharge all of the indebtedness and encumbrances on said Orland property within a period of sixty days'; that said brokers represented that they *would cause* all of said indebtedness to be paid either by refinancing the same or by causing the same to be paid out of the $9,000 cash payment to Tweedt; and that said Tweedt would immediately move to said ranch and farm, care for, and maintain it. * * * The clear and unequivocal language of the section [1974, Code Civ.Proc.] compels the holding that all this oral evidence was inadmissible."

In Beckjord v. Slusher, 22 Cal.App.2d 559, 71 P.2d 820, 823, it was held that the complaint failed to state a cause of action against defendants for fraud and deceit. The false representations allegedly made by defendants to plaintiff, and upon which he relied, were that one of two persons (the Chamberlains) substituted by plaintiff in a lease in lieu of defendants, "had a large amount of property", was "financially responsible" to carry out the terms of the proposed lease and pay the aggregate rental provided therein of $87,000, *that defendants would lend the Chamberlains $10,000* "without security", *with which to alter and improve the leased property, would insure and had insured the Chamberlains against all loss if they would enter into the transaction, and that defendants would under no circumstances permit the leased premises to close but would stand back of the Chamberlains financially.* That court held that these were representations concerning the financial responsibility and credit of a third person, and, since they were not in writing, could not be the basis of a cause of action against defendants.

It is clear from the allegations of the complaint that respondent's oral representations that Harold was the beneficiary of a trust estate worth $500,000, and that respondent and the other trustees were empowered to distribute accumulated income to Harold on September 27, 1947 (the due date of the note), were within the statute. They were made for the purpose of convincing appellants that Harold was a man of means, capable of meeting his financial obligations, and for the purpose of inducing appellants to sell an interest in their business on credit in lieu of cash. The further representation that respondent and the other trustees would cause sufficient money to be paid to Harold to enable him to meet the note when due is so inextricably interwoven with the other representations as to Harold's financial status and credit as to be unseverable therefrom, since, in effect, it is a representation that Harold's note was good. In the Cutler and Beckjord cases the party making the representations and promises as to the credit of a third person in addition represented and promised that he would do something in order that credit be extended to the third person. See, Hicks v. Steel, 142 Mich. 292, 105 N.W. 767, 768, 4 L.R.A.,N.S., 279, where it was held that an action could not be maintained upon an oral false representation that the notes of a third person were good and that he was financially responsible; Gains v. Massey, 190 Mo.App. 199, 176 S.W. 427; Boyd v. Farmers' Bank, 223 Mo.App. 442, 14 S.W. 2d 6.

We conclude that the second count of the complaint does not state facts sufficient to constitute a cause of action as to E. J. Lange and that the demurrer thereto was properly sustained without leave to amend.

Judgment affirmed.

SHINN, P. J., and WOOD, J., concur.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.

92 Cal.App.2d 724

DERTIMAN v. ALMEY et al.

Civ. 13874.

District Court of Appeal, First District,
Division 2, California.
July 6, 1949.

Landlord and tenant ⚿283

Where notice served on tenant and assignee of lease stated that the rent due was $875, or five months at $175 per month, and the court found that the rent was only $77 a month, the court was without power to declare forfeiture of lease since under the code the defendants were entitled to a demand for the payment of the exact sum due. Code Civ.Proc. § 1161.

◆

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by John Dertiman against E. Almey and John E. Scarborough for restitution of certain leased premises, the forfeiture of lease, and $770 of unpaid rent and $100 attorney's fees. From a judgment for plaintiff, the defendant John E. Scarborough appeals.

Judgment reversed.

Albert Picard, San Francisco, Kenneth C. Zwerin, San Francisco, for appellant.

George T. Davis, San Francisco, for respondent.

GOODELL, Justice.

This is an appeal on the judgment-roll from a judgment for (a) the restitution of certain leased premises, (b) the forfeiture of the lease, (c) $770 of unpaid rent, and (d) $100 attorney's fees.

The appeal is presented on appellant's brief alone. No brief was filed by respondent, and neither side appeared when the case was called for argument.

The findings show that respondent leased to defendant Almey, 10 rooms and a bath on the second floor of a hotel on Eddy Street in San Francisco, for the term of 5 years commencing December 15, 1946. The rent reserved by the lease was $175 a month. Defendant Almey assigned the lease to defendant Scarborough, who went into possession. By September 4, 1947, 5 months' rent was in arrears, and on that day respondent served on both defendants a notice in writing, stating that the arrearage was $875, and demanding payment thereof or surrender of possession within 3 days.

The court found that "On August 8, 1942, said premises were registered by the plaintiff with the Office of Price Administration as rented for housing or dwelling purposes at a maximum rental of $77.00 per month" and "At the time said premises were leased * * * plaintiff knew or should have known that defendant E. Almey intended to and would use said premises for hotel purposes, and that the monthly rental reserved * * * was in excess of the maximum rental of $77.00 per month * * *"

By the time findings were signed 10 months rent had accrued, so the judgment was for $770.

Section 1161 Code Civ.Proc. requires the 3-day notice to state the amount which is due. The notice served on defendants stated $875—5 months at $175. The court found, however, that the rent was but $77 a month. The notice, therefore, did not state the amount due, but overstated it.

This is the only point urged by appellant. He says "A demand for payment of the exact sum due was a necessary prerequisite to the forfeiture of the lease * * * and the court had no power to declare the forfeiture * * *" Appellant relies on the cases of J. B. Hill Co. v. Pinque, 179 Cal. 759, 178 P. 952, 3 A.L.R. 669, and Johnson v. Sanches, 56 Cal.App.2d 115, 132 P.2d 853. Both cases sustain his position. In the last cited case this court discussed the question at some length and cited the earlier authorities. It is not necessary to do more than call attention to those cases.

For the reasons given in those two cases, and on the authorities cited therein, the judgment is reversed.

DOOLING, J., concurs.

92 Cal.App.2d 669

DE CORSEY et al. v. PUREX CORPORATION, Limited, et al.

Civ. 16692.

District Court of Appeal, Second District,
Division 3, California.
June 29, 1949.

Rehearing Denied July 15, 1949.

Hearing Denied Aug. 25, 1949.

1. Explosives 🔑8

Where cleaning fluid was manufactured and packaged to meet normal conditions of handling, plaintiff injured by explosion of half gallon bottle containing the fluid was not required to adduce evidence as to the atmospheric conditions in which the bottle was handled after it left manufacturer's possession or to prove absence of unusual, unexpected conditions that might have exposed the bottle to excessive heat.

2. Explosives 🔑8

In action for damages resulting from explosion of half gallon bottle containing cleaning fluid, whether the cleaning fluid was under abnormal pressure due to manufacturer's negligence and whether such pressure resulted in the explosion which injured the plaintiff were for jury.

3. Negligence 🔑15, 61(2)

Negligent acts of several persons each of which contributes proximately to the occurrence of the accident or injury may give rise to liability on part of all the actors.

4. Negligence 🔑61(2)

One who is guilty of negligent acts which contribute proximately to the occurrence of the accident or injury may not escape liability upon the ground that the acts of others, whether negligent or not, are also contributing causes.

5. Negligence 🔑61(1)

Liability may be imposed upon a defendant where his negligence is one of several contributing factors each of which is a proximate cause of the injury.

6. Negligence 🔑136(25)

The question of proximate cause is ordinarily one of fact.

7. Negligence 🔑136(25)

The determination of the issue of proximate cause by the jury will be upheld if it expresses a reasonable conclusion drawn from the evidence.

8. Negligence 🔑103

One who is injured as a proximate cause of another's negligence is entitled to compensation.

9. Negligence 🔑61(1)

It is not necessary that negligence of the defendant, in order to be actionable, be the sole cause of the damage.

10. Explosives 🔑8

Evidence from which it could have been found that half gallon bottle of cleaning fluid was under extreme internal pressure and that the severity of the plaintiff's injuries was probably due to the fact that the liquid exploded was sufficient for jury.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by Lea DeCorsey and John DeCorsey against Purex Corporation, Limited, and another for personal injuries. From a judgment for the named defendant on directed verdict, the plaintiffs appeal.

Judgment reversed.

Stephen Monteleone and Wellborn, Mitchell, Barrett & Rodi, Los Angeles, Vernon Barrett and Owen F. Goodman, Los Angeles, of counsel, for appellants.

Sidney A. Moss, Fulcher & Wynn and Bert W. Henderson, Los Angeles, Henry F. Walker, Los Angeles, of counsel, for respondent.

SHINN, Presiding Justice.

Plaintiff suffered a severe cut in her right wrist when a half gallon glass bottle of Purex burst while she was unscrewing the metal cap. She brought suit against Purex Corporation Ltd., manufacturer and bottler of Purex, and Latchford-Marble Glass Company, manufacturer of the bottle. In a jury trial a judgment of nonsuit was entered in favor of Latchford-Marble Glass Company, from which no appeal was taken. Judgment on directed verdict in favor of Purex Corporation was entered, and plaintiff appeals from such judgment.

The sole question on appeal is whether there was sufficient evidence to have justified findings of the jury that Purex Corporation was negligent and that its negligence was a proximate cause of plaintiff's injuries.

About a week before the accident, plaintiff's sister-in-law purchased the bottle of Purex from Fitzsimmons Stores, Ltd., and delivered it to plaintiff's home where it was left in a small cabinet below the sink in the kitchen. Plaintiff removed the bottle from the cabinet, placed it on a bread board underneath a counter, started to unscrew the metal cap, when the bottle burst into many large and small fragments. The unopposed testimony of plaintiff and her sister-in-law was sufficient to prove that the bottle was carefully handled by them. It was shown by the evidence that there are three ways in which such a bottle may be broken, namely, by thermal shock, internal pressure, or a blow or series of blows. Breakage by thermal shock is accomplished by thrusting the bottle into cold water after its immersion in hot water, and is not to be considered. It was shown by the testimony of expert witnesses, based upon experiments with such bottles, that they break under pressures varying from 62 to 172 pounds per square inch, and it was further shown that a sharp blow or several blows are required to break a bottle. Purex normally does not develop a pressure of more than two pounds per square inch except through deterioration over a period of months or through contamination. Exposure to heat or light accelerates decomposition. The metal caps are so designed that they may release pressure of 12 pounds per square inch or more, although there was expert testimony based upon experiments that sometimes pressure was not released until it had reached 35 or 40 pounds per square inch. There was also evidence that Purex, if contaminated with iron particles or certain other substances, deteriorates rapidly, resulting in the formation of gas and increase of internal pressure. Plaintiff's expert witnesses and those of defendants were in agreement that the characteristics of a breaking from internal pressure are quite different from those manifested by breaking by means of a blow. In the former, the base of the bottle, which is normally its weakest part, is shattered; in the latter, if the blow is received on the side of the bottle a percussion cone is produced, evidenced by radiating cracks, and the bottle breaks at that point, leaving the base intact. The bottle in question here had such a percussion cone about three inches from the bottom and the base was not broken except for a fraction of an inch into the base at a point below a major break in the side. When the bottle burst, the fragments flew about the kitchen, and the cap and some particles of glass were picked picked up in an adjoining room. Most of the pieces were collected and preserved, were fastened together with adhesive and the bottle as thus restored was placed in evidence. Some of the parts were missing and a jagged hole remained at the point in the side where the bottle burst into small pieces, the hole being, roughly, two inches in size measured from top to bottom, and three and one-half inches in its widest part measured from side to side. There was another smaller hole below and to one side of the one described. Witnesses who came to plaintiff's house shortly after the accident testified that particles of glass had been thrown about the kitchen, Purex had been scattered on the walls and floor and one witness testified that there was Purex and splotches of blood on the ceiling which was eight and one-half feet high.

Negligence of defendant could have consisted of placing the product on the market in a dangerous condition due to its being contained in a defective bottle, or being under dangerously high pressure, or it could have consisted of both.

It appears from the briefs that the directed verdict was ordered upon the ground that the evidence was insufficient to show that the bottle when in defendant's hands had a defect which would have been discoverable in the exercise of ordinary care, or any defect at all. Plaintiff claims that in this connection she was entitled to the benefit of the rule of res ipsa loquitur to prove negligence in placing the product on the market in a defective bottle. Defendant denies that the rule is applicable under the evidence, and the court so ruled in directing a verdict for defendant. Where a bottle of carbonated beverage explodes in the hands of a retail purchaser, an inference of negligence of the bottler may be drawn if there is evidence that between the time the bottle left the hands of the bottler and came into the hands of the plaintiff it was handled carefully and was not subjected to harmful forces, and if there is also evidence that there were available to the bottler, and in common use, tests by which defects due to imperfection of manufacture or rough use are discoverable. The evidence need not go so far as to eliminate every remote possibility of injury by third persons. Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 150 P.2d 436; Gordon v. Aztec Brewing Co., 33 Cal.2d 514, 203 P.2d 522.

Plaintiff attempted to prove that the bottle in question was carefully handled by those who had possession of it after it left the hands of defendant. Fitzsimmons Stores purchased Purex through Market Wholesale Grocers and not directly from Purex Corporation. There was no evidence at all as to the manner in which the product was handled by Market Wholesale Grocers, or whether accidents had occurred in the course of delivery that might have caused injury to some of the bottles. There was some evidence as to the manner in which cartons of Purex were ordinarily handled by Fitzsimmons Stores. The manager of the grocery department testified that he was present when some deliveries were received and that other persons also handled deliveries; that the cartons were stacked up in the store, were partly opened to exhibit the contents, and that the customers helped themselves. He testified that he had not noticed that any of the cartons had been opened or disturbed when received. He knew nothing about the bottle in question or the carton in which it was contained, and had no idea who had handled it when it was received or sold. There was no other evidence tending to prove that the bottle was not cracked while it was in the possession of Market Wholesale Grocers or Fitzsimmons Stores.

[1] While there was evidence that exposure to heat or light accelerates the decomposition of Purex, plaintiff was not required to furnish evidence as to the atmospheric conditions in which the bottle was handled at all times after it left defendant's possession. There was evidence that Purex was kept in the salesroom, at prevailing temperatures, by Fitzsimmons Stores, and that when plaintiff received the bottle in question she kept it in a cabinet under her sink. The half gallon amber glass bottles are put out by defendant in sealed cardboard cartons containing six bottles and the amber glass also tends to exclude the light. It might have been assumed reasonably that the product was handled in a normal manner by Market Wholesale Grocers to the extent, at least, that it was not exposed to high temperatures. It is manufactured and packaged to meet normal and usual conditions of handling. We think it would have been unreasonable to require plaintiff to prove the absence of some unusual, unexpected conditions that might have exposed the bottle to excessive heat. Under the circumstances rapid deterioration resulting from exposure to excessive heat or light was no more than a remote possibility.

[2] We find it unnecessary to decide whether the incomplete evidence as to the manner in which the Purex was handled after it was bottled would have been sufficient to prove that the bottle probably was not damaged during that time. The sufficiency of plaintiff's evidence, in our opinion, did not require reliance upon the res ipsa loquitur rule. There was evidence from which the jury could properly have determined that the liquid was under abnormal pressure, that this was due to defendant's negligence, that the explosion resulted from the excessive pressure and that it was a proximate cause of the severe injuries sustained by plaintiff.

The manner in which Purex is manufactured was described by defendant's chemist. A specified amount of caustic soda is dropped into a concrete tank and cool water is then added to make 4200 gallons of liquid. Liquid chlorin is introduced under the surface of the solution and is absorbed. Certain raw materials are added to keep down the rate of decomposition. The mixture is tested from time to time by a standard process. It is transferred from 4,200 gallon tanks to a 90,000 gallon concrete tank from which the bottles are filled. Only new bottles are used. They are not washed or tested by defendant, but are inspected visually. There was evidence that over a period of nine years an estimated 9,000 bottles of Purex have been put aside "for a period of 6 months, 8½ or 9 years" and that none of them has ever been known to explode within a period of six months.

As previously mentioned, a normal pressure of Purex at the time it is marketed is from a fraction of a pound to two pounds per square inch, and the metal tops are designed to release excessive pressure. Plaintiff's expert witness testified that a particle of rust would accelerate reaction from decomposition as much as a thousand fold, and that rust might decompose it in a day or two. He also testified that he had calculated that results such as those described could follow an explosion under a pressure of 40 pounds per square inch. One of defendant's experts testified that when he broke an empty Purex bottle against the edge of a tile sink the pieces flew six or eight feet onto the floor, but that he did not notice any fly upwards. Several tendons in plaintiff's wrist were severed, as well as an artery and the ulna nerve. The surgeon who repaired the lacerations testified that the tendons were not cut sharply, but were macerated, evidently by an object propelled with considerable force. The injury resulted in permanent atrophy of the muscles leading to three of the fingers. The nature of plaintiff's injuries and the manner in which the bottle was shattered and the contents thrown onto the ceiling furnished substantial evidence of the release of a powerful force. The testimony of one of defendant's experts, already mentioned, was to the effect that upon the breaking of a bottle with no internal pressure the fragments would simply fall to the floor and not fly upward. A reasonable inference would have been that the liquid was contaminated by the presence of some foreign substance which caused rapid deterioration and the development of excessive gas. Manifestly, in view of the evidence that defendant did not wash its bottles before using them, the question whether such contamination resulted from any negligent act or omission of Purex Corporation was one for the jury.

There was no evidence from which it could reasonably have been inferred that the bottle was burst through internal pressure alone. There is wide variation in the strength of blown bottles. A single bottle may be much thicker at one point than at others, and as we have said, the capacity to withstand internal pressure was shown by experiments to range from 62 to 172 pounds. Plaintiff's expert made a test of three Purex bottles and they did not burst under pressure of 110 pounds. If full credit was given to the testimony of plaintiff that she handled the bottle carefully, it would have been highly improbable that the bottle was burst solely by internal pressure. All the expert evidence was that it had been broken by a blow. Although plaintiff's expert did not express that opinion, he did not disagree with the testimony of defendant's experts that the bottle, as restored, had the characteristics of one broken by exterior force. But this fact, if it had been established, would not have defeated plaintiff's claim. For reasons to be stated, it was unnecessary for plaintiff to prove that the bottle was or was not defective, or if defective that such condition did or did not contribute to the occurrence of the accident.

[3, 4] If the jury had believed that the bottle was defective when it was received by plaintiff, it would not have been a necessary conclusion that the defective condition was the sole proximate cause of plaintiff's injuries. Negligent acts of several persons, each of which contributes proximately to the occurrence of the accident or injury, may give rise to liability on the part of all of the actors. One who is guilty of negligent acts which contribute proximately to the occurrence of the accident or injury may not escape liability upon the ground that the acts of others, whether negligent or not, are also contributing causes. Section 439, Restatement, Torts, reads: "If the effects of the actor's negligent conduct actively and continuously operate to bring about harm to another, the fact that the active and substantially simultaneous operation of the effects of a third person's innocent, tortious or criminal act is also a substantial factor in bringing about the harm does not protect the actor from liability."

[5-9] It is too well settled to admit of question that "Liability may be imposed upon a defendant where his negligence is one of several contributing factors, each of which is a proximate cause of the injury." Westover v. City of Los Angeles, 20 Cal.2d 635, 128 P.2d 350, 352. Also that the question of proximate cause is ordinarily one of fact and that the determination of the issue by the jury will be upheld if it expresses a reasonable conclusion drawn from the evidence. Smith v. Schwartz, 14 Cal.App.2d 160, 164, 57 P.2d 1386, and cases cited. Plaintiff was entitled to be compensated for injuries sustained as a proximate cause of defendant's negligence. If the excessive internal pressure was found to have resulted from contamination of the liquid, negligence could have been inferred, and in that event it would have been for the jury to determine the extent of the injuries sustained by plaintiff as the proximate result of such negligence. There was good reason to believe that except for the violence of the explosion the injuries would have been far less severe. It is not necessary that negligence of the defendant, to be actionable, be the sole cause of the damage. There may be other factors which contribute to the extent of the damage. It was said in City of Oakland v. Pacific Gas & E. Co., 47 Cal.App.2d 444, 450, 118 P.2d 328, 331: "One who contributes to damage cannot escape liability because the proportionate contribution may not be accurately measured. Reclamation Dist. No. 833 v. American Farms Co., 209 Cal. 74, 285 P. 688; Stephani v. Abbott, 137 Cal. App. 510, 30 P.2d 1033; Switzer v. Yunt, 5 Cal.App.2d 71, 41 P.2d 974. It is incumbent upon the party alleging injury to prove the amount of damages. Respondent sustained that burden in this case. If the damages proven could be reduced proportionately, that burden rested upon appellant. Vitagraph, Inc. v. Liberty Theatres Co., 197 Cal. 694, 242 P. 709; Andersen v. Rinconada Country Club, 4 Cal. App.2d 197, 40 P.2d 571."

[10] Evidence from which it could have been found that the bottle was under extreme internal pressure and that the severity of plaintiff's injuries was probably due to the fact that the liquid exploded was sufficient to send the case to the jury. Even if it had been believed that the bottle had been cracked before plaintiff received it the jury would have been required to determine whether it would have burst under normal pressure. And if the assumed defective condition of the bottle combined with the excessive pressure to cause plaintiff's injuries the burden of segregating the damages due to one cause or the other was upon the defendant. This issue, if made by the evidence, would have been for submission to the jury, under proper instructions. All such questions relate to the issue of proximate cause.

Plaintiff's evidence was sufficient to have supported a verdict in her favor. It was therefore error for the court to direct a verdict in favor of the defendant.

The judgment is reversed.

WOOD and VALLÉE, JJ., concur.

92 Cal.App.2d 539

PEOPLE v. HICKOK.

Cr. 2537.

District Court of Appeal, First District,
Division 1, California.
June 22, 1949.

1. Criminal law ⚷1192

Where remittitur had already issued, motion to set aside order of appellate court dismissing appeal for failure to file opening brief would be treated as a petition to recall the remittitur. Rules on Appeal, rules 17(a), 25(d).

2. Criminal law ⚷1130(4)

Where new attorney retained for appellant had not been substituted as attorney of record, notice that appeal would be dismissed unless opening brief was filed within 30 days was properly sent to former attorneys for appellant who still appeared as attorneys of record. Rules on Appeal, rule 17(a).

3. Criminal law ⚿1130(4)

Appellate court has jurisdiction under Rules On Appeal to relieve an appellant from inadvertent default on a criminal appeal. Rules on Appeal, rule 53(b).

4. Criminal law ⚿1192

Appellate court has inherent power in a proper case to recall a remittitur inadvertently or improperly issued, and such power may be exercised where court has been induced to decide case under a misapprehension of the true facts. Rules on Appeal, rule 25(d).

5. Criminal law ⚿1192

Where failure to prosecute appeal and dismissal thereof, for failure to file opening brief, were the result of confusion incident to change of attorneys representing appellant, without making such change of record, and without fault of appellant who was then imprisoned, remittitur was issued under a misapprehension as to the true facts and should be recalled. Rules on Appeal, rules 17(a), 25(d).

◆

Appeal from Superior Court, Contra Costa; Harold Jacoby, Judge.

Donald E. Hickok was convicted of an offense, and from the judgment of conviction and order denying a new trial, he appealed. On motion to set aside order dismissing appeal for failure to file opening brief.

Motion granted.

Donald Edward Hickok, San Quentin, for appellant.

Fred N. Howser, Attorney General, Francis W. Collins, District Attorney, Martinez, for respondent.

PETERS, Presiding Justice.

[1] This is a motion made by defendant and appellant in propria persona to set aside this court's order of July 29, 1948, dismissing his appeal under Rule 17(a) for failure to file an opening brief. Inasmuch as the remittitur has issued, the proceeding may be treated as a petition to recall the remittitur.

The appellant, through his then lawyers, Albert M. King and William M. Savage of Oroville, on April 3, 1948, filed a timely notice of appeal from a judgment of conviction and from an order denying his motion for a new trial. On May 11, 1948, the clerk's and reporter's transcripts were filed with this court. On June 23, 1948, the clerk of this court addressed a letter to the law firm of King and Savage, the then attorneys of record for appellant, informing them that the appellant's opening brief had not been filed, and that the appeal would be dismissed under Rule 17(a) unless the brief was filed within 30 days. On July 29, 1948, no brief or request for an extension having been filed, this court dismissed the appeal. On September 7, 1948, the remittitur issued to the county clerk. On February 17, 1949, this motion was filed.

[2] Service has been made on the Attorney General, and affidavits have been filed by all interested parties. Appellant is confined in the state's prison. There is no doubt that he desires to prosecute his appeal. From the affidavits it appears that shortly after the notice of appeal was filed by the firm of King and Savage, appellant notified that firm that he did not want them to handle the appeal, but that attorney Leo Sullivan, located in Oakland, had been retained for that purpose. A fee was paid to Sullivan in May of 1948 by relatives of appellant. Neither King and Savage nor Sullivan proceeded to have Sullivan substituted as attorney of record, as should have been done. The 17(a) notice was, therefore, properly sent to King and Savage by the clerk of this court. According to the affidavits of King and Savage, they notified the son of appellant of the receipt of this notice and asked him to convey the information to Sullivan. Whether or not Sullivan actually received this notice is not clear. It is clear that during or about this time Sullivan was undecided whether to appeal or to test the legality of the conviction by a writ of habeas corpus. About this time Sullivan was ill with a heart attack. He apparently believed that someone else was protecting the appeal. No brief was written or extension secured, with the result

that the appeal was dismissed. From the documents and letters on file it is quite apparent that appellant believed that his appeal was being prosecuted. It was not until January of 1949 that, upon inquiry, he learned from the clerk of this court that the appeal had been dismissed. This motion was filed shortly thereafter.

[3-5] It is apparent that the appeal was dismissed because of the confusion existing when the attorneys were changed. King and Savage should, of course, have had Sullivan substituted as attorney of record. Sullivan should have been more diligent in protecting his client's interests. But the appellant, the real party in interest, was not at fault. He was incarcerated and was doing all that he could to protect his rights, and thought that he had done so. If this were merely a motion for relief from default, this being a criminal appeal, this court, under Rule 53(b), would have the power to relieve appellant from his inadvertent default, and, under the rule of the decided cases, undoubtedly would do so. Jarkieh v. Badagliacco, 68 Cal.App.2d 426, 156 P.2d 969; Averill v. Lincoln, 24 Cal.2d 761, 151 P.2d 119; Peebler v. Olds, 26 Cal.2d 656, 160 P.2d 545; In re Estate of Hultin, 28 Cal.2d 340, 170 P.2d 16; Peak v. Nicholson, 61 Cal.App.2d 355, 143 P.2d 78. In a proper case the court also has power to recall a remittitur inadvertently or improperly issued. Rule 25(d) provides that "A remittitur may be recalled by order of the reviewing court on its own motion, on motion after notice supported by affidavits, or on stipulation setting forth facts which would justify the granting of a motion." This is an inherent power of the court and was recognized long before the above rule was adopted. Isenberg v. Sherman, 214 Cal. 722, 7 P.2d 1006; Trumpler v. Trumpler, 123 Cal. 248, 55 P. 1008; Rowland v. Kreyenhagen, 24 Cal. 52. Under these cases, and others that could be cited, and under the rule, one of the grounds for exercising the power is that the court has been induced to decide the case under a misapprehension of the true facts. That rule is applicable here. Appellant was not personally at fault. He tried to prosecute his appeal and thought that his lawyers were handling it. The lawyers in Oroville thought that Sullivan was handling things, and he apparently thought that someone else was protecting the appeal. The time between the issuance of the remittitur and the filing of this motion was not unreasonably long. It should also be mentioned that the Deputy Attorney General handling this matter, although he has not stipulated that the motion may be granted, has filed no opposition to the granting of this motion. Had we known the facts on July 29, 1948, which we now know, we would not have dismissed the appeal. Under such circumstances, it is apparent that we issued the remittitur on September 7, 1948, under a misapprehension as to the true facts. This being so, the remittitur should be recalled.

The motion to recall the remittitur is granted.

WARD and BRAY, JJ., concur.

WARNER v. WARNER.

Civ. 16936.

District Court of Appeal, Second District,
Division 1, California.
June 29, 1949.

Rehearing Denied July 18, 1949.

Hearing Granted Aug. 25, 1949.*

1. Divorce 🔑223
Husband and wife 🔑295

During pendency of an action of divorce or for separate maintenance, trial court may in its discretion require either party to pay as costs of action or as counsel fees any moneys necessary for prosecution of action by another party, taking into consideration all facts involved. Civ.Code, § 137.

2. Husband and wife 🔑295

$10,000 counsel fees pendente lite for wife's counsel in wife's separate maintenance action was an abuse of discretion and fees would be reduced to $2500 although testimony would support inference that husband was financially worth more than $1,000,000. Civ.Code, § 137.

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* Subsequent opinion 215 P.2d 20.

3. Divorce ⚿227(1)

Counsel fees for a wife's counsel in a divorce action are not to be determined solely by wealth of her husband and while seriousness of charges made by parties and gravity of interests involved may enhance or diminish obligation laid upon wife's counsel to preserve her status as wife and to maintain her in social esteem, such factors do not justify a liberal fee in absence of work done and results accomplished.

◆

Appeal from Superior Court, Los Angeles County; Stanley Mosk, Judge.

Action by Anita Lipton Warner against Thomas William Warner, Jr., for separate maintenance. From an order awarding plaintiff's counsel $10,000 counsel fees pendente lite, defendant appeals.

Order affirmed and modified.

Manuel Ruiz, Jr., Fink, Rolston, Levinthal & Kent, Los Angeles, Nelson Rosen, Hollywood, for appellant.

Gold & Needleman, J. George Gold and James J. Needleman, Beverly Hills, for respondent.

DRAPEAU, Justice.

The only question on this appeal is whether the trial court abused its discretion in granting counsel for plaintiff $10,000 counsel fees pendente lite.

In her complaint for separate maintenance the plaintiff wife alleges cruelty and grievous mental suffering. The usual order to show cause issued, and hearing followed, for the purpose of fixing temporary alimony, court costs, and counsel fees.

The plaintiff testified to declarations of the defendant which would support the inference that he was financially worth more than a million dollars. She also testified that she had no money or property of her own; that the defendant told her she would never get anything from him if she sued for divorce; and that he took her automobile away.

The defendant testified that while he owned interests in holding and family corporations, his wealth was nominal; that most of his property was in the estate of his father, undistributed in probate, and subject to extensive inheritance taxes; and that he had very meager present liquid assets. He also testified that the reason the automobile was taken from the wife was because it belonged to one of the corporations which held title to the car.

The parties were married for two and a half years before filing of the complaint. There are no children of the marriage. The defendant pays alimony to a former wife and support money for a child of that marriage.

The court ordered the defendant to pay $500 a month for temporary support for the wife, and to permit her to occupy the family dwelling house (which has twenty-two rooms), and to pay $10,000 attorney's fees, on account, payable in four monthly installments, and costs of $250.00.

It was stipulated that upon the trial of the case on the merits the balance, if any, of counsel fees might be fixed.

[1] During the pendency of an action for divorce or for separate maintenance, the court may, in its discretion, require either party to pay as costs of action or as attorney's fees any money necessary for the prosecution of the action by the other party, Civ.Code, sec. 137; Loeb v. Loeb, 84 Cal.App.2d 141, 190 P.2d 246, taking into consideration all the facts and circumstances of the case involved. 1 Cal.Jur., sec. 48, p. 995; Peyre v. Peyre, 79 Cal. 336, 21 P. 838.

[2] While it appears in this case that there may well be considerable legal work to determine just what the actual worth of the defendant is—to unscramble and determine his interest in various holding companies—and while the conduct of the defendant in denying the plaintiff the use of an automobile, and in telling her she would never get anything from him if she sued him for divorce, is unfortunate; nevertheless it is the opinion of this court that the amount of the fee ordered for legal services pending the trial was an abuse of discretion.

In a sense such a fee is in the nature of a retainer. If death or serious injury should happen to counsel involved, the defendant may be called upon to pay additional fees for preparation of plaintiff's case. There is the possibility of a reconciliation between the spouses. This frequently happens, and the law is always hopeful that it may come to pass. In the event of an early reconciliation, obviously the fee named would be too much. Then, too, there is the possibility of death of one of the parties. Fees for legal services can be fixed by the trial court which finally hears the case with better regard for the rights of all parties concerned.

[3] In the case of Shopiro v. Shopiro, Cal.App., 153 P.2d 62, 67, 68, the amount of counsel fees pendente lite in an action for separate maintenance was given careful consideration by the District Court of Appeal. The amount ordered was $7,500. After the decision in the District Court, the Supreme Court granted a hearing, and thereafter the matter was settled and the appeal dismissed. In that case the court observed:

> "Any fee paid is unjust to the extent that it exceeds the value of services rendered. Counsel fees for a wife's attorney in a divorce action are not to be determined solely by the wealth of her husband. A generous fee for the conduct of a divorce case against a wealthy man is oppressive unless it be commensurate with the services to be performed. While the seriousness of the charges made by the parties and the gravity of the interests involved may enhance or diminish the obligation (Clark v. Ellsworth, 104 Iowa 442, 73 N.W. 1023) laid upon the wife's attorney to preserve her status as wife and to maintain her in the social esteem, such factors do not justify a liberal fee in the absence of work done and results accomplished.
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> "The issues here are neither novel nor complex. The questions projected are commonplace to an experienced attorney. Every rule of law and every principle of equity suggested by the pleadings have been repeatedly clarified by the appellate courts. In the absence of proof that extraordinary demands will be made upon respondent's counsel, it was an abuse of discretion for the court thus to exercise its 'vicarious generosity' (Chief Justice Taft in In re Gilbert, 276 U.S. [294], 296, 48 S.Ct. 309, 72 L.Ed. 580). * * *"

The order is affirmed, and modified fixing the counsel fees pendente lite at $2,500.00.

WHITE, P. J., and DORAN, J., concur.

RIANDA et al. v. SAN BENITO TITLE GUARANTEE CO.

Civ. 13998.

District Court of Appeal, First District, Division 1, California.

June 22, 1949.

Hearing Granted Aug. 18, 1949.*

1. Escrows ⚷1

The signing of formal instructions is not a prerequisite to a complete escrow.

2. Escrows ⚷1

Where there is no valid underlying contract on file with escrow agent, other than can be found in instructions of vendor and purchaser, instructions can be used to create a binding and complete contract and therefore a complete escrow.

3. Escrows ⚷5

Separately executed escrow instructions are to be construed together.

4. Escrows ⚷1

Where vendor and purchaser had signed deposit receipt which contained every provision necessary to create a valid contract of sale and proposed escrow instructions were prepared by escrow agent entirely from information contained in deposit receipt, so that instructions would have added nothing to rights and liabilities of parties, a complete escrow existed when deposit receipt was deposited with escrow agent with purchasers' check, and failure of purchaser to sign escrow instructions was no defense in vendor's damage action based on failure of escrow agent to perform its duties.

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* Subsequent opinion 217 P.2d 25.

5. Escrows 🔑9

Where an escrow has been created, escrow agent is charged with duty of exercising skill, care and diligence in handling the escrow.

6. Escrows 🔑9

Failure of escrow agent, with whom purchaser's check had been deposited, to protect vendor by cashing check within a reasonable time and holding the proceeds in escrow was actionable negligence rendering agent liable to vendor. Civ.Code, § 3265b.

7. Escrows 🔑9

Where escrow agent knew that check deposited in escrow was to be forfeited to vendor if purchaser defaulted, in addition to any express authority, escrow agent had implied authority to cash check as an act reasonably necessary to accomplish purpose of the agency, and in proper performance of its duty should have cashed check and held proceeds until events demonstrated who was entitled to proceeds. Civ. Code, § 2319.

8. Escrows 🔑9

Where escrow agent had neglected to promptly cash purchaser's check which was deposited with agent with contract for sale of realty, subsequent failure of escrow agent to cash check upon being informed by vendor's attorney that purchaser had defaulted and that vendor claimed the money on deposit, thereby enabling purchaser, a few days later, to withdraw money from bank and avoid payment, was actionable negligence rendering agent liable to vendor.

Appeal from Superior Court, San Benito County; A. M. Runnells, Judge.

Action by Harry Rianda and Marian Hublit against San Benito Title Guarantee Company, for damages resulting from the alleged negligence of defendant in handling an escrow transaction. From a judgment for defendant, plaintiffs appeal.

Reversed.

Phil F. Garvey, San Francisco (John J. Jones, San Jose, Julia M. Easley, San Francisco, of counsel), for appellants.

Royal E. Handlos, San Francisco, for respondent.

PETERS, Presiding Justice.

Plaintiffs brought this action against the defendant title company for $5,000 damages alleged to have been suffered by plaintiffs as the result of the alleged negligence of defendant in handling an escrow transaction. From a judgment in favor of defendant plaintiffs appeal.

There is no substantial dispute as to the facts. On July 2, 1946, Rianda was the owner of a ranch in San Benito County. On that date he agreed to sell, and Nick Daskarolis agreed to buy, the ranch for $91,200. The sale was negotiated by plaintiff Hublit, a licensed real estate broker. Daskarolis delivered a deposit of $5,000 to Hublit by means of a check made out to Hublit as trustee for Rianda. This first $5,000 check was immediately cashed by Hublit and deposited in her "trustee account."

The sales agreement, a standard form of the California Real Estate Association, is entitled "Deposit Receipt" and was signed by Hublit, Rianda and Daskarolis. It constitutes a complete agreement of purchase and sale. All necessary terms are therein contained. Among other things, it provided for a commission to Hublitt of $4,560, or one-half the deposit if the purchaser should default, provided that this amount did not exceed the full amount of the commission. It also provided that "On acceptance by purchaser, deposit to be immediately increased to 10% of purchase price." After providing for the amount of cash to be paid and the amount and terms of the deed of trust the agreement contains these three pertinent provisions:

"That should the purchaser fail to pay the balance of the purchase price, or fail to complete the purchase, as herein provided, the amounts paid hereon may, at the option of the seller, be retained as the consideration for the execution of this agreement by the seller."

"That the evidence of title shall be (a) title insurance policy issued by a responsible title company to be furnished and paid for by the (b) seller. That should the title to said property prove defective or unmerchantable and should the seller be unable to perfect the same within a reasonable time from date hereof all amounts paid hereon shall be returned to the purchaser unless the purchaser elects to accept the title in said condition."

"That the deposit and all other payments called for herein, if made with other than lawful money of the United States of America, may be converted into cash immediately, unless otherwise provided for herein, and held subject to the terms of this Deposit Receipt."

The contract also provided that Daskarolis agreed "to purchase the above described property on the terms and conditions herein stated."

On July 3, 1946, Hublit sent the contract to the title company together with a covering letter addressed to Elliott, its vice-president and manager. That letter reads as follows:

"Please prepare title search, necessary deed and deed of trust, etc covering the sale of 608 acres in San Benito County by Harry Rianda to Nick Daskarolis. Attached hereto is copy of contract agreement of sale. Mr. Rianda has requested that deed and deed of trust etc be submitted to his attorney, John J. Jones, Bank of America Bldg, 6 fl, San Jose, California, for approval before submitting to buyer and seller for signatures. Demand is hereby made by Broker Marian Hublit for 5% commission of selling price of $91,200.00. Commission is due and payable to Marian Hublit by seller, Harry Rianda, in the amount of $4,560.00.

"Very truly yours,
"Marian Hublit."

In accordance with the provision of the contract requiring Daskarolis to increase the deposit to at least 10% of the purchase price upon acceptance by him, the buyer made out a second check for $5,000, naming the title company as payee, and on July 5, 1946, sent it to Hublit. Hublit testified that "The additional $5,000.00 check was given to me to bind and complete this contract, to be deposited with the escrow holder, which I did immediately." Upon delivery of this check to the title company by an agent of Hublit, the manager and vice-president of that company signed the following receipt:

"July 5, 1946

"Received Of Marian Hublit Check 90-1332 of Nick Daskarolis Five Thousand and no/100 Dollars on Escrow #9848.

"San Benito Title Guarantee Company
"By Stanley J. Elliott
"Vice President"

Elliott thereupon, that day or the next, endorsed the check as follows: "Pay to the order 12 The Hollister National Bank 12 Hollister, Cal., Escrow Account, San Benito Title Guarantee Company." After endorsing the check Elliott placed it in the escrow file where it remained until the time of trial. At no time was it ever presented to the bank. The bank is located about 200 yards from the title company.

Pursuant to the letter from Hublit the title company thereafter prepared a title search, but no written report was ever rendered. It also prepared a deed to the property, and proposed buyer's and seller's instructions. These documents were all prepared from the information contained in the Deposit Receipt. Rianda signed the deed and the seller's instructions and delivered them back to the title company. The buyer's instructions were never signed by Daskarolis; in fact, neither the instructions nor the note and deed of trust were ever presented or delivered to him by the title company.

Under date of August 23, 1946, a Friday, the attorney for Rianda, whose office was in San Jose, wrote to the title company demanding the $5,000 on deposit with that company for his client on the ground that Daskarolis had determined not to complete the contract, and that, under its terms, Rianda was entitled to this money. On that date, and from July 5, 1946, to and until August 26, 1946, Daskarolis had on deposit in his checking account at the Hollister National Bank, the sum of $5,748.69. Sometime on August 26, 1946, Daskarolis withdrew $5,000 from this account and orally informed Elliott that he had "stopped payment" on the $5,000 check on deposit with the title company. There is no evidence that in fact a formal "stop payment" order was ever filed with the bank. The title company thereupon telephoned Hublit and informed her of Daskarolis' action, and also wrote to Jones to the effect that payment had been stopped on the check.

Elliott admitted that he knew that the $5,000 check was a payment to be used in the Rianda escrow, and knew of the major provisions of the Deposit Agreement, but claimed that he had no instructions from Daskarolis as to what to do with the check, so placed it in the escrow file.

On these facts the trial court determined that, as to the check, the title company owed Rianda and Hublit no duty, and was therefore not negligent. The reasoning of the lower court, which is adopted by respondent on this appeal, is best disclosed in an opinion prepared by that court that fully and fairly states its position. It reads, in part, as follows:

"It is true that when an escrow is formed the depositary is as much the agent of the purchaser as of the seller, and is charged with the duty of obeying their instructions. But the escrow is not formed until instructions shall have been received by the depositary from both parties. See Hudson v. Slonaker, 89 Cal.App. 620 [265 P. 346]; Tuso v. Green, 194 Cal. 574 [229 P. 327]; Neher v. Kauffman, 197 Cal. 674 [242 P. 713]; Thoroman v. David, 199 Cal. 386 [249 P. 513]; Los Angeles City High School District v. Quinn, 195 Cal. 337 [234 P. 313] and Thompson v. Walsh, 76 Cal. App.2d 188 [172 P.2d 745].

"It must be conceded that the escrow was incomplete. The receipt by defendant of plaintiff Hublit's letter * * * with alleged Deposit Receipt * * * attached was the beginning of the escrow and created the relationship of escrow holder in the defendant for the plaintiffs and subsequently upon receipt of escrow instructions from plaintiff Rianda, an agency was established in the defendant for plaintiff Rianda. But at no time was an agency created in the defendant for Daskarolis. By the provisions contained in the Deposit Receipt, it cannot be said that the Daskarolis check for $5000.00 * * * was the property of plaintiff Rianda. It appears clear too, that the receipt of the $5000.00 check which came to defendant by way of a messenger, did not convey to defendant the information that the check represented the balance of a 10% deposit on the purchase price. Neither of the plaintiffs saw fit to give any instructions to the defendant at any time concerning the $5000.00 check. The issuance by defendant of a receipt to plaintiff Hublit for the $5000.00 check certainly in itself created no liability in defendant.

"The defendant could not have properly handled the matter without adequate instructions from each of the parties. It is plain that plaintiff Hublit's letter, the Deposit Receipt and the Daskarolis check forwarded to defendant, were to lie dormant in the hands of defendant until receipt of instructions from each of the parties.

"The evidence shows no act of negligence and no act of fraud on the part of defendant and therefore it is found that defendant should have judgment herein."

[1-3] It will be noted that it is the basis of the above opinion that a complete escrow was not formed here because the buyer had not signed the formal instructions, and until that was done the title company had no duty to do anything with the check. We do not think that the law requires that formal instructions be signed before a complete escrow is formed. Certainly, the cases cited in support of that conclusion in the above opinion do not go that far. They simply hold that, where there is no valid underlying contract on file with the title company, other than can be found in the instructions of the buyer and seller, these two independent documents can be used to create a binding and complete contract, and therefore a complete escrow. Thus, in Tuso v. Green, 194 Cal. 574, 229 P. 327, one of the leading cases on the subject, the Court simply held that where there was no other valid contract of sale, but where the buyer's and seller's instructions concur in all terms and conditions, even though each writing is signed by only one party, there was a valid and binding contract. The basic premise of the opinion is that if there had been an independent contract signed by both parties, a complete escrow would have resulted. Hudson v. Slonaker, 89 Cal. App. 620, 265 P. 346, fairly states the principle for which the cases cited by the trial court and respondent stand. At page 624

of 89 Cal.App., at page 348 of 265 P., it is stated: "The facts in the above case [Tuso v. Green] were similar to those in the case at bar, and this authority, together with the later cases of Neher v. Kauffman, 197 Cal. 674, 242 P. 713, and Thoroman v. David, 199 Cal. 386, 249 P. 513, establishes the contrary principle to that contended for by respondent, viz., the principle that the separately executed escrow instructions are to be considered and construed together, and not as 'unrelated, individual instructions.'"

[4] In the instant case the Deposit Receipt was signed by all parties. It was a complete and valid contract. Every provision necessary to create a valid contract of purchase and sale was in that contract. In fact, when the buyer's and seller's instructions were prepared by the title company they were prepared entirely from the information contained in the Deposit Receipt. The instructions would have added nothing to the rights and liabilities of the parties. When this complete contract was deposited with the title company, with the check, it seems quite clear that a complete escrow existed. It is no insurmountable obstacle that Daskarolis did not sign formal instructions. He signed the Deposit Receipt. That contract contemplated that the transaction should be handled by a title company. He signed the check and named the title company payee. He permitted Hublit to deliver the contract and check to the title company, and knew it had been done. Clearly, he had appointed the title company his agent to complete the transaction in accordance with the terms of the Deposit Receipt.

[5, 6] Inasmuch as an escrow was created, the title company was charged with the duty of exercising skill, care and diligence in the handling of the escrow. The failure of the title company to cash the check to protect the seller constitutes actionable negligence. Not only under the express terms of the Deposit Agreement, but under general provisions of the law it was the duty of the title company to present the check for payment within a reasonable time, § 3265b, Civ.Code, and clearly July 5th to August 26th was an unreasonable time. The case is no different than one where the depositary makes a wrongful return of the money to the person who deposited it. In such event the depositary is liable. Montgomery v. Pacific Coast Land Bureau, 94 Cal. 284, 29 P. 640, 28 Am.St.Rep. 122; Cohn v. Valentine, 88 Cal.App. 430, 263 P. 846; Jones v. Title Guaranty & Trust Co., 178 Cal. 375, 173 P. 586; Gallagher v. California Pacific Title & Trust Co., 13 Cal.App.2d 482, 57 P.2d 195.

The present case is somewhat similar to Citizen's National Bank of Roswell, N.M. v. Davisson, 229 U.S. 212, 33 S.Ct. 625, 57 L.Ed. 1153. In that case a complete contract of purchase and sale, as here, was deposited wrth the bank together with a check. No formal instructions were signed. The officers of the bank placed the contract in an envelope. The contract contained a forfeiture clause similar to the one here involved. The bank officers never read the contract and had no knowledge of its terms. The purchaser defaulted and demanded back his deposit, and the bank complied. An action was then brought by the seller and broker. They were held entitled to recover. The Court stated, 229 U.S. at page 223, 33 S.Ct. at page 629, 57 L.Ed. 1153:

"Upon the whole case, we are clear that the effect of the deposit of the contract and check with the bank was to constitute it a custodian or stakeholder for the benefit of both parties, holding the money without right or interest in it, bound above all things not to take sides between the parties, and answerable ultimately to the one or the other, according to their respective rights as between themselves. * * *

"The fact that no officer of the bank read this contract or knew of its terms is of no avail to the bank. By the very circumstances of the deposit it was put upon notice that it was assuming a duty that could not be fully understood or fairly performed without a knowledge of the contents of the contract; it had possession of that instrument, with full opportunity to examine it; except for its own negligence it would have known the terms thereof. To permit it now to set up its own ignorance as an excuse or justification of its conduct in violating the rights of one of the parties to the contract would be to permit it to take advantage of its own wrong."

The Court held that the bank had violated its duty of acting impartially between the parties, and was liable for the amount of the deposit.

[7] The present case is much stronger. Here Elliott knew of the provisions of the contract. He knew that the check was to be forfeited to the seller if the buyer defaulted. He even endorsed the check. He had express authority given in the contract to cash the check. In addition, the title company had implied authority to cash the check, as the cashing of the check was an act reasonably necessary to accomplish the purpose of the agency. § 2319, Civ. Code; Rest. of the Law of Agency, § 35. The title company knew that, regardless of whether instructions were signed by the buyer or seller, a binding contract existed between them. Under such circumstances it was its duty to cash the check and hold the proceeds until events demonstrated who was entitled to it. By failing to cash it, the title company made it possible for Daskarolis to withdraw the money on August 26th to the injury of Rianda and Hublit.

[8] We think, as a matter of law, an escrow was created on July 5th when the contract and check were deposited. On that date, or within a reasonable time, the title company should have cashed the check and deposited the proceeds in its escrow account. Its failure to do so was negligence. Even if this were not so, its actions on and subsequent to August 23rd were clearly negligent. On that day, or the 24th, it was informed by the attorney for Rianda that Daskarolis had defaulted and that Rianda claimed the money on deposit. It did nothing on the 23rd and 24th, and then on Monday, the 26th, Daskarolis drew the money out and told the title company that he had stopped payment. This was clearly negligence on the part of the title company. That negligence, and the prior negligence, caused Rianda and Hublit to lose money that was rightfully theirs. Defendant is therefore liable.

The judgment is reversed.

WARD and BRAY, JJ., concur.

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92 Cal.App.2d 770

WHELAN et al. v. ZAHNISER et al.

Civ. 3934.

District Court of Appeal, Fourth District, California.

July 8, 1949.

1. Waters and water courses ⚷158½(1)

In action to quiet title, wherein plaintiffs sought to terminate an easement granted by deed to construct and maintain a drainage ditch to drain excess water from lake into river, evidence sustained finding that easement had not been terminated by defendants by abandonment or failure to keep ditch in condition or repair to serve its purposes for three successive years within meaning of deed.

2. Appeal and error ⚷1010(1)

Trial court's finding based on substantial evidence, could not be disturbed on appeal.

3. Waters and water courses ⚷156(9)

As long as water flowed from time to time down ditch from lake into river, apparently to satisfaction of interested parties, there was no abandonment of easement to maintain the ditch to drain excess water from lake into river.

4. Easements ⚷30(2)

An easement acquired by deed is not ordinarily lost by mere non-user, but there must be an intent to abandon it, either express or implied.

5. Waters and water courses ⚷156(5)

Plaintiffs were precluded from insisting on a forfeiture of defendants' easement granted by deed to construct and maintain a drainage ditch to drain excess water from lake into river, where plaintiffs and predecessors in interest for many years acquiesced in use to which ditch was put and in performance of work on ditch by defendants.

◆

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action to quiet title by Mary J. Whelan and another, against Ellis Zahniser and another, in order to terminate an easement granted to predecessors in interest of defendants for construction and maintenance of a drainage ditch. From a judgment for the defendants, plaintiffs appeal.

Judgment affirmed.

Harry P. Bowman, San Diego, for appellants.

Cottingham & Moore, Oceanside, Monroe & McInnis, San Diego, for respondents.

MUSSELL, Justice.

This is an action to quiet title in which plaintiffs seek to terminate an easement granted to the predecessors in interest of defendants for the construction and maintenance of a drainage ditch extending from Foss Lake to the San Luis Rey River in San Diego County. The area covered by Foss Lake is owned by the defendants, and in 1918 was owned by John Johnston, Jr., and his wife. On June 25, 1918, the Santa Fe Land Improvement Company, predecessors in interest of plaintiffs, executed a deed conveying an easement across property owned by them to the Johnstons for the purpose of constructing and maintaining a drainage ditch. The Johnstons also obtained an easement over an adjoining area known as the Pico property, now owned by plaintiffs. This easement was likewise for the purpose of maintaining a drainage ditch, and the ditch constructed in accordance with the terms of the two easements runs in a southwesterly direction from Foss Lake, across the property here involved, then across the so-called Pico property, and empties into the San Luis Rey River. The upper part of Foss Lake is fed by springs and has never been entirely dry. The lake is shallow and at certain times of each year most of it dried up so that there was no water running in the drainage ditch. At other times of the year a stream of water ran through the ditch to the San Luis Rey River.

Some time in 1943, after the establishment of Camp Pendleton by the United States Government, water used in the operation of the Camp, pumped from the Santa Margarita River, was drained into Pilgrim Creek which empties into Foss Lake from the north, and such water then flowed into Foss Lake and down the drainage ditch to San Luis Rey River. Since the establishment of Camp Pendleton there has constantly been water flowing down the drainage ditch at all times. Apparently Mr. Johnston intended to drain Foss Lake and use the land for agricultural purposes. He constructed the ditch in 1919 but abandoned his original plan and the lake has been used as a place to hunt ducks during the hunting seasons since 1919. While there was testimony that some one had placed sand bags in the ditch to increase the size of the duck hunting area there were no dams or obstructions that interfered with the flow of water down the ditch.

Defendant Ellis Zahniser bought the Foss Lake property in 1945 and also received deeds to the two easements for the drainage ditch from Foss Lake to the San Luis Rey River. He testified that at that time water was flowing into the lake through Pilgrim Creek from Camp Pendleton, and through the drainage ditch but was not escaping fast enough and because of complaints of other property owners that the lake was becoming "too large" he decided to clean and deepen the drainage ditch. In March, 1946, Zahniser cleaned three or four hundred feet of the ditch on plaintiffs' property, and in August and September of that year performed additional work in deepening the ditch. This work was done at a cost to defendants of approximately $4,000 and plaintiffs made no objection, in fact gave the U. S. Navy permission to deepen the ditch along the easement across the Pico property. Since the deepening of the ditch by Zahniser and the Navy, Foss Lake has dried up and the area is used for farming. The water from Pilgrim Creek now flows directly through the Foss Lake area down the drainage ditch to the San Luis Rey River.

Plaintiff Ellen Douglas Whelan was familiar with the property involved for many years. She testified that during the first ten years after the construction of the drainage ditch, the lake was used as a duck pond and was not entirely empty and that there was no difference in conditions during the first ten years and the period thereafter, prior to the work done by defendants in 1946.

On September 12, 1928, a decree quieting title to the easement here involved, as well as the easement over the Pico property, was entered in an action in the Superior Court of San Diego County in which the parties involved were the predecessors in interest of the present property owners. This was a consent decree and the parties then owning the property conceded that the easement was still in effect at that time.

After the work on the ditch had been completed in 1946, plaintiffs brought this action to quiet title to the land described in the easement and the trial court gave judgment for defendants, determining that the land involved was subject to an easement for a drainage ditch by virtue of an express grant executed in 1918 and confirmed in 1928 by stipulated judgment.

Plaintiffs here contend that the easement was granted upon condition of the continued use of the property as a drainage ditch between Foss Lake and the river; that the easement terminated by operation of law upon the cessation of the use of the easement for drainage purposes; that the use of the lake and the area in general for duck clubs and duck hunting, which required the water to be retained in the lake, indicated a use inconsistent with the purpose for which the grant was originally made and that the many years of this inconsistent use, by operation of law terminated all rights defendants had to the original easement.

This document is a grant to the Johnstons of an easement for the construction and maintenance of a drainage ditch extending from Foss Lake to the San Luis Rey River on land therein described. The grantor reserved the right to maintain power lines, fences, pipe lines, etc., on the property, following which this language is used:

"To Have and To Hold said easement over the above described premises unto said Grantees solely for the purpose of laying out, constructing and maintaining a drainage ditch thereupon and thereover and so long as said premises shall be so used, upon and subject, however, to each and all of the terms and conditions, reservations and restrictions which shall constitute covenants running with the grant and to which the Grantees, by exercising the privileges hereby accorded, have expressly agreed, and which shall be binding upon the heirs and assigns of the Grantees as follows:" The conditions following were, as far as material here, that the ditch should at all times be maintained in proper condition to perform its purpose as a drainage ditch; that the grantor was permitted to connect laterals to the main ditch; that the grantees keep the ditch free from obstructions and open to the free and uninterrupted passage of water therein and that in the event of any failure so to do grantees should be liable for all damages resulting to the property of the grantor from any overflow; that in the event of abandonment or failure to keep the ditch in proper condition and repair to serve its purposes for three successive years the easement would become null and void and all rights of the grantees would then revert to the grantor.

[1] The trial court found that the defendants were the owners of the easement and that the rights conveyed to defendants by it were not terminated by abandonment or failure to keep the ditch in condition or repair to serve its purposes for three successive years. These findings find substantial support in the evidence. There is nothing in the terms of the easement which prescribe the water level to be maintained in Foss Lake by the drainage ditch, nor is the precise purpose of the drainage ditch set forth. The apparent purpose of the ditch was to convey surplus water from Foss Lake to the river at such times as there was a surplus. This is indicated by the provision in the easement for the recovery of damages in the event of overflow onto the property of the grantor and by the construction which the interested parties placed upon the instrument. The record does not disclose that there was ever any question as to the proper maintenance of the ditch until the present suit was filed and it is apparent that the conditions as to its maintenance and repair were the same after as before the consent judgment in 1928. The grantors and their successors named in the easement did not insist or claim that the drainage of Foss Lake be carried out to any particular degree at any time and the ditch served its purpose at all times to carry off surplus waters.

[2] Whether the terms of the easement created a limited fee, that is to say, a grant

so long as certain conditions prevail, or is a grant containing covenants running with the land, is not of controlling importance in view of the finding of fact by the trial court that there was no breach of the conditions of the easement. This finding is based on substantial evidence and cannot be here disturbed. Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689.

[3, 4] The only use of the easement was for the maintenance of a ditch to carry water from Foss Lake to the San Luis Rey River and the practical construction placed upon the grant by the parties is that it was contemplated that the water so conveyed to the river was such water as was not desired to be retained in Foss Lake. As long as water flowed from time to time down the ditch and into the river, apparently to the satisfaction of the parties interested, there was no abandonment. An easement acquired by deed is not ordinarily lost by mere non-user. There must be an intent to abandon it either express or implied. Smith v. Worn, 93 Cal. 206, 212, 28 P. 944; People v. Southern Pacific Co., 172 Cal. 692, 701, 158 P. 177. There is no substantial testimony indicating an intention on the part of the grantees to abandon the ditch as an outlet for the waters of Foss Lake, indeed the expenditure of some $4,000 by defendants in deepening and widening the ditch is entirely incompatible with an intention to abandon it.

[5] The trial court properly found that at the time this work was being done plaintiffs knew that it was being performed and had full knowledge of the progress of the work; that they made no objection thereto, and by acts and conduct encouraged defendants to proceed with the work and to complete the same, and that plaintiffs were not damaged by the work or the manner in which it was done. The acquiescence of plaintiffs and their predecessors in interest for many years in the use to which the ditch was put and in the performance of the work by defendants, together with plaintiffs' acceptance of work done on the Pico property should preclude plaintiffs from now insisting on a forfeiture of the easement on the ground that it ceased to exist and was terminated by operation of law in 1919, when the lake was first used for duck hunting purposes. Waldteufel v. Sailor, 62 Cal.App.2d 577, 581, 144 P.2d 894; Sacramento etc. Dist. v. Pacific Gas & Electric Co., 72 Cal.App.2d 638, 649, 165 P.2d 741; Wilson v. Bailey, 8 Cal.2d 416, 423, 65 P.2d 770; Estate of Davis, 38 Cal. App.2d 579, 584, 101 P.2d 761, 102 P.2d 545.

Furthermore the consent decree by which title to the easement here involved was quieted in 1928, established the easement as valid and existing at that time, and the evidence before us does not indicate that any change in the condition of the ditch was necessary until some time in 1943, when the waters from Camp Pendleton were turned into Pilgrim Creek and thence into Foss Lake. Then it became necessary to accommodate the excess water from the Camp. This was done by the Navy and the defendants. The evidence fully supports the finding of the trial court that the easement here involved is valid and binding and in force and effect.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

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92 Cal.App.2d 639

BROWN v. SOUTHERN PAC. CO.

Civ. 13978.

District Court of Appeal, First District,
Division 2, California.
June 29, 1949.

1. Appeal and error 🔑205

Where on sustaining of objection to question calling for regular custom and practice when brakeman or switchman directing movement of engine suddenly disappears from view, no offer of proof was made the record failed to show prejudicial error.

2. Appeal and error 🔑1050(1)

Where witness was asked to state the purpose of railroad rule and answer of witness was based on an assumption at variance with any evidence in the case, and consisted of a mere paraphrase of rule, permitting the witness to answer over objection was not prejudicial.

3. Appeal and error ⟹1050(1)

Permitting witnesses to testify that rule did not apply to the case was not prejudicial where the rule itself showed that it did not apply to the facts in evidence.

4. Appeal and error ⟹1032(1)

Appellant has the burden of establishing prejudicial error.

5. Appeal and error ⟹1032(2)

Answers of witnesses with respect to meaning of railroad rule were harmless where the appellant failed to show that the rules applied to the case.

◆

Appeal from Superior Court, City and County of San Francisco; Melvyn I. Cronin, Judge.

Action by Rose Marie Brown as administratrix of the estate of Ray Brown, deceased, against Southern Pacific Company, under the Federal Employers' Liability Act, for death of plaintiff's decedent. From a judgment for defendant, the plaintiff appeals.

Judgment affirmed.

Hildebrand, Bills & McLeod, Oakland, for appellant.

Arthur B. Dunne, Louis L. Phelps, Dunne & Dunne, San Francisco, for respondent.

GOODELL, Justice.

This action under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., was brought by appellant, the widow of Ray Brown a brakeman employed by respondent. He was run over and killed by an engine while switching at Pittsburg, California, on November 25, 1944. Nobody saw him fall, jump or step from the rear footboard of the engine tender, on which he had been standing just before the accident. The jury returned a verdict for defendant. A new trial was denied, and this appeal from the judgment was taken.

Decedent's train, consisting of the locomotive, three freight cars and a caboose, reached Pittsburg from Tracy between 8 and 8:30 a. m., headed west. The three freight cars were to be transferred to the Santa Fe, and to do this the engine had to get on the other end, eastward of the cars, so as to shove them into place on the transfer track. This could be done only by "dropping" them, which was accomplished by the following operation. A side track immediately north of the main line and parallel to it, was connected with the main line (on which the engine and cars stood) by a cross over. The cars were "bled", i. e., the air was released which freed them from air-brake control from the engine. The train was then started westerly. After a good start the speed was reduced which caused a slack between engine and cars and while this slack was on, and while in motion, a pin was pulled which uncoupled the engine from the string of cars. The engine, thus cut off, was then speeded up, across the switch point, and after clearing it the switch was thrown and the cars, coasting on the momentum which the engine had given while pulling them, crossed over onto the side track, where they were brought to a stop by hand-braking. The engine stopped on the main line about 180 feet west of where the cars had been switched. All this time decedent was standing on the rear footboard of the engine tender, and it was he who pulled the pin which cut the engine loose while in motion, after which he gave the engineer an arm signal that this had been done so the engine could speed up and get clear of the cars as they rolled onto the other track. The "drop" was smoothly and successfully completed and it is conceded that it had nothing to do with this accident.

The next move was for the engine to run back, easterly, to just beyond the switch, then reverse and run forward and over the cross over, onto the side track, so as to shove the cars into their places on the transfer track.

Brakeman Peters was handling the cars and saw nothing of the accident; the conductor was in the depot and saw nothing of it. Brakeman Varner was on the ground and while the engine was at a standstill after the "drop" he saw decedent standing on the rear footboard of the tender. Varner went to throw the switch so the main track would be relined for the passage of the engine over it.

Decedent, according to the engineer's testimony, leaned out on the engineer's side of the rear footboard and gave the arm signal to back up. The engineer responded by starting the engine easterly toward the switch. After giving the back up signal decedent gradually disappeared from the engineer's vision.

As Varner straightened up from relining the switch he saw decedent lying across the north rail, on his right side, facing the rear of the engine, with the footboard against him. Varner stepped to the north so the engineer would see him and with both arms gave him a violent stop signal and pointed to the rail. The engineer threw on the emergency brake but the decedent was run over and killed by the rear wheels of the tender.

The footboard was characterized by appellant's witness Frost as standard, and he described it thus: "They are divided. Placed from the drawbar to the outside edge of the tender, on each side. The footboard is about 8 or 10 inches wide, made of 2-inch material, sufficient to support a man on them." This witness visited the scene that morning and there is nothing in his testimony to indicate anything unusual about the footboard. The fireman testified that there was no oil on it; "everything was perfect"; it was perfectly flat; it was not loose; "everything was mechanically O. K." Another witness testified there was no sand or gravel on the footboard. The engineer immediately made a complete inspection of his engine and found nothing unusual. He also examined the rails and ties and found no evidence of dragging. The day was dry.

The engineer and fireman testified that the bell was rung before the engine started up; that its start was gradual, without any jerk or anything unusual; that on Varner's emergency stop signal it came to an immediate stop. Varner himself said it made a good stop. A Pittsburg traffic officer testified that decedent's body was 19½ feet under the tender. All the testimony shows that the engine from start to stop traveled about 45 feet, which means that it went but 26 feet before running over decedent and about 19 afterward. The engineer testified that when he received the emergency stop signal he was going from 3½ to 4½ miles per hour; the fireman put it at 2 or 3, and Varner at 5 or 6. Varner testified that he did not hear the bell when the engine started.

The original complaint was drawn on the theory that the engine had been "suddenly, violently and unusually jerked" whereby decedent was thrown from the footboard and run over. A second count repeated these allegations and added that the trainmen (other than decedent) "failed and neglected to keep a proper lookout for signals and * * * to stop said engine in time" to prevent decedent being run over after being thrown to the track. At the conclusion of plaintiff's case she moved to amend the complaint to conform to the proof and was permitted to do so. The amendment replaced the second count and alleged that decedent had stepped from the footboard and had been run over through the negligence of the other employees of respondent. In discussing the amendment with the court appellant's counsel said: "Well * * * there are certain cases where you just don't know, as we don't know in this case. Nobody knows how he got on the ground."

The case was tried on the theory that a sudden jerk of the engine had thrown decedent off. There was no evidence that he stepped off.

Appellant attempted to establish that it is the duty of an engineer, as soon as the head-end brakeman in an ordinary switching operation—riding on the footboard of his engine—disappears from his vision, to immediately stop his engine.

Appellant's only contentions on appeal are that the court committed prejudicial error in rejecting certain evidence offered by appellant and in admitting certain evidence offered by respondent. The first point is that appellant's witness Frost should have been permitted to answer a question touching custom and practice.

Frost was a conductor employed by respondent and had been steadily with that railroad either as conductor or brakeman for 22 years. He went to the scene of the accident that morning and had seen the engine there. He had worked with that engine and with others of the same class. He described the footboard. He gave as his opinion that a light engine (meaning one not coupled to cars) going approximately 5 miles an hour on dry, level track, could make an emergency stop within 5 or 6 feet. He was then asked "Now, then, in regular custom and practice, when a brakeman or a switchman is working on a footboard of a light engine, that is, with no cars attached to it, and assuming that that brakeman or switchman is directing the movement of the engine, and that he suddenly disappears from view, from the view of the engineer, what, in regular custom and practice, does the engineer do, if anything?" An objection that it called for the opinion and conclusion of the witness was sustained. Appellant's counsel then said, "All right. I believe that is all. You may cross-examine." Thus "the subject was immediately dropped upon the sustaining of the objection." see Shasta Lumber Co. v. McCoy, 85 Cal.App. 468, 474, 259 P. 965.

[1] We are satisfied that the ruling, if error, was not prejudicial. Three witnesses had preceded Frost. Brakeman Varner had given a comprehensive description of everything up to and including decedent's death. Officer Wildes, the Pittsburg traffic officer, had testified to the position of decedent's body under the tender. Mrs. Brown had testified to her marriage to decedent, as to his age, and other matters unrelated to the physical facts. The engineer had not yet testified as to decedent disappearing from his view.

The rule where the question is not followed up with an offer of proof or any indication what the answer if given would show, is found at 2 Cal.Jur. p. 275, where some of the early cases are cited.

Among the later cases is that of Grandy v. Southern Pacific Co., 9 Cal.App.2d 441, 442, 444, 49 P.2d 1127, 1128, which was an action by a pedestrian for injuries sustained when struck by a freight car. The opinion shows that "There was no watchman or flagman at the crossing, although it was a rule and custom of the company to have a flagman on duty when the crossing was being used by trains. No warning signal of any sort was given by the train crew." The trial court directed a verdict for the defendant. It was contended on appeal that the court committed prejudicial error in sustaining an objection to a question. The court said: "Plaintiff * * * testified that during a period of five years he had on probably ten occasions seen cars and switch engines backing over the driveway sidewalk crossing, where the accident occurred. He was then asked: 'Now at those times, would there or would there not be any person down there at the crossing?' Objection being interposed to the question, it was sustained. This ruling plaintiff asserts was prejudicial error. Prejudicial error will not be presumed in a ruling of the trial court sustaining an objection to the introduction of evidence. If error is alleged to exist, it must be made to appear affirmatively in the record. Snowball v. Snowball, 164 Cal. 476, 480, 129 P. 784; County of Sonoma v. Hall, 129 Cal. 659, 662, 62 P. 213; Marshall v. Hancock, 80 Cal. 82, 83, 22 P. 61. Where a question to which an objection is sustained does not itself indicate that the answer to it will be favorable to the party seeking to introduce the testimony, before the ruling will be reviewed on appeal by this court, an offer of what is proposed to be proven must first be made to the trial court, so that this court can determine whether the proposed evidence would have been *material* and *beneficial* to the party offering the evidence. [Citations.] There was nothing in the question asked to indicate the answer, nor was any offer of proof made which even indicated that counsel expected an affirmative answer to the question. [Citations.] Therefore the record fails to show any error in this ruling." A hearing by the Supreme Court was denied, and several years later that Court cited the Grandy case approvingly in MacDonnell v. California Lands Inc., 15 Cal.2d 344, 348, 349, 101 P.2d 479, 482, saying that the rule "has been invariably followed by the appellate courts of this state."

The interrogation now under discussion dealt with "regular custom and practice." For that reason the case of Travelers Fire Ins. Co., v. Brock & Co., 30 Cal.App.2d 115, 117, 85 P.2d 904, 905, is in point. There it was claimed that the court had committed prejudicial error in sustaining an objection to questions relative to an alleged custom in the jewelry trade with reference to the liability assumed by one jeweler who accepts merchandise for repair from another jeweler. The court, in applying the rule said: "* * * nor was any offer of proof made as to what the custom was that appellant was endeavoring to prove. So far as is disclosed by the record here, the custom referred to by appellant's witnesses might have placed the entire responsibility for the loss of the brooch upon appellant, and in the absence of a showing to the contrary we must assume in support of the judgment that such was the fact."

There are numerous cases holding the same way, both before and after the Grandy and Brock cases, many of which are cited by respondent, but appellant has made no attempt to explain or distinguish them. We cannot hold the ruling to be prejudicial error without running counter to this rule, which has been settled law ever since Marshall v. Hancock, 80 Cal. 82, 22 P. 61, and perhaps earlier.

Respondent's rule 7-B reads in part as follows: "In backing a train or cars or shoving cars ahead of the engine, the disappearance from view of trainmen or lights by which signals are given will be construed as a stop signal."

Appellant offered this in evidence and it was admitted over respondent's objection that it had "no application or bearing upon the facts of this accident." The objection should have been sustained on the ground stated. At the time of the accident the engine was not backing a train, or a train of cars, or backing cars, or shoving cars ahead. It was a "light engine" coupled to no car or cars, ahead or behind, backing up by itself. These facts make it clear that rule 7-B had no application, its very language showing that it covers only an operation where cars are involved, and then only while being backed or shoved.

However, the rule was admitted in evidence and respondent called two witnesses for the purpose of showing its non-applicability. The answers which these witnesses gave are now claimed to run counter to Richman v. San Francisco, etc. Railway, 180 Cal. 454, 181 P. 769.

The witness V. E. Anderson, assistant superintendent of respondent's Salt Lake Division was its assistant trainmaster and stationed at Pittsburg, California, on November 25, 1944. He had been a switchman, train man, yard master, assistant trainmaster, trainmaster, terminal superintendent and assistant superintendent. He was familiar with the company's operating rules; had occasion to enforce them every day, and had given examinations on them.

[2] The rule was read to him by respondent and he was asked to tell its purpose. Appellant's objection "on the ground the rule is the best evidence and speaks for itself" was overruled. The answer was entirely harmless. It was: "That rule, its proper interpretation would be if [we emphasize the "if"] an engine is shoving cars, or a car, and curvature of the track would take the man that is riding the leading point out of sight of the engineer, and the engineer would not know where he is shoving, he shall stop until some member of the crew will place himself in a conspicuous position to pass signs to the engineer." The answer was predicated entirely on the condition *"if an engine is shoving cars, or a car"*, which was nothing but a paraphrase of the rule. Having been so predicated on an assumed fact wholly foreign to the case, the answer was purely abstract, academic and hypothetical. Prejudicial error cannot be based on such a situation, regardless of what the Richman case holds.

[3] After the answer the record shows: "Q. And did that rule apply to this situation that we have been discussing? A. No, sir, it did not.

"Q. And that is the way it is so interpreted by the company? A. The engineer could see where he was going." The conclusion that it did not apply simply told the jury what they already knew from the plain language of the rule itself.

The same question was put to the witness Ryan, who gave substantially the same answer, and what has been said applied to his testimony as well.

This brings us to another part of the book of rules. On the cross-examination of the engineer counsel for appellant read into the record the following from page 7 of the rules: "Note. Where in these rules, special instructions in the time table, or in a time table bulletin or train order, the following terms appear, they will apply as follows: 'Engine', to either engines or motors, train or trains, in connection with speed restrictions or the observance of signals, except train order signals. Also applies to engines." Respondent objected on the grounds that "it has no application at all. It refers to his speed restriction and observance of automatic signals * * * it is without foundation, and there is no showing it has any connection with this case. There is no evidence that it was violated. It refers to speed restrictions, which are not in point, and observance of automatic block signals, which are not in point here * * * And there is no evidence of a time table, a time table bulletin or train order * * * it is completely without foundation." The objection was overruled.

The first question which respondent asked Anderson respecting the "note" or definition of terms was not objected to. It asked him to "tell us first what are train order signals", and he answered: "A train order signal is a semaphore type signal, consisting of a signal mast, which is like a kind of a telephone pole, with a blade, which is the semaphore blade. And when a train is approaching it, if they have train orders under, it will be in a horizontal position, and if they do not have train orders for that train, it drops down into what we refer to as a clear position. That is why, in the note on page 7 that signal is exempt." The witness was then asked "What is * * * the original intention and purpose of that note exception on page 7?" to which appellant objected "on the ground already stated" ["that note and that rule are perfectly plain and speak for themselves"]. When the objection was overruled the witness answered: "That is to call attention that that rule should be observed so far as fixed signals, whistle boards, speed boards, any signal that is generally considered as fixed in its position and not moved from place to place."

At least one part of the "note" is clear i. e., that the term "engines" includes motors, but that is not involved herein. What is meant by "train or trains" in the grammatical setting in which those words are found is not at all clear, but engine 2301 was not a "train" at the time of the accident since the evidence shows without conflict that it was merely a "light engine" engaged in switching and had no "markers" on. "Also applies to engines" would seem fairly to mean that any "speed restrictions or the observance of signals" which trains were bound to obey, light engines were likewise bound to obey.

In attempting to construe this rather obscure "note" (which, if it "speaks for itself" does not do so very audibly or clearly) we are in no way helped by counsel for appellant, for they nowhere, either in the record or the briefs, attempt to tell us what it was supposed to prove or how it was supposed to relate to the instant facts. If appellant's purpose was to have it read in combination or connection with rule 7-B, that would not help, for 7-B is circumscribed and limited by its own "backing" and "shoving" provisions, and those provisions would likewise circumscribe and restrict anything read in connection with it. It could not enlarge or broaden the scope of rule 7-B or draw 7-B's provisions any nearer to this case.

[4, 5] Appellant, whose burden it is to establish prejudicial error should show how Anderson's or Ryan's answers to the questions on the "note" were harmful. That has not been done. Appellant has not even shown how the "note" touches the case at all. It seems to us as remote as rule 7-B, and that Anderson's and Ryan's answers respecting it were just as harmless as the answers they gave respecting 7-B. If these two witnesses had been questioned respecting a rule cover-

ing the switching operation at the time of the accident, a problem similar to that in the Richman case might have been presented. There is no such problem, hence no need to discuss the Richman case at all.

We find no prejudicial error in the record.

The judgment is affirmed.

DOOLING, J., concurs.

92 Cal.App.2d 626

O'CONNOR et al. v. CITY AND COUNTY OF SAN FRANCISCO.

Civ. 13921.

District Court of Appeal, First District, Division 1, California.

June 28, 1949.

Hearing Denied Aug. 25, 1949.

1. Appeal and error 🔑110, 782

No appeal lies from an order denying motion for new trial, and attempted appeal from such order would be dismissed.

2. Street railroads 🔑114(14)

In action for death of pedestrian who was struck by a streetcar, evidence was sufficient to sustain jury's implied finding that pedestrian was crossing the street outside the crosswalk, against the traffic light, and walked on the track in front of the approaching streetcar and was contributorily negligent.

3. Trial 🔑296(4)

Instructions that if pedestrian fails to watch and listen for streetcars he may be found contributorily negligent and instruction that where evidence is as consistent with neglect of duty of deceased as it is with neglect of duty by motorman plaintiffs could not recover, were cured by instructions on proximate cause and full and fair instructions on all phases of the case, and judgment for defendant was not a miscarriage of justice. Const. art. 6, § 4½.

4. Trial 🔑296(4)

In action for death of pedestrian instruction that streetcar has right of way over its tracks although such right is not exclusive, that it is the duty of pedestrians to give unobstructed passage to streetcars, and that a motorman is not required to presume that pedestrian will not perform such duty was not prejudicially erroneous in view of the full and fair instructions of the court. Const. art. 6, § 4½.

5. Trial 🔑296(4)

In action for death of pedestrian, instruction which quoted part of vehicle code to effect that pedestrians must not cross roadway against a red or stop signal and except in a crosswalk, and that if deceased did either, she was contributorily negligent, was not erroneous because it did not include duty of motorman to use ordinary care and omitted the required conditions as to proximate cause and contributory negligence, where such matters were covered in other instructions. Vehicle Code, § 563.

6. Trial 🔑228(1), 295(1)

An instruction must be read in the light of all the other instructions and one instruction need not cover all the applicable situations and law.

7. Trial 🔑295(7)

In action for death of pedestrian killed by streetcar, instruction on last clear chance was required to be considered with all the instructions as a whole and when so considered, did not require a verdict for defendant.

8. Street railroads 🔑118(15)
Trial 🔑191(8)

In action for death of pedestrian who was struck by streetcar, where instruction on last clear chance stated that in order to apply the doctrine, the jury must find that pedestrian had negligently placed herself in a position of danger, instruction was correct and did not assume that the pedestrian was negligent.

9. Trial 🔑296(1)

In action for death of pedestrian who was struck by streetcar, any errors in particular instructions were not prejudicial in view of the full and fair instructions covering the entire case and the evidence. Const. art. 6, § 4½.

10. Trial ⚿295(1)

The virtue of one instruction cannot be determined by extracting it from the entire charge to be criticized as if it alone were given.

11. Appeal and error ⚿1050(2)
Death ⚿64, 70

In action by administrator and heirs for wrongful death of pedestrian who was struck by streetcar, where heirs claimed that they had paid funeral expenses, defendant was entitled to show that funeral expenses had been paid by the estate, but not the value of the estate; however, evidence as to value was not prejudicial in view of action of plaintiffs' counsel in pressing the matter of value of the estate even after court had intimated that evidence was not relevant.

◆

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

Action by Daniel O'Connor and others against City & County of San Francisco for wrongful death struck by defendant's streetcar. From a judgment for defendant, and from order denying motion for a new trial, the plaintiffs appeal.

Appeal from order denying motion for new trial dismissed, and judgment affirmed.

Elkins & Wright, San Francisco, William C. Burns, San Francisco, for appellants.

Dion R. Holm, City Atty., San Francisco, George E. Baglin, Deputy City Atty., San Francisco, for respondent.

BRAY, Justice.

[1] After judgment for defendant in an action for the death of a person struck by a San Francisco streetcar, plaintiffs appealed. They also attempted to appeal from the order denying their motion for new trial. No such appeal lies.

Plaintiffs, son and daughter of the deceased, sue individually and as administrators with the will annexed of her estate.

Grounds of Appeal.

1. Insufficiency of the evidence. 2. Erroneous instructions. 3. Prejudicial misconduct of defense counsel.

1. Evidence.

The evidence clearly shows the negligence of the motorman operating the streetcar. It also clearly shows the contributory negligence of the deceased. There is not a great deal of conflict in the testimony of the witnesses, except, possibly, as to the location of the deceased when struck. The accident occurred at about 2:30 p. m. March 28, 1945, at Market and Fourth Streets in San Francisco. At that point there were two sets of tracks on Market Street, for each direction, i. e., east and west. The streetcar was proceeding east on the inner eastbound track. It had stopped at the Emporium a short distance from Fourth Street. One of the passengers pressed the buzzer for the motorman to stop at Fourth Street. Approaching that street the car did not stop but increased its speed. In the opinion of at least two witnesses the car was going "too fast." It was a clear, sunny day, and there were no trucks or other vehicles to obstruct the motorman's view. The bell was not sounded.

The deceased, Mary Heffernan, was 84 years old. Her son described her health at the time of the accident as "very good." However, she was partially blind in one eye, and the autopsy revealed that she had a marked "arteriosclerosis of the cerebral vessels." Mrs. Heffernan's original position was in front of a jeweler's store near the southeast corner of the intersection. She left the curb and started to cross Market from south to north. She was walking with a cane. No other traffic was crossing Market at the time. No witness testified that she used the crosswalk for this purpose. Plaintiffs' counsel stated in his opening argument that she was about 10 or 15 feet east of the crosswalk. Two witnesses placed her about 20 feet east of the easterly line of the crosswalk. One witness testified "she was not right in that painted white section, she was so near it that she was in it," although in a statement made shortly after the accident she placed Mrs. Heffernan as crossing 50 to 60 feet east of the crosswalk. Mrs. Heffernan was well out into the street as the car approached. She stepped onto the track when the car was only a short distance away. The motorman had been looking at the witness who was demanding that she be let off the car. When he saw Mrs. Heffernan, he tried to stop the car, but it was too late. After striking Mrs. Heffernan the car proceeded about half a car's length. After being hit by the car Mrs. Heffernan was lying on the westbound car tracks about 10 to 25 feet east of the crosswalk. A police officer located at Ellis and Market Streets (a part of the Fourth and Market intersection, and less than 140 feet from the easterly line of the easterly crosswalk), was notified of the accident and at that time the streetcar was just coming to a stop and the traffic signal was "Go" for traffic on Market Street. The signal was set so that the "Go" lasted 30 to 40 seconds. None of the other witnesses noticed the situation of the traffic signal at or near the time of the accident. The streetcar was stopped quickly, its position then being variously described as half a car's length beyond the place of the accident, quite a way down the street, and two car lengths past the location of the body. The motorman was not called as a witness.

[2] It is obvious from the record that the evidence was sufficient to sustain the implied finding of the jury that Mrs. Heffernan was crossing the street outside the crosswalk, against the traffic light, and walked onto the tracks in front of the approaching car and was contributorily negligent.

2. Instructions.

The most serious point in the case concerns the giving of two of the instructions. (For convenience of reference we have lettered these instructions (A) and (B).) They read: (A) "The tracks of a street railway company are in themselves a sign of danger, and one walking in the vicinity of the tracks of a street railway company ordinarily must exercise his faculties of sight and hearing and watch and listen for cars going in every direction. If he fails so to do, and in consequence thereof is injured, he may be found guilty of contributory negligence and may be denied recovery against the defendant City and County of San Francisco." (B) "Where the evidence is as consistent with a neglect of duty or care on the part of the decedent, Mary Heffernan, as it is with a neglect of duty or care on the part of the defendant charged with causing the injury, the plaintiffs cannot recover."

In Gillette v. City and County of San Francisco, 41 Cal.App.2d 758, 764, 107 P.2d 627, 630,[1] two instructions which were practically identical with those above set forth were condemned (with one other not given here) on the ground that "Each instruction wholly ignored the element of proximate cause. Each was, in effect, an instruction to the jury, under the conditions specified in each instruction, to bring in a verdict in favor of the defendants. But that was not the law. Although the plaintiff may have been negligent, if his negligence was not a proximate cause of his injuries it did not constitute a defense. 19 Cal.Jur. 561."—and were inconsistent with the instructions given on the last clear chance doctrine. A minor distinction between the Gillette case and ours is that there, the evidence as to the contributory negligence of the plaintiff was highly conflicting and the plaintiff relied "principally on the application of the doctrine of the last clear chance." 41 Cal.App.2d 764, 107 P.2d page 630. The question here is whether under the particular facts of this case the giving of the instructions, which were held to be erroneous in the Gillette case, was prejudicial. In this case, the court fully instructed on the last clear chance doctrine. It likewise instructed fully on all phases of the case. In the Gillette case, the court held that an instruction to the effect (as was given here) that the jury were to consider all the instructions as a whole and not select a single one, was not sufficient to cure the error. It is curious that in the Gillette case there was no discussion of the many cases which had held that the failure to include proximate cause in a particular instruction was not prejudicial error where the subject had been fully covered by other instructions.

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[1] This is the first Gillette appeal. There was a second appeal. See Gillette v. City and County of San Francisco, 58 Cal.App.2d 434, 136 P.2d 611.

An instruction similar to instruction (B) was held not prejudicially erroneous as omitting the element of proximate cause where the jury, as in this case, was fairly and fully instructed elsewhere on the subject of proximate cause and contributory negligence, in Mahoney v. Murray, 140 Cal. App. 206, 35 P.2d 612. A similar instruction was approved in Miller v. Dollar Steamship Lines, Inc., 19 Cal.App.2d 206, 212, 64 P.2d 1163; In Jewell v. Bell, 120 Cal.App. 682, 8 P.2d 223, the court instructed that stopping upon the paved highway in violation of the Motor Vehicle Act constituted conclusive negligence. The instruction was attacked as omitting the element of proximate cause. The court stated, 120 Cal.App. page 687, 8 P.2d page 225: "The jury were fully instructed on proximate cause, and were repeatedly told that they could not bring in a verdict against appellants unless they found that Sauls was negligent and his negligence proximately caused the injuries and death. * * * Taking the instructions as a whole, we are satisfied that the jury cannot have been misled by the criticized instruction, nor have regarded it as a formula instruction." In our case the jury was fully instructed on proximate cause.

In Howard v. Clark, 29 Cal.App.2d 374, 84 P.2d 529, 532, the court gave certain instructions which stated that if the jury found certain conditions to exist their verdict must be for plaintiff. Defendants contended that these instructions omitted "imputed negligence of plaintiff" and "proximate cause as respects defendants' negligence." The court said, 29 Cal.App.2d page 380, 84 P.2d page 532: "It will be conceded at once that the attacks are technically sound but we are wholly unable to find that any one of the errors constituted prejudicial error. * * * It may properly be said that some instruction was more nearly complete than another one. However, we do not find that any two instructions were conflicting. The record shows it was quite impossible that an intelligent jury could have failed to fully and completely grasp each rule of law stated by the trial court." In Klenzendorf v. Shasta Union High School Dist., 4 Cal.App.2d 164, 40 P.2d 878, certain instructions were claimed to be erroneous as not containing proximate cause. The court stated, 4 Cal. App.2d page 171, 40 P.2d page 882: "Appellants also criticize two so-called formula instructions, one because it failed to state that lack of care on the part of plaintiff must be found to have proximately or directly contributed to the injury in order to bar his recovery, and the other in that it purported to inform the jury that if certain facts are found by them, they must find for the defendants, taking from the jury the right to determine whether or not the hypothetical facts recited constituted negligence. We have read and compared the numerous instructions given and believe as a whole the jury were fully and fairly instructed. As Mr. Chief Justice Waste said in Douglas v. Southern Pacific Company, 203 Cal. 390, 264 P. 237, 239: 'Jurors are presumed to be persons of common intelligence and capable of comprehending the ordinary use of language as applied to the particular proposition under consideration and in reference to which it is employed. We will not assume that they may not have understood the charge as we understood it. The instructions must be considered in their entirety, and if, as so considered, they state the law of the case fairly and clearly, then they are, as a whole, unobjectionable, even though by selecting isolated passages from single instructions they may in some respects be amenable to just criticism.' And in Reuter v. Hill, 136 Cal.App. 67, 28 P.2d 390, 394: 'There is a disposition to relax the rigid application of the rule regarding formula instructions which is announced in Beyerle v. Clift, 59 Cal.App. 7, 209 P. 1015, and other similar cases since the adoption of article 6, § 4½, of the Constitution, where the record fails to show a miscarriage of justice.'"

Again, in De Fries v. Market St. Ry. Co., 31 Cal.App.2d 463, 88 P.2d 256, in considering a construction concerning the failure of a plaintiff to exercise his faculties of sight and hearing, the court said, 31 Cal. App.2d page 467, 88 P.2d page 258: "This instruction is one often given in similar cases and its vice, if any, was in the neglect to add to the instruction a provisional statement that it was to be considered with or was subject to other given instructions. However, the usual instruction 'You are cautioned not to select a single instruction, or a portion of an instruction alone, but to consider all of the instructions in determining any issue in this case' was given, which directed that not any single instruction was determinative of any issue in the case." Further, concerning this instruction the court said: "Standing alone, the first questioned instruction does not contain a full explanation or exposition of the divergent theories advanced by appellants and respondent but, in conjunction with the last clear chance instruction, it may not be said that the jury misconceived or ignored the theory presented by respondent. It is impossible at times to state all of the law in a single instruction. The instructions must be read as a whole. The first instruction upon its face appears to be a peremptory direction to find for the appellants, but when read in the light of the last clear chance instruction, it simply carried out the rule to present any theory upon the issues advocated in the pleadings, and supported by essential and substantial evidence."

In Bennett v. Chandler, 52 Cal.App.2d 255, 126 P.2d 173, decided subsequent to the Gillette case, the court gave an instruction that if the defendant drove his truck on the left hand side of the road at the place of the accident, he was negligent, and the jury's verdict must be against him. As to this instruction the court said, 52 Cal.App. 2d page 263, 126 P.2d page 177: "It is further pointed out that the instruction lacks the essential fundamental elements of proximate cause. (19 Cal.Jur. 636, § 67.) This latter portion, however, may be and is cured by the fact that the trial court in another instruction correctly stated the general rule of proximate cause and specifically gave appellants' instructions to the effect that the burden of proof was upon respondent to prove by a preponderance of the evidence that defendants were negligent and that such negligence was a proximate cause. This instruction was followed by a general instruction * * *" similar to the instruction given here that the jury was to regard the instructions as a whole. See also Aubel v. Sosso, 72 Cal. App. 57, 236 P. 319, and Will v. Southern Pacific Co., 18 Cal.2d 468, 116 P.2d 44.

In the Gillette case, too, there is no consideration of the fact that the instruction similar to instruction (A) here uses the phrase "and in consequence thereof." In Dougherty v. Ellingson, 97 Cal.App. 87, pages 93-94, 275 P. 456, at page 459, the court said: "Instruction XV, reading as follows: 'If you believe from the evidence that either or both of the two automobiles involved in this collision were driven or operated in violation of any express provision of the Motor Vehicle Act of the State of California, and that *by reason thereof* (italics ours) the plaintiff sustained injury and that she was herself free from contributory negligence, then your verdict shall be in favor of said plaintiff and against the defendant or defendants, guilty of such violation, without further proof of negligence on the part of such defendant or defendants,' is criticized by appellant Ross because of an alleged omission of the element of proximate cause. This objection is untenable, for the italicized phrase included in the instruction such element, and required a finding that the violation be a proximate cause of the collision and injury before the jury could find a liability therefor. 'The use of the words "by reason of," instead of "as the direct and proximate result of," by the court below in paragraph 5 of its charge, was not misleading to the jury, as the words first quoted were the equivalent of those last quoted; and, perhaps, would have been more easily understood by the average jury.' [Citing cases.] Similar phrases in analogous instructions have been held to sufficiently include the element of proximate cause. [Citing cases.]"

In High v. Waterloo, C. F. & N. R. Co., 195 Iowa 304, 190 N.W. 331, page 337, it was held: "It is urged that the court failed to instruct on the question of proximate cause. The words 'proximate cause' do not appear in the instructions, but the court told the jury, in effect, that appellee could only recover if struck and injured 'in consequence' of appellant's negligence. The jury could not have been misled as to the question of proximate cause under the instructions given."

In addition to instruction (B), the court gave the following instructions on the same subject matter: "To put the matter in another way, if, after considering all the evidence, you should find that it is just as probable that either the defendant was not negligent, or if he was, his negligence was not a proximate cause of the accident, as it is that some negligence on his part was such a cause, then a case against the defendant has not been established. By the same principle, if you should find that it is just as probable that plaintiff was free from negligence, or even negligent, that her negligence did not contribute as a proximate cause of the injury, as it is that negligence on plaintiff's part did contribute as a proximate cause, then the defense of contributory negligence has not been established."

The court fully and fairly instructed on all possible phases of the case, including an instruction on the presumption that deceased used ordinary care for her own safety and one on imminent peril. Very closely following instructions (A) and (B) is an instruction defining contributory negligence as an act or omission by an injured party which, cooperating with the negligent act of defendant, was the proximate cause of the injury.

[3] After the jurors had been deliberating, they returned to the courtroom and asked for further instructions on the last clear chance doctrine. After giving the jury the required elements of the doctrine, the court briefly discussed matters which would constitute contributory negligence by deceased, and ended: "And the general rule is, that where the negligence of the injured party is a contributing *proximate cause* of the accident, he cannot recover damages." (Emphasis added.) The failure to mention proximate cause in instructions (A) and (B) was cured under the facts of this case by the many instructions given on the subject by the court and by the clearing up of any confusion which might have existed by the very clear instructions given to the jury when they returned to the courtroom. Moreover, under section 4½ of article VI of the Constitution, there was no miscarriage of justice. It is not reasonable under the facts of this case to assume that either the omission of instructions (A) and (B) entirely, or the addition thereto of the element of proximate cause, could have resulted in a different verdict.

[4] Another instruction complained of was the following: "A street car has from necessity a right of way over that portion of the street upon which alone it can travel paramount to that of persons and ordinary vehicles, though this superior right is not exclusive and does not prevent others from standing along its tracks at any place or time when by so doing it will not materially interfere with the progress of the cars. It is the duty of persons on foot, when necessary to avoid a collision, to give unobstructed passage to the cars, which cannot turn to leave the tracks, and a street car motorman is not required to presume that such person will fail in her duty in such respect." In Abelseth v. City and County of San Francisco, 129 Cal.App. 552, 19 P.2d 53, practically the same instruction was condemned on the ground that it wholly ignored the provisions of an ordinance which then required a streetcar to stop before entering a marked crosswalk if there was a pedestrian in it. In our case, there was no such ordinance. A somewhat similar instruction appears in B. A. J. I. Instruction 202-C. See also Salvo v. Market St. Ry. Co., 116 Cal.App. 339, 2 P.2d 585, and O'Connor v. United Railroads, 168 Cal. 43, 141 P. 809.

[5, 6] Plaintiffs also complain of an instruction which quoted Vehicle Code section 563 to the effect that pedestrians must not cross the roadway against a red or stop signal and except in a crosswalk, and that if deceased did either she was guilty of contributory negligence and plaintiffs could not recover, on the ground that it did not include the duty of the motorman to use ordinary care, and omitted the required conditions as to proximate cause and contributory negligence. The court fully instructed elsewhere as to these matters. The objection to this instruction is unsound. It is impossible to cover all the applicable situations and law in each instruction. This instruction must be read in the light of all the other instructions.

Finally, plaintiffs attack certain instructions given on the last clear chance doctrine. The instructions were as follows: "With reference to the doctrine of last clear chance, I instruct you that the plaintiff was not in a position of danger until she stepped on the street car track, and that the motorman at all times until plaintiff did step on the track was entitled, in the exercise of ordinary care, to assume plaintiff would stop short of the track and not step in front of his car. If at the time the plaintiff stepped on the track the motorman had no clear chance to avoid striking the plaintiff, there is no room for application of the last clear chance doctrine." "While the operators of street railroads are to be held to due care in the management of their lines, they, when exercising such care, are not responsible in damages to a person who, in a careless, or reckless or absent-minded way, walks suddenly in front of a moving car and is injured before there is time to stop it. The person in charge of a car with a clear track before him has a right to assume that people will not suddenly undertake to cross in front of it; otherwise he could not make any headway, and no street car line could be successfully operated, either for the profit of the owner or the convenience of the public. And the general rule is, that where the negligence of the injured party is a contributing proximate cause of the accident, he cannot recover damages."

After deliberating for a period the jury returned for further instructions, particularly with respect to the doctrine of last clear chance. The court specified the six conditions required for application of the doctrine, and summarized: "If all the conditions just mentioned are found by you to have existed with respect to the accident in question, then you must find against the defense of contributory negligence, because under such conditions the law holds the defendant liable for any injury suffered by the plaintiff and proximately resulting from the accident, despite the negligence of the deceased." The court then repeated the instructions on last clear chance which it had given the jury before their retirement.

[7] Plaintiffs take portions of these instructions and complain that those portions do not contain all the elements of last clear chance and of proximate cause, and that they enlarge the doctrine of last clear chance by the addition of conditions additional to those required by law. These instructions must be considered with all the instructions as a whole, and do not have the claimed effect, or, as suggested by plaintiffs, require a verdict for defendant.

[8] While the court did not give the instructions on last clear chance offered by plaintiffs, those it gave were fully as complete and proper as those offered. Plaintiffs' main objection seems to be that at the same time the court gave instructions as to the duty of the deceased. Plaintiffs also claim that in giving the six conditions of the last clear chance doctrine the court seemed to assume that Mrs. Heffernan was negligent. The court did not assume it. It stated that to apply the doctrine, the jury must first find that she had negligently placed herself in a position of danger. This is the law. See Girdner v. Union Oil Co., 216 Cal. 197, 13 P.2d 915. That these instructions were proper is fully supported by Behne v. Pacific Electric Ry. Co., 30 Cal. App.2d 437, 86 P.2d 843, and Gore v. Market St. Ry. Co., 4 Cal.2d 154, 48 P.2d 2.

[9, 10] On the whole, the court's instructions were full and fair, and if in any respect erroneous, were not prejudicially so. As we pointed out with reference to instructions (A) and (B), the record discloses that there was no miscarriage of justice. "Unless upon a consideration of the entire case, including the evidence, it appears that the error complained of has resulted in a miscarriage of justice, a judgment will not be reversed by reason of an erroneous instruction." Perbost v. San Marino Hall-School for Girls, 88 Cal.App. 2d 796, 199 P.2d 701, 703. The main objection of plaintiffs to all the questioned instructions is that each does not contain all the elements of the case. As said in the Perbost case, supra, 88 Cal.App.2d 801, 199 P.2d page 703: "The virtue of one instruction cannot be determined by extracting it from the context of the entire charge to be criticized as if it alone were given. * * * The court is not required to state all the law in any one instruction."

3. Alleged Misconduct.

[11] This consisted of questions by defendant concerning the value of the estate left by Mrs. Heffernan. In McLaughlin v. United Railroads, 169 Cal. 494, 147 P. 149, L.R.A.1915E, 1205, Ann.Cas.1916D, 337, it was held that in a personal injury action evidence of the pecuniary benefit to the deceased's heirs from the death of a victim is not admissible. However, the situation here was different from that in the McLaughlin case. Here, plaintiffs did not object to the original questions concerning the value of Mrs. Heffernan's estate, and encouraged the statements of counsel which they now claim to be misconduct, and further, made no assignment of misconduct in the trial court. There were two causes of action in this case, the first by the administrators with the will annexed, the second by the son and daughter as heirs of the deceased. In this cause of action the heirs alleged that they paid a certain sum for funeral expenses. At the trial, they introduced bills for medical and hospital services (these were only marked for identification), funeral services and for the cemetery plot (the funeral and cemetery bills were admitted in evidence). Plaintiff Daniel O'Connor testified that the heirs had paid these bills. Defendant asked the witness if it wasn't a fact that Mrs. Heffernan left $10,000 and that the bills were paid out of her estate. Without objection, defendant read into evidence the doctors, hospital and cemetery bills which had been filed in the estate. Plaintiffs' counsel then said: "Read the inventory of the estate." Defendant did not do so. Whereupon plaintiffs' counsel said: "I want him to prove the statement he made that the mother had $10,000." The witness then admitted the bills were paid out of the estate. From then on plaintiffs' counsel was insisting that defendant's counsel was wrong in having stated that the value of the estate was $10,000 and wanted him to admit that it was only $6,977. The alleged misconduct was defendant's counsel's insistence that the value of the estate was in excess of its inventory value. The value of the estate was immaterial. Defendant had the right to show that the bills were paid by the estate and not by the heirs. The matter should have ended there. However, in view of the absence of objections and assignments of misconduct, see Cope v. Davison, 30 Cal.2d 193, 180 P.2d 873, 171 A.L.R. 667 and Collas v. Pasadena City Lines, 89 Cal.App.2d 93, 200 P.2d 77 and in view of the action of plaintiffs' counsel in pressing the matter of the value of the estate (even after the court had interjected "I am wondering if this is relevant to this case") the misconduct, if any, was not prejudicial.

The appeal from the order denying the motion for a new trial is dismissed, and the judgment is affirmed.

PETERS, P. J., and WARD, J., concur.

Hearing denied; CARTER, J., dissenting.

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92 Cal.App.2d 616

SHAW et al. v. McCARDLE et al.

Civ. 16681.

District Court of Appeal, Second District, Division 3, California.

June 27, 1949.

1. Estates 🔑10(1)

A "merger" occurs when a greater estate and a lesser coincide in the same person in one and the same right without any intermediate estate.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Merger".

2. Municipal corporations 🔑519(5)

Where owner of bond issued under Improvement Act, acting for corporation controlled by him, entered into an escrow to purchase lot covered by the bond from owner of fee, and at same time owner of bond entered into second escrow to sell lot, and thereafter owner of bond by mistake instructed city treasurer to cancel bond, being unaware that lot had been sold for taxes, there was no "merger" of assessment lien and fee title or negligence by owner of bond so as to prevent him from having bond reinstated. Streets and Highways Code, § 5000 et seq.

3. Municipal corporations ⚷519(5)

Action filed on December 26, 1946, to compel city treasurer to reinstate improvement bond, which owner of bond had inadvertently instructed treasurer to cancel, was not barred by four-year statute of limitations. Streets and Highways Code, § 5000 et seq.; Civ.Code, § 2911.

◆

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Action by Ted Shaw, Federated Income Properties, Inc., a corporation, against L. V. McCardle, the City of Los Angeles, and Elbert, Limited, a corporation, to compel reinstatement of a bond issued under the Improvement Act of 1911. From a judgment for plaintiffs, Elbert, Limited, appeals.

Judgment affirmed.

Robt. E. Rosskopf, John F. Bender, and Gizella M. Loshoncy, all of Los Angeles, for appellant.

James M. Gammon, of Los Angeles, for respondents.

VALLÉE, Justice.

Appeal by defendant Elbert, Ltd., from a judgment for plaintiffs ordering the City Treasurer of Los Angeles to reinstate a bond issued under the Improvement Act of 1911. Streets & Highways Code, sec. 5000 et seq.

On January 25, 1946, and for a long time prior thereto, plaintiff Shaw was the owner of the bond which was a lien on lot 8, tract 6346 in Los Angeles. Shaw was President of and controlled plaintiff Federated Income Properties, Inc. Early in 1946 Shaw, acting for Federated, entered into an escrow to purchase lot 8 from the owner of the fee. About the same time he entered into a second escrow to sell the property. In the escrow instructions he directed the escrow holder to pay the bond and taxes through the escrow. At that time the bond was delinquent. On March 30, 1946, Shaw gave the bond to the City Treasurer with instructions to institute foreclosure proceedings. On July 24, 1946, the escrow holder received a report from a title company stating among other things that the property was subject to sale for delinquent taxes. The contents of the report were immediately given to Shaw. On August 1, 1946, defendant Elbert Ltd. purchased lot 8 at a sale for delinquent taxes and received a deed. On August 21, 1946, the escrow holder, pursuant to instructions given it by Shaw after August 1st, authorized the City Treasurer to cancel the bond. At that time the foreclosure proceedings were pending and the bond was still in the possession of the City Treasurer. The Treasurer cancelled the bond on August 22, 1946, and a certificate of cancellation was issued.

The court found that Shaw instructed the Treasurer to cancel the bond through inadvertence and mistake; that at the time the instruction to cancel was delivered to the Treasurer Shaw was unaware that the property had been sold for taxes and would not have caused the cancellation to be made if he had known of the sale; that defendants will not suffer any damage by reinstatement of the lien of the bond for the reason that neither of them acquired any right or lien after cancellation. The judgment reinstated the bond upon delivery by plaintiff to the City Treasurer of a bond indemnifying the city against loss.

Appellant's points are: (1) There was a merger of the assessment lien and the fee title; (2) Shaw was negligent and equity will not relieve a party from his own negligence; and (3) the assessment lien was extinguished.

[1, 2] A merger occurs when a greater estate and a less coincide in the same person in one and the same right without any intermediate estate. 10 Cal.Jur. 606, sec. 10. There was no merger here. The fee title and the assessment lien did not meet in the same person. At the time appellant purchased the property the fee was owned by the prospective seller to Federated and the assessment lien was owned by Shaw. The sale to Federated fell through when it was learned that appellant had purchased the property.

We cannot say as a matter of law that Shaw was negligent. It is argued that because he knew prior to August 1, 1946, that the property was subject to sale for delinquent taxes that he was negligent in giving instructions to cancel the bond without first ascertaining whether the property had been sold. This was a question for the trial court. The evidence supports the findings. There are no intervening equities. Appellant purchased the property subject to the assessment lien. No rights have been acquired by appellant by reason of the cancellation of the bond. The mere fact that Shaw had knowledge that the property was subject to sale for delinquent taxes and had means of ascertaining whether the property had been sold before giving instructions for cancellation of the bond does not bar him from relief where appellant will not suffer injury. Copp v. Millen, 11 Cal.2d 122, 130, 77 P.2d 1093. The equities are with respondents. There are none with appellant.

[3] As an affirmative defense appellant pleaded that "more than four years have expired since the maturity of the last instalment of said Street Improvement Bond claimed by plaintiffs and the said bond has not been foreclosed and no proceedings are now pending for the foreclosure thereof." Civil Code section 2911, as amended in 1945, provides that: "* * * Anything to the contrary notwithstanding, any lien heretofore existing or which may hereafter exist upon real property to secure the payment of a public improvement assessment shall be presumed to have been extinguished at the expiration of four years after the due date of such assessment or the last installment thereof, or four years after the date of the lien attaches, or on January 1, 1947, whichever is later, or in the event bonds were or shall be issued to represent such assessment, the lien shall then be presumed to have been extinguished at the expiration of four years after the due date of said bonds or of the last installment thereof or of the last principal coupon attached thereto, or on January 1, 1947, whichever is later. * * *" It is obvious that the assessment lien was not extinguished on December 26, 1946, the date the complaint was filed.

The appeal is wholly without merit.

Judgment affirmed.

SHINN, P. J., and WOOD, J., concur.

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92 Cal.App.2d 448

POPCORN EQUIPMENT CO. v. PAGE et al.

Civ. 17040.

District Court of Appeal, Second District, Division 2, California.

June 16, 1949.

1. Arbitration and award 🔑66

Every reasonable intendment will be indulged to give effect to arbitration proceedings.

2. Arbitration and award 🔑76

An arbitration award made upon unqualified submission will not be set aside on ground that it is contrary to law unless error appears on face of award and causes substantial injustice, and to justify setting aside of award on account of error it must be shown that rights of one of parties are prejudiced by award, and burden is on party objecting to award to show affirmatively that error was committed by arbitrators.

3. Arbitration and award 🔑60

Award of arbitrators is sufficient if it is clear and precise and gives result of accounts between parties without detailing process by which result was reached on the several amounts in detail.

4. Arbitration and award 🔑66

The presumption is that all matters in dispute between parties were intended to be decided by arbitration and every reasonable presumption favors award of arbitrators.

5. Arbitration and award 🔑60

An award for specified amount, which arbitrators found to be owing by sellers by reason of their unauthorized sales of machinery which they had exclusively licensed respondent to manufacture and sell, was not uncertain or indefinite.

6. Arbitration and award 🔑72

An award was properly confirmed in absence of showing that arbitrators had failed to determine all matters submitted to them or that award was defective.

7. Arbitration and award 🔑52

Arbitrators are not required to find facts nor to give reasons for their award.

8. Arbitration and award ⚷31

Arbitrators could not pass on question whether dismissal of former action between parties operated as bar to consideration of matters submitted to arbitrators unless files in former action were offered in evidence, since a court will not take judicial notice of its own records in cases other than those in the case on trial.

9. Evidence ⚷43(3)

A court will not take judicial notice of proceedings in another action in same court pleaded as res judicata but not offered in evidence.

10. Evidence ⚷43(3)

Findings based on records in former case but not introduced in evidence cannot be sustained.

11. Evidence ⚷48

Although statute provides that courts will take judicial notice of acts of legislative, executive, and judicial departments of state, and although Railroad Commission and Industrial Accident Commission act judicially and their judgments are res judicata in all subsequent proceedings between same parties on same subject matter, nevertheless judicial notice is not taken of decisions of Railroad Commission or of findings and award of Industrial Accident Commission. Code Civ.Proc. § 1875, subd. 3.

12. Evidence ⚷1, 43(3)

Under certain circumstances Supreme Court will take judicial notice of records of Supreme Court, although not pleaded in trial court, when brought to court's attention in some appropriate manner.

13. Evidence ⚷1

The party on whom rests burden of establishing a fact of which court may take judicial notice is not relieved of the necessity of bringing fact to knowledge of court.

14. Evidence ⚷1, 43(3)

The court will not take judicial notice of proceedings in prior action, although the same are pleaded as a bar, unless such proceedings are presented to the court.

15. Arbitration and award ⚷76

Unless it be made to appear that failure of arbitrators to pass on all matters submitted to them or that any error committed by them was prejudicial to objecting party, award will not be vacated.

16. Arbitration and award ⚷76

Arbitration award would not be disturbed in absence of showing that arbitrators did not pass upon each item submitted by arbitration agreement and that report of arbitrators was incorrect in any particular and that prior action between parties related to items submitted to arbitration and that dismissal of such action operated as settlement as to such items and a bar to further proceedings thereon and that objecting party was prejudiced by award or judgment thereon.

◆

Appeal from Superior Court, Los Angeles County; Stanley Barnes, Judge.

Proceeding for confirmation of arbitration award by Popcorn Equipment Company, a corporation, against Charles E. Page and Page Engineering Company, a copartnership. From a judgment for the amount of the award, Charles E. Page and the Page Engineering Company appeal.

Affirmed.

Woodward & Weissman, Los Angeles, for appellants.

Sampson & Dryden and Jacob Swartz, Los Angeles, for respondent.

WILSON, Justice.

Appeal from judgment confirming arbitration award.

Under contracts entered into in December, 1945, and February, 1946, appellants granted to respondent an exclusive license throughout the world excepting Canada to manufacture and sell popcorn machinery and equipment. Disagreements arose between the parties concerning the interpretation of the contracts and respondent asserted that appellants had violated the agreements by making sales of licensed items without respondent's knowledge. By a contract entered into in January, 1947, the parties agreed that if they could not arrive at an adjustment of their differences they would submit to arbitration the amount which appellants should pay respondent for the asserted violations. They were unable to agree, and respondent filed a demand for arbitration in accord with the agreement, specifying 18 separate sales of popcorn machinery and equipment in violation of the original agreements as matters to be submitted to the arbitrators. Such items were separately set forth specifying dates of sales, names of the persons to whom sales were made, and the price received for each sale, totaling more than $50,000. After hearing the evidence of both parties the arbitrators made an award directing that appellants pay to respondent the sum of $18,018.66. Respondent filed a petition in the superior court for confirmation of the award and appellants filed a motion to vacate it. The court denied the motion to vacate, granted the motion to confirm, and entered judgment in favor of respondent and against appellants for the amount of the award. From the judgment comes this appeal.

It must be noted at the outset that it is apparent from statements in their brief that appellants did not enter into the arbitration proceedings in good faith or with the intention of being bound by the decision of the arbitrators. Despite the fact that they voluntarily entered into the agreement which formed the basis of arbitration and submitted their evidence without objection to the jurisdiction of the arbitrators they now, having failed of success before both the arbitrators and the court, assert that they agreed to the arbitration but did not anticipate that the award would be enforced, stating in their brief: "Appellants agreed to arbitration hoping for a moral vindication thereunder, recognizing the moral force of an adverse decision, but that does not mean that Appellants agreed to or contemplated the enforcement of any such decision against them through the transmutation of such decision into a judgment of the Superior Court." Such trifling with the orderly processes provided by law does not commend itself to the court, nevertheless we shall proceed to a consideration of the questions raised by the appeal.

Appellants contend that the award of the arbitrators was indefinite and uncertain in that it cannot be ascertained whether the arbitrators passed upon all 18 items submitted for arbitration.

[1, 2] Every reasonable intendment will be indulged to give effect to arbitration proceedings. An award made upon an unqualified submission will not be set aside on the ground that it is contrary to law unless the error appears on the face of the award and causes substantial injustice. Utah Const. Co. v. Western Pac. R. Co., 174 Cal. 156, 159–160, 162 P. 631. To justify the setting aside of the award on account of error it must be shown that the rights of one of the parties is prejudiced by the award. Pacific Vegetable Oil Corp. v. C. S. T., Ltd., 29 Cal.2d 228, 240, 174 P.2d 441. The burden is on the party objecting to the award to show affirmatively that error was committed by the arbitrators. Blair v. Wallace, 21 Cal. 317, 321; United Farmers Ass'n etc. v. Klein, 41 Cal.App.2d 766, 769, 107 P.2d 631; Carsley v. Lindsay, 14 Cal. 390, 394.

[3, 4] The award of the arbitrators is sufficient if it is clear and precise and gives the result of the accounts between the parties without detailing the process by which the result was reached. Carsley v. Lindsay, supra. It will be presumed that all matters in dispute between the parties were intended to be decided and every reasonable presumption favors the award. Dugan v. Phillips, 77 Cal.App. 268, 278, 246 P. 566.

[5, 6] Appellants rely on Muldrow v. Norris, 12 Cal. 331. In that case three separate and unrelated matters were submitted to the arbitrators. One of the items was a claim for damages growing out of a breach of a lease. The judgment confirming the award was reversed because of a gross error of the arbitrators in estimating the amount of damages which appeared on the face of the award. In the instant case the items submitted to the arbitrators were not unrelated but all grew out of the contracts between the parties and all were for damages claimed by respondent on account of sales alleged to have been made by appellants in violation of the agreements. Therefore the Muldrow case is not in point. The award was not uncertain or indefinite but was for a specified amount which the arbitrators found to be

owing by appellants by reason of the unauthorized sales. The award gave the results of the accounts between the parties and it was not necessary to set out the several amounts in detail. Carsley v. Lindsay, supra. Since appellants did not show in the court below that the arbitrators had failed to determine all the matters submitted to them or that the award was defective, the court could not do otherwise than confirm the award and this court cannot do otherwise than affirm the judgment. Bank of Coronado v. Shreve, 51 Cal.App. 353, 356, 196 P. 787.

[7] The arbitrators were not required to find facts nor to give reasons for their award, In re Connor, 128 Cal. 279, 282, 60 P. 862; Dugan v. Phillips, supra, nor to describe how they arrived at their decision.

Another objection raised concerning the award and advanced as a reason for the reversal of the judgment is that a previous action in the superior court included within its scope and pleadings all matters sought by respondent to be submitted to arbitration and that the dismissal of the action as provided in the agreement of January, 1947, operated as a retraxit barring respondent from further asserting such claims. The record on appeal does not show (1) that the pleadings and files in such action were offered in evidence before the arbitrators, (2) that such pleadings and files were before the trial court upon the hearing of the respective motions to confirm and to vacate the award, or (3) that such pleadings and files covered the matters that were submitted to arbitration.

It appears from the briefs that counsel for appellants agreed at the hearing before the arbitrators that the matter to be determined by them was whether or not sales had been made in violation of the agreement between the parties and if so how much was due and owing on account thereof. Appellants' counsel stated that the former superior court action had been dismissed and objected to any discussion of that action, stating that it was not a question to be determined "even whether a lawsuit was filed."

[8-11] The record on appeal does not show that the files in the former action in the superior court were offered in evidence upon the hearing of the respective motions (1) to confirm, and (2) to vacate the award. The arbitrators could not, nor could the court, pass upon the question whether the dismissal of the former action operated as a bar to the consideration of the matter submitted to the arbitrators unless such files were offered in evidence, since a court will not take judicial notice of its own records in cases other than those in the case on trial. Wolfsen v. Hathaway, 32 Cal.2d 632, 638, 198 P.2d 1; Johnston v. Ota, 43 Cal.App.2d 94, 96-97, 110 P.2d 507; Ralphs v. Hensler, 97 Cal. 296, 304, 32 P. 243; Sewell v. Price, 164 Cal. 265, 273, 128 P. 407; Olds v. Peebler, 66 Cal.App.2d 76, 82, 84, 151 P.2d 901; Willson v. Security-First National Bank, 21 Cal.2d 705, 711, 134 P.2d 800; Bank of America Nat. Trust & Savings Ass'n v. Button, 23 Cal.App.2d 651, 653, 74 P.2d 81; In re Estate of Fulton, 8 Cal.App.2d 423, 425, 48 P.2d 120; Stanley v. McElrath, 86 Cal. 449, 457-458, 25 P. 16, 26 P. 800, 10 L.R.A. 545; Plum v. Indian Valley Bank, 118 Cal.App. 13, 17, 4 P.2d 543; People ex rel. Carrillo v. De La Guerra, 24 Cal. 73, 78; Stanley v. McElrath, 3 Cal. Unrep. cases 163, 165, 22 P. 673; Lake Merced Water Co. v. Cowles, 31 Cal. 214, 215. Even where the proceedings in another action in the same court are pleaded as res judicata but not offered in evidence the court will not take judicial notice thereof. Johnston v. Ota, supra; Olds v. Peebler, supra. Findings based on records in a former case but not introduced in evidence cannot be sustained. Ralphs v. Hensler, supra. Although the statute provides that courts will take judicial notice of the acts of legislative, executive and judicial departments of the state, Code Civ.Proc., sec. 1875, subd. 3, and although the Railroad Commission and the Industrial Accident Commission act judicially and their judgments are res judicata in all subsequent proceedings between the same parties upon the same subject matter, Goodman Bros., Inc. v. Superior Court, 51 Cal.App.2d 297, 301, 124 P.2d 644, nevertheless judicial notice is not taken of decisions of the Railroad Commission, Mound Water Co. v. Southern California Edison Co., 184

Cal. 602, 610–611, 194 P. 1014, or of findings and award of the Industrial Accident Commission. Liberty Mut. Ins. Co. v. Superior Court, 62 Cal.App.2d 601, 610, 145 P.2d 344.

[12] Only in exceptional cases will the court depart from the general rule, for example in order to avoid a resulting unreasonable hardship. Under certain circumstances the Supreme Court will take judicial notice of the records of that court, although not pleaded in the trial court, when brought to the court's attention in some appropriate manner. An examination of the opinions in which it is said that judicial notice will be taken of prior decisions or proceedings discloses that they were placed before the court by citation in the briefs, Hammell v. Britton, 19 Cal.2d 72, 75, 119 P.2d 333, or in the argument. Sewell v. Johnson, 165 Cal. 762, 772, 134 P. 704, Ann.Cas.1915B, 645. In Calhoun v. Calhoun, 81 Cal.App.2d 297, 302, 183 P.2d 922, the settled statement on appeal shows that the previous case, with the result of the appeal, was relied on in the trial court and cited to the appellate court, and in Southern Pacific R. R. Co. v. Painter, 113 Cal. 247, 45 P. 320, where the court said it was bound to take judicial notice of the decisions of the Supreme Court of the United States, the opinions of the latter court were cited in the briefs and by stipulation in the trial court the lands there involved were shown to be of the same character as those described in the opinions of the Supreme Court.

[13, 14] There is a vast difference between judicial notice and judicial knowledge. The party on whom rests the burden of establishing a fact of which the court may take judicial notice is not relieved of the necessity of bringing the fact to the knowledge of the court. Shapleigh v. Mier, 299 U.S. 468, 475, 57 S.Ct. 261, 81 L.Ed. 355, 359, 113 A.L.R. 253. The court will not take judicial notice of proceedings in a prior action, although the same are pleaded as a bar, unless such proceedings are presented to the court. Bank of America Nat. Trust & Savings Ass'n v. Button, supra; Plum v. Indian Valley Bank, supra. Findings based on records of a prior action, not introduced in evidence, cannot be sustained. Ralphs v. Hensler, 97 Cal. 296, 304, 32 P. 243.

[15, 16] Unless it be made to appear that the failure of the arbitrators to pass upon all matters submitted to them or that any error committed by them was prejudicial to the objecting party, the award will not be vacated. The burden is on the objector to expose error. Appellants have not shown (1) that the arbitrators did not pass upon each and every item submitted by the agreement of arbitration, (2) that the report of the arbitrators is incorrect in any particular, (3) that the prior action in the superior court related to the items submitted to arbitration, (4) that the dismissal of the action operated as a settlement as to such items and a bar to further proceedings thereon. They have not shown that they are in anywise prejudiced by the award or by the judgment thereon.

Judgment affirmed.

MOORE, P. J., concurs.

McCOMB, J., concurs in the judgment.

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92 Cal.App.2d 589

PEOPLE v. McPHEELEY.

Cr. 672.

District Court of Appeal,
Fourth District, California.
June 24, 1949.

1. Larceny 🔑28(4)

An information, alleging that defendant willfully and feloniously drove and took an automobile belonging to named persons without their consent, with intent to deprive them of their title to and possession of vehicle, sufficiently charged grand theft.

2. Criminal law 🔑273

Defendant, pleading guilty, admitted all elements of offense charged.

3. Larceny ⚷86

A judgment sentencing defendant to state prison on his plea of guilty of felony of grand theft of automobile was valid as against contention that it might have been judgment of conviction under any one of three separate and distinct statutes penalizing the taking of automobiles without owners' consent. Pen.Code, §§ 487, 499b; Vehicle Code, § 503.

4. Criminal law ⚷161

One may be punished but once for single act of taking an automobile without owner's permission. Pen.Code, §§ 487, 499b; Vehicle Code, § 503.

5. Criminal law ⚷1177

One sentenced to state prison on his plea of guilty of grand theft of automobile, as authorized for violation of either Vehicle Code section or Penal Code section penalizing the taking of automobiles without owners' consent, was not prejudiced thereby. Pen.Code, § 487; Vehicle Code, § 503.

6. Indictment and Information ⚷147

When particulars of offense charged or particular results of defendant's actions are not stated in information with sufficient clarity to satisfy defendant or enable him to present his defense more ably, or if more than one offense is charged, his duty is to demur to information. Pen.Code, § 1004.

7. Criminal law ⚷999(1)

If commitment to state prison, based on valid judgment and in effect a certified copy thereof, is defective in form, new and corrected commitment may be issued to conform to judgment.

8. Escape ⚷1

A commitment to state prison on valid judgment, pursuant to plea of guilty of grand theft of automobile, was sufficient authority, together with order for prisoner's transfer to state institution for men, to authorize his detention in such institution as a prisoner and sustain his conviction of escape therefrom.

9. Escape ⚷10

Evidence sustained conviction of escape from state prison.

Appeal from Superior Court, San Bernardino County; A. D. Mitchell, Judge.

William Kenneth McPheeley was convicted of escape from the state Institution for Men, and he appeals.

Affirmed.

Taylor F. Peterson, San Bernardino, for appellant.

Fred N. Howser, Atty. Gen., Howard S. Goldin, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

Defendant was charged by an information with a felony in that he did willfully, unlawfully and feloniously escape from the California Institution for Men at Chino, California, while confined therein as a prisoner. He entered a plea of not guilty to the charge, waived trial by jury, and after a trial by the court was found guilty. Thereafter judgment was pronounced and defendant was sentenced to imprisonment in the State Prison at San Quentin for the term prescribed by law, such sentence to run concurrently with any sentence defendant was under obligation to serve by reason of a prior conviction.

On January 26, 1948, defendant was committed to the State Prison at San Quentin from Yolo County upon a charge denominated an "unlawful taking of a motor vehicle, a felony", and defendant's appeal is based solely on the ground that this commitment was void and defendant's imprisonment in the California Institution for Men at Chino, to which prison he was transferred, was without authority. He argues that since the commitment was void he could not be guilty of the escape charge.

The material part of the information filed against the defendant in Yolo County was as follows:

"The said William Kenneth McPheeley and Joseph Weldon Moody are accused by the District Attorney of and for the County of Yolo, State of California, by this Information of the crime of unlawful taking of a motor vehicle, a felony, committed as follows to-wit:

"That the said William Kenneth McPheeley and Joseph Weldon Moody, on or about the 27th day of December, 1947, at and in the County of Yolo, State of California, then and there being did wilfully, unlawfully and feloniously drive and take a certain vehicle, to-wit a Frazer Sedan, which was then and there of the personal property of Thelma Marie Davis and J. G. Davis, without the consent of the said Thelma Marie Davis and J. G. Davis with the intent to deprive the said owners, Thelma Marie Davis and J. G. Davis, of their title to and possession of said vehicle."

Following defendant's plea of guilty to the above charge, judgment was pronounced against him, in which judgment it was recited that defendant had entered a plea of guilty to the charge contained in the information. Thereupon defendant was sentenced to the State Prison at San Quentin and no appeal was taken from that judgment.

[1-3] It is apparent that the information sufficiently charged the offense of grand theft under the statute. People v. Israel, 91 Cal.App.2d 773, 206 P.2d 62. Defendant pleaded guilty and thereby admitted all the elements of the offense charged. People v. Brown, 140 Cal.App. 616, 619, 36 P.2d 194; People v. Outcault, 90 Cal.App.2d 25, 202 P.2d 602. The judgment based thereon was valid and we see no merit in defendant's contention, raised for the first time in the instant case, that the judgment of January 26, 1948, convicting him of the unlawful taking of a motor vehicle, a felony, might have been a judgment of conviction of any one of three separate and distinct penal statutes, namely, section 499b of the Penal Code, section 503 of the Vehicle Code, or section 487 of the Penal Code.

Penal Code section 499b provides that any person taking an automobile for the purpose of temporarily using or operating it, without the permission of the owner, shall be guilty of a misdemeanor. The information filed in Yolo County charged the defendant with a felony and he was found guilty of a felony and not the misdemeanor referred to in section 499b of the Penal Code.

[4] We need not here decide whether the offense specified in section 503 of the Vehicle Code is included within the offense of grand theft under Penal Code section 487, as an offender may be punished but once for the single act of taking an automobile without the permission of the owner. Both statutes are part of legislation to prevent the taking of an automobile without the owner's consent. People v. Kehoe, 33 Cal.2d 711, 204 P.2d 321.

[5] In the instant case the judgment in Yolo County provided that the defendant be imprisoned in the State Prison at San Quentin, a punishment authorized for a violation of section 503 of the Vehicle Code, or section 487 of the Penal Code, and defendant is not now prejudiced thereby. People v. Dallas, 42 Cal.App.2d 596, 604, 109 P.2d 409.

[6] Defendant did not demur or otherwise object to the information filed in the Superior Court in Yolo County, nor did he appeal from the judgment based on his plea of guilty to such information. As stated in People v. Perfetti, 88 Cal.App. 609, 615, 264 P. 318, 321:

"When the particulars of an offense, or if in this case the particular results of the defendant's actions, were not stated with sufficient clarity to satisfy the defendant or to enable him to more ably present his defense, it was his duty to demur thereto, as provided by section 1004 of the Penal Code, or, if more than one offense was charged, it was such duty." See, also, People v. Welton, 190 Cal. 236, 238, 211 P. 802.

[7, 8] The commitment from Yolo County was based on a valid judgment and is in effect a certified copy of the judgment rendered, and if in fact it was defective in form, a new and corrected one may be issued to conform to the judgment. People v. Sourisseau, 62 Cal.App.2d 917, 929, 145 P.2d 916. Since we have concluded that the judgment upon which this commitment was issued is valid, the commitment was sufficient authority, together with the order of transfer to the California Institution for Men at Chino, to authorize defendant's detention therein as a prisoner.

[9] At the trial of the instant case properly certified copies of the prison records of defendant were admitted in evi-

dence, showing a copy of the commitment and judgment from Yolo County, and other prison records kept by the prison authorities under section 2083 of the Penal Code, including an order of transfer of defendant from San Quentin Prison to the California Institution for Men at Chino. These records showed a receipt of defendant at Chino on April 27th, 1948, and his escape therefrom on July 5th, 1948. It was stipulated that defendant had been received at Chino on or about April 27, 1948; that on or about the 5th of July, 1948, it was discovered that he was missing; that defendant was apprehended and returned to custody; that defendant had been confined in the California Institution for Men at Chino under the custody of the proper officers at said institution whose duty it was to have charge of such prisoners; that defendant had not been released by official action and that defendant was the same individual who had been found to be missing from the California Institution for Men.

The evidence was sufficient to sustain the conviction of the crime of escape from a State Prison.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

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92 Cal.App.2d 620

FERRELL v. MATRANGA.

Civ. 16696.

District Court of Appeal, Second District, Division 3, California.
June 27, 1949.

1. Appeal and error 🔑1001(1)
Negligence 🔑136(14)

In personal injury action, question of negligence is generally one of fact for a jury, and its findings thereon, if supported by substantial evidence, are binding upon a reviewing court; and it is only when there is no substantial conflict as to facts, and from the facts reasonable persons can draw only the inference that a defendant was negligent, that reviewing court will disturb verdict rendered in favor of defendant.

2. Trial 🔑139(1), 140(1)

Jury is sole judge of weight of evidence and credibility of witnesses.

3. Automobiles 🔑245(8)

Whether motorist who was traveling 15 to 20 miles an hour in residential district in vicinity of picket fence and who struck three and one-half year old child near middle of block after mother called to child from opposite side of street was negligent for failing to see child was for the jury.

4. Appeal and error 🔑1067

Where contributory negligence on part of three and one-half year old plaintiff was pleaded in answer, but defense was waived at beginning of trial, and it was conceded that plaintiff was too young to be guilty of negligence and jury was otherwise fully and correctly instructed, refusal to give instruction that plaintiff of that age was incapable of contributory negligence was not prejudicial error.

Appeal from Superior Court, Los Angeles County; Benjamin J. Scheinman, Judge.

Action by Leon Ferrell, by his guardian ad litem, Curtis Ferrell, against Laurence Matranga for personal injuries sustained when plaintiff was struck by defendant's automobile. From the judgment, plaintiff appeals.

Judgment affirmed.

Blanche and Fueller, Pasadena, for appellant.

Parker, Stanbury & Reese and Harry D. Parker, Los Angeles, for respondent.

VALLÉE, Justice.

Plaintiff, a minor three and one-half years of age, appeals from a judgment for defendant after a verdict by a jury in an action for damages for personal injuries.

On December 15, 1945, at about 10:30 a.m., defendant was driving a Buick automobile in an easterly direction on Wood Avenue, in a residential section of Los Angeles. He was traveling at a speed of about 15 to 20 miles an hour when suddenly, approximately in the middle of the block, he heard a scream which came from his left, or the north side of the street. He glanced in that direction and saw plaintiff's mother run from the north sidewalk. At about that instant he heard "a little thump" which seemed to come from the right front of his car. He immediately brought the car to a stop. Not knowing what "he hit or what had hit him," he got out of the car and started toward the rear. There he saw the infant-plaintiff and his mother, who "already had the little boy in her arms." Plaintiff's mother said to him, "It isn't your fault. I should never have called him." Defendant's car did not run over plaintiff. Defendant testified that: he was looking straight ahead all the time he was driving; he did not see the plaintiff before the impact; after the impact he did not swerve his car either to the right or left; he saw two other children after the accident standing "in back of that lot there where the fence was." The fence he referred to was a 4-inch picket fence which ran north and south from the sidewalk on the south side of Wood Avenue just west of the point of impact. It was about 38 inches high for about 7 or 8 feet, then it rose to about 4 feet in height. Defendant was asked whether the fence obstructed his view and he replied that it did. Pictures of Wood Avenue in the immediate vicinity where the accident occurred, showing the fence, driveways, sidewalks and surrounding residences, were introduced in evidence. The impact occurred some ten feet of the fence. After the impact, defendant's car traveled about "Two car lengths, approximately 30 feet" from the point where he heard the "thump." There was no damage to, nor any brush marks on, the car. One of the police officers who investigated the accident shortly thereafter testified that defendant's car was headed in an easterly direction approximately 6 or 7 feet from the south curb. He was unable to determine the point of impact as there were no skid marks or tire marks on the street. He also testified that he heard plaintiff's mother say "it was her fault, that she had called the boy."

[1-3] Appellant contends that the evidence established that defendant was negligent as a matter of law in failing to see plaintiff and argues that plaintiff must have been "in or near the street immediately prior to the accident * * * and defendant should have seen the plaintiff during the time necessary to travel the last 100 feet before the accident. For the defendant to look in such a fashion and fail to see what is in plain sight is to look without a reasonable degree of care, and if defendant's looking was done in such a negligent manner, he may as well not have looked at all." The question of negligence is generally one of fact for the jury, and its finding thereon, if supported by substantial evidence, is binding upon a reviewing court. It is only when there is no substantial conflict as to the facts, and from the facts reasonable persons can draw only the inference that a defendant was negligent, that the reviewing court will disturb the verdict of the jury rendered in favor of a defendant. Collas v. Pasadena City Lines, 89 Cal.App.2d 93, 200 P.2d 77. There is a decided conflict generally in the evidence and specifically with respect to the position of plaintiff, both before and after the accident, and as to the point of the impact. The jury was the sole judge of the weight of the evidence and of the credibility of the witnesses and the determination of whether defendant was negligent was solely within its province. By its decision the jury impliedly found that the defendant was operating his automobile in a careful and prudent manner and did not see plaintiff because he was not in view. This conclusion is amply supported by substantial evidence from which the jury could reasonably have inferred that the presence of the infant-plaintiff was obscured by the picket fence and that he suddenly darted out into the street in answer to his mother's call.

[4] Plaintiff complains that the court erred in refusing an instruction reading, "Concerning the defense of contributory negligence that has been raised in this case, I instruct you that the law conclusively presumes that a child the age of the Plaintiff child, that is three and one-half (3½) years, is incapable of contributory negligence. Hence you need not consider

that defense." While contributory negligence on the part of plaintiff was pleaded in the answer, this defense was waived at the beginning of the trial and it was conceded that the infant-plaintiff was too young to be guilty of negligence. Under these circumstances, and in view of the fact that the jury was otherwise fully and correctly instructed, the refusal to give the instruction does not constitute prejudicial error. The jury was told that the issues it was to determine were: (1) was the defendant negligent, (2) if so, was that negligence the proximate cause of any injury to plaintiff, and (3) if so, the damage, if any. The other instructions of which appellant complains were predicated on the evidence, are correct statements of the law and were therefore properly given.

In view of the jury's verdict in favor of defendant, the question of the exclusion of testimony relative to medical and hospital expenses paid by plaintiff's father and pleaded as an item of special damages by plaintiff, is immaterial.

Judgment affirmed.

SHINN, P. J., and WOOD, J., concur.

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92 Cal.App.2d 352

Ex parte OROSCO et al.

Cr. 2587.

District Court of Appeal, First District, Division 1, California.

June 10, 1949.

1. Habeas corpus ⚿85(1)

Recitals in a judicial order attacked on habeas corpus must be taken as true.

2. Habeas corpus ⚿3

The recital in juvenile court judgment that due notice was given to mother of hearing in which child was declared a ward of court could not be attacked in habeas corpus proceeding, particularly where mother had right to attack judgment by direct proceeding in juvenile court to set aside judgment for lack of notice or had right to apply to juvenile court to change, modify, or set aside order. Welfare and Institutions Code, §§ 700(b, c), 745.

3. Infants ⚿18

Allegations that mother was unmarried and unwilling to assume responsibility for child's support, and that alleged father had not contributed to support of child, and that there were no relatives willing to provide necessities of life for child, were sufficient to give juvenile court jurisdiction of proceeding to declare child a ward of court. Welfare and Institutions Code, § 700(b, c).

4. Infants ⚿19

Where order of juvenile court making child a ward of court and granting its custody to association was binding on District Court of Appeal, it could not direct that the child be delivered to the mother or to petitioners for adoption of child, or both, even though warrant of arrest by which association procured child was void. Welfare and Institutions Code, § 700(b, c).

◆

Proceeding in the matter of the application of Lupe Orosco, Amanda Bilgera, and Herman Bilgera for and on behalf of Martha Ann Orosco, an infant, for a writ of habeas corpus.

Writ discharged.

Alfred J. Hennessy, San Francisco, for petitioner.

Dion R. Holm, City Atty., and Edward F. Dullea, Deputy City Atty., San Francisco, for respondent and defendant Laguna Honda Home, City and County of San Francisco, and Ososke.

Charles P. Scully and Thomas Mulvihill, San Francisco, for respondents James Murray, etc.

BRAY, Justice.

Petition for writ of habeas corpus. The principal question is whether in a proceeding of this kind, the recital in the judgment of the Juvenile Court that due notice of the hearing, in which a child was declared a ward of that court, was given to its mother, is binding on this court.

The petition sets forth that on August 5, 1945, Martha Ann Orosco was born to Lupe Orosco (one of the petitioners), an unwed mother; that on September 27, 1945, she was placed with Amanda and Herman Bilgera (the other petitioners). On January 6, 1946, the mother consented to the adoption of the child by the Bilgeras, who filed a petition for adoption, which is still pending. On February 12, 1946, the Bilgeras notified respondent James Murray, Assistant Director of Catholic Social Service of the Archdiocese of San Francisco, a corporation, and Little Children's Aid, an unincorporated association, that they would take financial responsibility for the child, and subsequent to February 26, 1946, the Bilgeras at their own expense have provided full care, including medical care, of said child. On March 25, 1946, a petition was filed in the Juvenile Court to the effect that the child came within the provisions of subdivisions (b) and (c) of section 700 of the Welfare and Institutions Code, and giving the name of the mother and her address in San Francisco, and the name of the alleged father and his address as Williams, Arizona. On April 8, 1946, a judgment was entered declaring the child a ward of the Juvenile Court and committing it to the care of Little Children's Aid. This judgment recited: "Due and legal notice of the hearing of said petition has been given to all parties entitled thereto." In the petition here, the petitioners allege that, in fact, no notice of the hearing in the Juvenile Court was given to the mother or to the Bilgeras, who then had the physical custody of the child, and that the order was based upon false testimony given at the hearing. They also allege that on November 16, 1948, at the direction of said James Murray, one Helen Shands (actually it was Rose B. McGrorey, Assistant Probation Officer) swore to an affidavit for the issuance of a warrant for the arrest of the child, and that pursuant to such warrant the child was taken from the Bilgeras and turned over to the Little Children's Aid. They then ask that a writ of habeas corpus issue directed to the said James Murray, Assistant Director of Catholic Social Service of the Archdiocese of San Francisco, a corporation, to the Little Children's Aid, to Mrs. Myrtle Williams, Director of Social Welfare of the State of California (at the hearing of the writ, upon stipulation, the proceedings were dismissed as to her), and to George W. Ososke, Chief Juvenile Probation Officer of the City and County of San Francisco, to produce the child.

Upon the representation in said petition that no notice had been given the mother of the child of the proceedings in the Juvenile Court, we issued the writ directed to the persons above named. Upon the hearing, returns were filed by them, in which they set up the proceedings in the Juvenile Court, produced its record, and contended that, under the Juvenile Court order of April 8, 1946, the custody of said child was granted to Little Children's Aid, and that such order was still in full force and effect. They alleged that the Bilgeras had refused to release the child to Little Children's Aid for replacement in another foster home, and that thereupon they had caused the warrant to issue, and that the child is now in the custody of said Little Children's Aid in a certain licensed foster home.

At the hearing it was stipulated that the record in the Juvenile Court does not contain any evidence of service of notice of the hearing upon the mother, other than the recital in the order above set forth. Also, petitioners requested that the mother and the Bilgeras be sworn and permitted to testify that none of them had been given any notice of the Juvenile Court hearing.

[1] Can the petitioners on habeas corpus attack the finding of notice in the Juvenile Court order? The authorities are well settled to the contrary, holding that the recitals in a judicial order attacked on habeas corpus must be taken as true. In re Shortridge, 5 Cal.App. 371, 90 P. 478; Ex parte Ah Men, 77 Cal. 198, 19 P. 380, 11 Am.St.Rep. 263. As said in Ex parte Ewell, 71 Cal.App. 744, 236 P. 205, in a proceeding in habeas corpus to secure the release of petitioner from custody on a commitment for contempt of court 71 Cal.App. at page 746, 236 P. at page 205: "* * * we do not agree with petitioner that in a habeas corpus proceeding a peti-

tioner may go behind the judgment and offer evidence to impeach the facts and matter adjudicated therein; those facts must be taken as true." See also In re Nicholls, 74 Cal.App. 504, 241 P. 399, and In re Jones, 34 Cal.App.2d 77, 93 P.2d 185. Showing how far the courts have gone under this rule is the decision in In re Koester, 56 Cal.App. 621, 206 P. 116. There the petitioner had brought a proceeding on habeas corpus to secure his release from Folsom State Prison on the ground that the superior court which convicted and sentenced him did not have jurisdiction of his person. The petition was denied, the court saying, 56 Cal.App. at page 626, 206 P. at page 118: "* * * the judgment of conviction, being in all respects valid upon its face, cannot, in a collateral attack thereon, be nullified or disturbed, and it therefore follows that the mere statement of facts in a petition for a jurisdictional writ impeaching such judgment cannot of themselves have the effect of countervailing the legal force of such judgment."

In Re Tiffany, 49 Cal.App. 44, 192 P. 547, 548, the father of a minor sought on habeas corpus to show that the order of the Juvenile Court making the son a ward was illegal because, as alleged, no notice of the hearing had been given the father. Just as in our case, "The judgment in this case recites that the steps prerequisite to jurisdiction were taken * * *." It was held: "* * * on collateral attack the recitals are conclusive on this court. The petitioner in this proceeding is not permitted to prove that any statement contained in the judgment is false, and no evidence can be received to contradict the judgment, except it be in a proceeding in the superior court, brought directly for that purpose. Ex parte Sternes, 77 Cal. 156, 19 P. 275, 11 Am.St.Rep. 251. The judgment being valid on its face, cannot be impeached in this proceeding." 49 Cal.App. at page 45, 192 P. at page 548.

In People ex rel. Pollock v. Bogart, 58 Cal.App.2d 831, 138 P.2d 360, 361, the Juvenile Court adjudged three children wards of that court and committed them to foster homes. About a year later, and long after the time for appeal had elapsed, the grandmother moved the court to set aside the orders making the children wards, on the ground that at the time of the original proceeding and theretofore, the children had been in her care and custody, and that no notice of the proceedings had been given her. The trial court, on this motion, found that except as to the recital in the orders declaring the children wards, the record "was silent as to the actual giving of notice," just as in our case, no *proof* of service appears in the record. The appellate court held that in spite of this fact "it could not be presumed * * * that notice was not properly given in view of the recital in the orders that 'due and legal notice' had been given to 'all parties entitled thereto'; * * *. The appellant's offer of proof in rebuttal to the findings was refused on the ground that such motion constituted a collateral attack on the judgment; that therefore 'the court is limited to an inspection of the record only, which appears valid on its face' * * *." 58 Cal.App. at page 834, 138 P.2d at page 361. See also In re Lamson, 50 Cal.App. 553, 195 P. 735, where the court held sufficient a finding in the minutes of the Juvenile Court that the parents "were present in open court."

In Estate of Eikerenkotter, 126 Cal. 54, 58 P. 370, the court pointed out that lack of notice must affirmatively appear on the record before that record may be collaterally challenged. There, after the time for appeal from an order of guardianship of a minor had expired, the person having the custody of the child at the time the proceedings were commenced, applied to the court to set aside its order on the ground that no notice of the hearing had been given her. The Supreme Court upheld the order of the superior court denying the application, even though there was nothing in the record to show proof of service. It said, 126 Cal. at page 56, 58 P. 370: "The fact of service, and not the proof of service, gives a court jurisdiction to hear and determine. Here there is nothing in the record to disprove the fact of service of the notice upon the person having the custody of the minor. Lack of jurisdiction must be affirmatively shown by the record." The same principle is set forth in Ex parte Ah Men, supra, 77 Cal. 198, 202, 19 P. 380, 381, 11

Am.St.Rep. 263, where the court said: "Nearly all of the objections urged against the validity of the judgment convicting petitioner of a contempt are answered by the recitals in the judgment itself. *If the record were silent as to the jurisdictional facts, jurisdiction would be presumed;* but the judgment itself recites all of the facts necessary to the exercise of jurisdiction by the court." (Emphasis added.)

In Re Spiers, 15 Cal.App.2d 487, 59 P.2d 838, the order making the child a ward of the court and giving its custody to the probation officer was silent on the question of service of notice of the hearing on the mother who had custody of the child at the time. There was nothing in the record to show that she was present at the hearing, had waived service of citation, or had received notice of any kind. The order was further defective in failing to find on any of the facts necessary to bring the child under the provisions of the Juvenile Court Law. It did not even find that the welfare of the child required that her custody be taken from her mother or that she be made a ward of the court. The mother refused to obey the order. Some months later, the probation officer filed a petition in the Juvenile Court asking that the child be adjudged a ward of the court on the ground that the child, 15 Cal.App.2d at page 492, 59 P.2d at page 840, "has failed, neglected, and refused to obey the orders and directions of the probation * * * officer * * * as required by the order" above mentioned. The mother was present at the hearing of this petition. The court then again made the child a ward, placing it in the custody of the probation officer. In a habeas corpus proceeding to secure the release of the child from custody under the latter order, the court held that it was a void order, as it was based upon the charge that the child had refused to obey the first order, which was also a void order, and, therefore, the child was under no obligation to obey it. The first order was void, because the court did not find existing facts which would bring the child, or its parent, within the terms of the Juvenile Court Law, and it made no finding of, nor did the record show, due notice given the mother. In referring to the hearing of the second petition the court said, 15 Cal.App.2d at page 492, 59 P.2d at page 841: "Nothing else appearing, the recital of the court that due notice had been given to all persons entitled thereto would necessitate a holding that citation had been issued and properly served." In our case the order finds that due notice was given and also finds the facts necessary to bring the child within the Juvenile Court Law.

The matter came before the court again in People v. Spiers, 17 Cal.App.2d 477, 62 P.2d 414, on an appeal by the mother from a conviction of the crime of taking the child away from the custody of the probation officer, and the court again passed on the validity of the first order mentioned in the case in 15 Cal.App.2d, 59 P.2d, which there had been held void because, among other things, it failed to find that notice of the hearing had been given the mother. In People v. Spiers, the respondent contended that in spite of this lack in the order and in the record, under the rule mentioned in some of the cases, 17 Cal.App. at page 484, 62 P.2d at page 417: "Everything necessary to give the court jurisdiction will be presumed to have been taken or done unless the contrary appears on the face of the record." The court held that this rule is true as a general proposition, but stated that the Juvenile Court Law provided that a citation giving 24 hours notice must be given to the parent with whom the child resides, and that the hearing was had and the order made on the same day the petition was filed. Therefore, the impossibility of giving the mother the 24 hours notice showed conclusively on the record. The court then referred to the rule that "Where opportunity is given for the service of summons, and nothing further appears, it will be presumed that service of summons has been had according to the statutes providing therefor." 17 Cal.App.2d at page 484, 62 P.2d at page 417. It then pointed out that the rule did not apply in their case for the reason that "our attention has not been called to any case, nor in our search of the authorities have we found any case where the record shows the impossibility of serving a citation as required by the statutes, that it will be presumed that the person to whom the citation should have been issued voluntarily appeared in the action and waived service. In other words, where it appears from the record that the statutes providing for the service of notice could not have been followed, it will not be presumed that the person to whom the citation should have issued, and to whom notice required by the statute should have been given, appeared and waived service of notice." Thus the peculiar facts of the Spiers cases are entirely dissimilar to those in our case, and although, because of those facts, the court held the Juvenile Court orders void, it approved of the general rules which are applicable here.

[2] The Spiers case was distinguished in In re Staser, 84 Cal.App.2d 746, 191 P.2d 791. Upon habeas corpus, the mother claimed that neither she nor the father of the child had received notice of the hearing in the Juvenile Court. The appellate court, after referring to the fact that the complaint in the Juvenile Court had been filed on April 15 and the hearing held on April 17, quoted the recital in the order to the effect that due and legal notice had been given to all parties entitled thereto, and then said, 84 Cal.App.2d at page 753, 191 P.2d at page 795: "It may not therefore be held, in the absence of evidence to the contrary, as the Spiers case clearly infers, that it was impossible to have served the citation on the mother twenty-four hours before the hearing." The appellate court discharged the writ, but in its opinion used the following language, 84 Cal.App.2d at page 753, 191 P.2d at page 795: "No evidence was adduced at the habeas corpus proceeding to show whether the citation was issued or whether the mother was or was not present at the hearing in the juvenile court. The petitioner's attorney did state that he wanted to call the mother as a witness for that purpose, but he failed to do so." This language might indicate that the court there thought that it had the power to receive evidence to overcome the Juvenile Court's finding of due notice, but the point was not discussed. The courts have considerably liberalized habeas corpus proceedings and allowed evidence dehors the record in a number of cases. See Article in Vol. XX, So.Cal.Law Rev. 304, and Vol. 36, Cal.Law Rev. 420. The above language in the Staser case, and the liberalization discussed in the Law Review articles, which refer to situations other than an attack by habeas corpus on the court's findings of due notice, do not justify an overruling of the cases hereinbefore set forth, which positively hold that the finding of the Juvenile Court of due notice cannot be attacked on habeas corpus. Particularly is this so where, as here, petitioner-mother has the right to attack the judgment by a direct proceeding in the Juvenile Court, by bringing a proceeding there to set aside the judgment on the ground that no notice of the hearing was given her. Moreover, if, in fact, she did receive notice of that hearing, she can make application to the Juvenile Court under section 745 of the Welfare and Institutions Code to change, modify or set aside the order.

[3] The petition alleged that the child came within the provisions of subdivisions (b) and (c) of section 700 of the Welfare and Institutions Code, and that she was then in the custody and control of Little Children's Aid; that the mother was an unmarried woman, and was "not willing to assume responsibility for the child's care and support"; and that the alleged father of the child had not contributed to its care or support and that "there are no relatives willing to provide the necessities of life for said child." These allegations are sufficient to bring the child within the provisions of subdivisions (b) and (c) of section 700 of the Welfare and Institutions Code. In Re Gutierrez, 47 Cal.App. 128, 190 P. 200, 201, the allegation that the minors "have no parent or guardian capable of exercising proper parental control" was held to be a sufficient averment in a petition to give the court jurisdiction of a proceeding to declare them wards of the court. See also In re Staser, supra, 84 Cal.App.2d 746, 191 P.2d 791. The cases cited by petitioners do not hold otherwise. In re Lewis, 3 Cal.App. 738, 86 P. 996; In re Mundell, 3 Cal.App. 472, 86 P. 833; Matter of Application of Burner, 23 Cal.App. 637, 139 P. 90, were cases in which there was an entire absence of any averment in the complaint in the Juvenile Court bringing the

child within any provision of the Juvenile Court Law. In Re Matter of Hill, 78 Cal. App. 23, 247 P. 591, the court made the child a ward without making any finding of notice to the parents or of any fact which would bring the child within the provisions of the Juvenile Court Law.

Under the authorities, therefore, as the Juvenile Court judgment recited that "Due and legal notice of the hearing of said petition has been given to all parties entitled thereto," no evidence can be admitted in this proceeding to attack that finding.

[4] Petitioners attack the validity of the warrant of arrest. Inasmuch as the order of the Juvenile Court making the child a ward and granting its custody to Little Children's Aid is binding on this court, we could not direct that the child be delivered to the mother or the Bilgeras, or both, even though the warrant of arrest were completely void. Had the Little Children's Aid obtained the physical possession of the child even without such a warrant, we could not in this proceeding disregard the Juvenile Court order and give the child to anyone other than Little Children's Aid. In view of that situation, nothing would be gained by passing upon the matters raised by petitioners concerning the warrant of arrest.

The motion to introduce evidence is denied, and the writ is discharged.

PETERS, P. J., and WARD, J., concur.

34 Cal.2d 95

BUDGET FINANCE PLAN v. GAMSON et al.

L. A. 20936.

Supreme Court of California, in Bank.
June 28, 1949.

1. Pawnbrokers and money lenders 🔑3

The term "personal property broker," as used in the usury provisions of the constitution exempting such brokers from the general interest rates fixed by the constitution and giving legislature the authority to determine rate which such brokers might charge, means personal property brokers as defined in the Personal Property Brokers Act of 1933, in effect in 1934. Gen. Laws, Acts 5825(2d), § 2(2); Const. art. 20, § 22.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Personal Property Broker".

2. Pawnbrokers and money lenders 🔑3

The definition of personal property broker contained in 1933 Personal Property Brokers Act, which was incorporated in the 1934 constitutional amendment relating to usury, when construed in light of legislative history, does not limit personal property brokers to that class of lenders who take only personal property or wage assignments as security. Gen.Laws, Acts 5825(2d) § 2(2); Const. art. 20, § 22.

3. Pawnbrokers and money lenders 🔑3

The 1909 Personal Property Brokers Act, defining as personal property brokers all who engaged in business of loaning or advancing money and taking "in whole or in part," as security for such loans, liens on personal property or wage assignments, by use of the quoted phrase, indicated legislative intent to subject to interest restrictions of that act not only lenders whose securities consisted entirely of liens on personal property or wage assignments but also those whose loans were partly so secured, including those whose loans were in addition secured by real property liens. St. 1909, p. 969, as amended by St. 1911, p. 978.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "In Whole or In Part".

4. Pawnbrokers and money lenders 🔑1

Where, from legislative history, personal property brokers were not prohibited from taking liens on real estate as additional security for loans made on personal property and wage assignments when constitutional amendment removing personal property brokers from the general restriction on interest rates was adopted, it was within regulatory power of legislature to prevent such brokers from taking real property security and thereafter to reinstate that right. Gen.Laws, Acts 5825(1st), 5825(2d), § 4(d); Const. art. 20, § 22.

5. Constitutional law 🔑205(1)
Pawnbrokers and money lenders 🔑2
Statutes 🔑74(1)

The 1945 statute, permitting personal property brokers who lend money on the security of personal property and wage assignments to take liens on real estate as additional security in the case of loans of $5000 or more, is not violative of constitutional provisions prohibiting discriminatory legislation. Gen.Laws, Acts 5825(1st), 5825(2d), § 4(d); Const. art. 1, §§ 11, 21.

6. Pawnbrokers and money lenders 🔑3, 6.9

By taking a lien on realty as part of the security for a loan of $20,000, as authorized by the 1945 amendment to the Personal Property Brokers Act, lender did not cease to be a "personal property broker" within constitutional provision exempting such brokers from the general ten per cent. interest limitation, so as to make interest charge of one and one-half percent per month usurious; and transaction did not fall within section of Personal Property Brokers Act declaring usurious contracts void and preventing licensed brokers from collecting any principal, interest or charges on a usurious loan. Gen.Laws, Acts 5825(1st), 5825(2d), § 4(d), 21; Const. art. 20, § 22.

CARTER, J., dissenting.

◆

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Budget Finance Plan, doing business under the fictitious name and style of Offer Finance Company, against Lawrence Gamson and Gertrude Gamson, to recover the personal property pledged to secure payment of unpaid balance of a loan, wherein defendants cross-complained. Judgment for plaintiff and defendants appeal.

Affirmed.

William Katz, Los Angeles, for appellants.

Mindlin & Levy and L. J. Styskal, Los Angeles, for respondent.

SHENK, Justice.

In April, 1946, the plaintiff corporation, a licensed personal property broker, loaned $20,000 to the defendants, Lawrence Gamson and his wife Gertrude, at charges of 1-½ per cent per month on the unpaid principal balances, taking as security a chattel mortgage on two automobiles and certain household furnishings, and in addition, a deed of trust on a parcel of real property. At the same time the defendants delivered a promissory note to the plaintiff which provided for repayment of the loan in 48 successive monthly installments of $600 each. When the defendants defaulted in several payments after paying a total sum of $4,800 the plaintiff, in accordance with a provision in the promissory note, declared the entire unpaid balance immediately due and payable, or in lieu of payment, demanded possession of the personal property covered by the mortgage. The defendants refused to pay or comply with the demand and this action to gain possession of the mortgaged personal property was thereupon commenced. By cross-complaint the defendants sought an injunction to restrain the plaintiff from exercising the power of sale contained in the deed of trust and from foreclosing the chattel mortgage, and a money judgment for treble the sum paid by the defendants to the plaintiff as interest on the loan. Relief on the cross-complaint was denied and judgment was entered for the plaintiff for possession of the personal property or $5,000 as the value thereof.

On this appeal by the defendants it is contended that the note, deed of trust and chattel mortgage are void on the ground that the loan violated usury provisions found in the Constitution, Art. XX, sec. 22, as amended 1934, and the Personal Property Brokers Act by reason of the fact that a part of the security consisted of a lien on real property. In 1945 the Personal Property Brokers Act was amended and section 4(d) enacted, Stats. 1945, pp. 2321, 2322, Gen.Laws, Acts 5825(1st), 5825(2d), which undertook to permit personal property brokers to take liens on real estate as security for loans of $5,000 or more. The defendants' contention is a challenge of the power of the Legislature to effect such an amendment.

[1] The contention of the defendants rests in the main on an interpretation of the term "duly licensed * * * personal property broker" as used in the 1934 amendment to the Constitution which exempted that class of lenders (as well as other named classes of business lenders) from the general interest limitations therein established. Specifically, the 1934 amendment fixed the legal rate of interest at 7 per cent per annum and authorized parties to provide by written contract for a rate not exceeding 10 per cent. However, duly licensed personal property brokers were exempted from the general interest limitations and the Legislature was empowered to establish rates of interest and charges such lenders can receive, which might be more or less than the general 10 per cent rate. Const., art. XX, sec. 22; Carter v. Seaboard Finance Co., 33 Cal.2d 564, 203 P.2d 758. No definition of a personal property broker appeared in the constitutional amendment, but both plaintiff and defendants agree, and their agreement finds support in established principles of construction, that as used in the 1934 constitutional provision, the term referred to the class of lenders which was defined only in the Personal Property Brokers Act of 1933, in effect in 1934, which declared: "Sec. 2.(2) The term 'personal property broker,' as used in this act, included all who are engaged in the business of lending money and taking in the name of the lender, or in any other name, in whole or in part, as security for such loan, any contract or obli-

gation involving the forfeiture of rights in or to personal property, the use and possession of which property is retained by other than the mortgagee or lender, or all who are engaged in the business of lending money and taking in the name of the lender, or in any other name, in whole or in part as security for such loan, any lien, assignment of, or power of attorney relative to wages, salary, earnings, income or commission." Stats. 1933, p. 1496. This is substantially the same definition as that found in the original Personal Property Brokers Act of 1909* and is identical with the definition found in the present act. Stats. 1939, pp. 2667, 2874.

It is claimed by the defendants that only lenders who take liens on personal property exclusively are embraced by the definition. Therefore, they reason, the exemption from the general interest limit which is accorded duly licensed personal property brokers by the 1934 amendment to the Constitution is limited to lenders taking personal property or wage assignments as security, and may not be enlarged by the Legislature so as to grant the special exemption to lenders who take real property security. See Pasadena University v. Los Angeles County, 190 Cal. 786, 214 P. 868. Such an enlargement, it is argued, would amount to an amendment of the Constitution which may be accomplished only by vote of the people. Const., art XVIII, sec. 1.

The statute to which the defendants object as being in excess of legislative authority and on which the plaintiff relied in making the loan here involved developed as follows: Prior to 1939 there had been no express statutory prohibition against the taking of real property security by personal property brokers. In that year there was included in the Personal Property Brokers Act a provision that "No licensee shall take a lien upon real estate as security for any loan made under this act, except such lien as is created by law upon the recording of an abstract of judgment." Stats.1939, pp. 2667, 2874, sec. 16, para. 4. An amendment to the act in 1945 declared that that provision (as well as other enumerated restrictive provisions) "shall not apply to any bona fide loan of a principal amount of five thousand dollars ($5,000) or more, or to a duly licensed personal property broker in connection with any such loan, provided the provisions of this paragraph are not used for the purpose of evading this act." Stats.1945, p. 2321, sec. 4(d).

[2, 3] The basic assumption in the defendants' argument that the definition of personal property broker found in the 1933 Personal Property Brokers Act which was incorporated in the 1934 constitutional amendment, limited that class of lenders to those who take only personal property security or wage assignments is shown to be unfounded by an examination of the wording of the definition and the circumstances which existed at the time of its adoption. In 1909 when the term was first defined by statute no general usury law was in effect. With the exception of pawnbrokers who had been regulated since 1861 lenders and borrowers could "agree in writing for the payment of any rate of interest." Civ.Code, sec. 1918. Usurious practices flourished during that period in California as elsewhere throughout the United States, and especially where loans were made to needy borrowers on the security of household furniture and other personal property or wages. Hubachek, Annotations on Small Loan Laws, (1935) pp. 1, 92. To curb abuses with respect to all loans where such security was taken, the 1909 Personal Property Brokers Act fixed a 5 per

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* "Section 1. That every person or corporation engaged in the business of loaning or advancing money or other thing and taking in whole or in part as security for such loan or advance any chattel mortgage, bill of sale or other obligation or contract involving the forfeiture of rights in or to personal property, the use or possession of which is retained by other than the mortgagee or lender, or engaged in the business of loaning or advancing money or other thing, and taking either in whole or in part as security therefore any lien on, assignment of or power of attorney relative to wages, salary, earnings, income or commissions, shall be held, and, for the uses and purposes of this act, is hereby declared and defined to be a personal property broker." Stats.1909, p. 969.

cent per month limit on charges, St. 1909, p. 969, in 1911 reduced to 2 per cent, St. 1911, p. 978, of those defined in the act as personal property brokers. All who "engaged in the business of loaning or advancing money * * * and taking in whole or in part as security for such loan" liens on personal property or wage assignments were no longer free to exact unlimited charges. The use of the phrase "in whole or in part" indicates plainly that the legislature intended to subject to the restrictions of the act not only lenders whose security consisted entirely of liens on personal property or wage assignments, but also those whose loans were only partly so secured, and it made no difference whether the loans were also secured by real property liens.

An interpretation of the meaning of the definition in the 1909 act favorable to the claim of the defendants is not warranted by the decisions in Eaker v. Bryant, 24 Cal. App. 87, 140 P.2d 310, and In re Stephan, 170 Cal. 48, 148 P. 196, Ann.Cas.1916E, 617, which sustained the basis of classification in the 1909 act as amended in 1911. Each of those cases decided that persons making loans in whole or in part on the security of personal property could be subjected to statutory prohibitions as to interest rates in view of the abuses which the Legislature was seeking to remedy. The further question of whether personal property brokers might take additional security in the form of real estate liens, a type of security at which the regulatory statute was not directed, was not raised.

[4] In the years since 1909 personal property brokers have been affected by numerous changes in loan laws. The historical development of these laws has been discussed in Carter v. Seaboard Finance Co., supra, 33 Cal.2d 564, 203 P.2d 758, and In re Fuller, 15 Cal.2d 425, 102 P.2d 321. The rate provisions of the first Personal Property Brokers Act as amended in 1911 and again in 1931 were found to conflict with the maximum rate established for all lenders by the initiative usury law of 1919, Stats.1919, p. lxxxiii, Gen. Laws, Act 3757, and were invalidated, Beneficial Loan Society, Ltd., v. Haight, 215 Cal. 506, 11 P.2d 857; since 1931 brokers have been required to be licensed and to be subject to the regulations and supervision of the Commissioner of Corporations, Stats.1931, p. 558; in 1909 personal property brokers were limited as to the interest and charges they could make while other lenders were unregulated, but they may now charge more than other lenders generally upon compliance with licensing and regulatory provisions. Stats.1939, pp. 2667, 2874. Despite these and other changes, the original definition which did not preclude personal property brokers from taking as partial security liens on real property, has not substantially changed. Therefore in 1934 when the amendment to the Constitution was adopted, they were not prohibited from taking such security. It was within the regulatory power of the Legislature to prevent brokers from taking real property security as was done in 1939. It follows from what has been said that the Legislature could in 1945 reinstate the right to take liens on real estate as security.

But it is argued by the defendants that if personal property brokers are permitted to take real estate liens, the very basis upon which the classification and regulation of personal property brokers has in the past been sustained as reasonable would be removed and constitutional provisions prohibiting discriminatory legislation would be violated. Const., art. I, secs. 21 and 11. It is claimed that the only justification for permitting personal property brokers to exact greater charges than non-business lenders, by means of an exemption to the general usury provision of the Constitution, is that the business of lending on the security of personal property is unique. Eaker v. Bryant, supra, 24 Cal.App. 87, 140 P. 310, the first decision sustaining the classification is cited. In that case it was said 24 Cal.App. at page 92, 140 P. at page 312: "A man engaged in the business which the statute here under review calls 'personal property broker' also 'does a business peculiar to himself.' * * * Likewise there is as much difference between the business of a personal property broker and that of one who lends money upon real estate security as there is between the latter business and that of a pawnbroker." We are asked to hold the 1945 amendment invalid for the reason that if effective the classification would lose its distinctiveness. We are then urged to declare the loan here involved void by virtue of section 21 of the Personal Property Brokers Act which declares contracts in violation of the act void and states that licensees shall not have the right in such cases to collect any principal, interest or charges whatsoever. Stats.1939, pp. 2667, 2874, sec. 21.

[5, 6] The characteristics peculiar to the business of lending on the security of personal property or wages do not disappear merely because loans of $5000 or more by personal property brokers may also be secured by real estate. Furthermore the useful and reasonable purpose served by the segregation of this class of lenders remains unaffected. Under the Constitution the regulation of personal property brokers has been committed to the Legislature. All members of this class, irrespective of the size of loans made by them, must obtain a license; all are subjected to certain regulatory features of the Personal Property Brokers Act; all must submit to supervision by the Commissioner of Corporations. In 1945 the Legislature determined that certain restrictive features of the act, including the prohibition against holding real estate liens as security, should be removed as to loans of $5000 or more. The Legislature might reasonably conclude that real estate security is more appropriate to loans of $5000 or more. However, the 1945 amendment is not to be construed as permitting those holding personal property brokers licenses to lend solely on the security of real property liens, for so construed it might cause the classification of personal property broker to lose its distinctiveness. When read in conjunction with the definition to which we have referred, the 1945 amendment is found to be an authorization to licensees to take real estate security in part when making loans of $5000 or more so long as the good faith requirements of the statute are satisfied.

Further arguments of the defendants claiming that the loan was usurious and demanding treble the interest paid because of violations of the 1919 usury law, are premised on the erroneous supposition that the Legislature could not permit personal property brokers to take any real property security and do not require discussion.

The judgment is affirmed.

GIBSON, C. J., and EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

The majority opinion cannot stand for two reasons: (1) It permits the legislature by the 1945 amendment to the Personal Property Brokers Act to enlarge the meaning of the term "personal property broker" beyond the scope thereof as used in the 1934 amendment to the Constitution. Cal. Const., Art. XX, sec. 22. (2) The classification permitting such brokers to charge interest on real estate loans in excess of that others may charge is unreasonable and without a rational basis.

It is conceded in the majority opinion that the exemption of personal property brokers from the 10% maximum interest rate by the 1934 constitutional amendment is governed by the *then existing definition of a personal property broker,* inasmuch as the Constitution did not define "personal property broker". The law at that time described such persons as those lending money and taking as security therefor *personal property.* We must consider that definition in the light of the court decisions on the subject. In Matter of Application of Stephan, 170 Cal. 48, page 51, 148 P. 196, page 197, Ann.Cas. 1916E, 617, the court upheld the classification of personal property brokers but did so on the ground that the security was *personal property,* the court stating: "But we think it must now be conceded that, in the course of the development of modern civilization, the business of *loaning money on chattel mortgages,* or like instruments, and that of loaning or advancing money on assignments or other transfers of wages, earnings, and the like, as well, have become so well known and so capable of classification and recognition that the Legislature is entirely justified in describing them as a peculiar class and giving them the name of personal property brokers. Their business is as distinct in many respects from other classes of business as is that of a pawnbroker. Nor can it be denied that abuses have grown up in connection therewith which the Legislature might well deem to call for the regulations imposed by this law." Likewise, in Eaker v. Bryant, 24 Cal.App. 87, 140 P. 310, the court considered the old personal property brokers act and referred to exemptions therein of real estate mortgage security, stating: "This legislation has been preceded by other acts whereby the Legislature attempted to limit the rates of interest and charges upon loans on *chattel mortgage on certain personal property.* * * *

"The act of 1909, as amended in 1911, applies equally to all classes of *personal property* and to all loans regardless of the amount thereof. In these respects at least it is not subject to the objections which were sustained as against the former statute. But the respondent insists, nevertheless, that the statute attempts to pick out *certain money lenders,* to wit, those engaged in lending money and taking as security *chattel mortgages,* or bills of sale, or assignments of salary, etc., and to define such money lenders as personal property brokers, and to prescribe for them alone a maximum amount of interest which they may charge, and to impose upon them alone the burden of issuing tickets to borrowers, designating the nature of the security, etc. It is pointed out that the *statute* by its terms *does not include loans* upon pledge, or loans without security, or loans upon the security of bank books, bank deposits, interests in estates, or contracts, or loans *secured by mortgage on real property.* * * *

"*Likewise there is as much difference between the business of a personal property broker and that of one who lends money upon real estate security* as there is between the latter business and that of a pawnbroker. * * *

"*And since the lending of money upon the security of real estate,* or of bank deposits, or of interests in estates, or of contracts, *has not been included within the prohibitions of this statute,* we may reasonably assume that the Legislature has not found that the business pertaining to such loans are usually accompanied by the abuses which the Legislature was seeking to remedy." [Emphasis added.] That is a square holding that loans on realty are not included in the old Personal Property Brokers Act. Precisely the same propositions were declared very recently by this court in Carter v. Seaboard Finance Co., 33 Cal.2d 564, 203 P.2d 758, 766, where it is said: "* * * the legislature in 1909, Stats. 1909, p. 969, [2 Deering's Gen.Laws, Act 5825] attempted *to regulate the business of making small loans secured by personal property.* This was the first Personal Property Brokers Act. That statute defined a personal property broker as one engaged in the business of loaning money on the security of *personal property.* * * *

"The classification of personal property brokers as a distinct class has consistently been upheld by California courts as justified by the unique problems of that class. [Citing cases.] The Assembly Interim Committee, whose report has been referred to, in 1935 recommended that the classification be retained in future legislation, setting forth the special problems met with in connection with personal property brokers, and stated: 'In the sense that *personal property is used as security, it is distinguished from real property by being movable, destructible, difficult to record as to property rights therein,* susceptible of abuse as to rights of third persons, and not subject to a period of redemption after foreclosure. These differences make personal property less valuable as security both to the borrower and to lender; *special regulations are required to overcome these difficulties.* Borrowers on personal property are subject to temptations in respect to its treatment after a lien is created, and lenders are tempted to abuses after default. This *type of security* and the fact that its possession is left with the borrower present problems of regulation peculiar to the class.'" [Emphasis added.] Moreover, the very name itself—"personal property broker", indicates that lenders on the security of realty are not included.

It is no answer to say that a personal property broker may take land as security as long as he also takes personalty, because the distinction between such loans then becomes absolutely meaningless and we have a clear discrimination. A broker could take any nominal article or chattel and have realty as the only real security of any value. Thus, although ostensibly in the personal property security loan business, he is in effect in the real property security loan business. Hence, we have nothing left of the distinction between the two, which brings us to the discrimination feature. This discrimination is evidenced by the illustration I pointed out in my dissent in Carter v. Seaboard Finance Co., supra. The only basis for distinguishing between loans on personalty and realty is that the latter are more safe and less expensive to handle and therefore the *interest rate may be less.* But here the majority say that the interest rate may be *without limit* when the lender has *more security*—realty, in addition to the personalty. In other words, he gets the safety and economy of a realty loan, yet because he received additional collateral, he should not be limited in his interest charges. If that is a reasonable basis for a legislative classification, so would the proposition that strong men may carry concealed weapons for their own protection but the weak may not, for the bigger they are the harder they fall. The money lender may be entitled to his "pound of flesh", but he should be required to take it lawfully, and I do not believe that there are any considerations of justice or public policy which justify this Court in placing a strained construction upon the plain language of the Constitution in order to permit the money lender to continue to exact more than the traffic can bear. This is what the majority decision accomplishes in this case.

I would, therefore, reverse the judgment.

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92 Cal.App.2d 735

MECUM v. OTT et al.

Civ. 7517.

Sac. 5929.

District Court of Appeal, Third District,
July 7, 1949.

1. Abatement and revival 🔑55(1)

Right of action for loss or destruction of property, either in existence or in expectancy, survives death of tort feasor, and may be maintained against his estate as provided by statute. Probate Code, § 574.

2. Abatement and revival 🔑55(1)

Regardless of the proportion of damages sought for personal injuries as compared with damage to property, if the complaint in an action founded on tort alleges destruction of property interests or estate, the cause does not abate at the death of the alleged tort feasor, but may be maintained under statute. Probate Code, § 574.

3. Executors and administrators 🔑228(3, 5)

Assuming that presentation of a claim against estate of deceased tort feasor was prerequisite to maintenance of suit for damages, growing out of tort, claim containing an itemized demand for payment of personal injuries and waste and destruction of property, was sufficient, but in any event where sufficiency of the claim was not questioned by special demurrer, objection was waived.

4. Executors and administrators 🔑228(3)

Claim against estate need specify only such details as will inform representative of estate and probate court of amount and nature of indebtedness and need not state claim with the same detail and exactness of a pleading.

5. Abatement and revival 🔑55(1)
Executors and administrators 🔑431(2)

Right of action of automobile accident victim who allegedly sustained personal injuries and who suffered waste and destruction of his property, property rights and estate, survived death of alleged tort feasor, and it was not necessary to file claim with estate of the deceased tort feasor as prerequisite to maintaining action against estate under the probate code. Probate Code, §§ 574, 707.

◆

Appeal from Superior Court, Sutter County; Arthur Coats, Judge.

Action by Preston M. Mecum against E. A. Ott, as administrator of the estate of Richard D. Bishop, deceased and another for personal injuries and property damage. From a judgment rendered against plaintiff pursuant to an order sustaining the named defendant's demurrer to the complaint without leave to amend, the plaintiff appeals.

Reversed with direction.

Price & Morony, Chico, Richard H. Fuidge, Marysville, for appellant.

Russell A. Harris, Sacramento, for respondent.

THOMPSON, Justice.

Plaintiff appealed from a judgment which was rendered against him pursuant to an order sustaining defendant Ott's demurrer to the complaint without leave to amend the pleading.

The amended complaint against the administrator of the estate of Richard D. Bishop, deceased, and Dorothy Elizabeth Bishop alleges personal injuries and property damages sustained by plaintiff in an automobile collision, as the result of alleged negligence of Mr. Bishop, the deceased, in an automobile casualty which occurred December 25, 1945; that Richard D. and Dorothy Elizabeth Bishop owned and occupied their car at the time of the accident; that plaintiff was driving his machine at the time of the accident, in which his mother and sister were riding; that both his mother and sister died as a result of the accident, and plaintiff sustained serious personal injuries which are partially permanent, and also damage to or loss of wearing apparel of the value of $69.50, and that he suffered "waste and destruction of his property, property rights and estate in the further sum of Ten Thousand Dollars" on account of said casualty; that the said Richard D. Bishop subsequently died and an administrator of his estate was duly appointed; that plaintiff presented and filed his claim for said personal injuries and property damage with the administrator on October 31, 1946, which was not allowed. The rejected claim is attached to the amended complaint as an exhibit, and contains an itemized demand for payment of said personal injuries and "waste, and destruction of the property, property rights, and estate of the said claimant in the sum of $10,183.90" including the bill of a named physician in the sum of $25; ambulance service $12.75; hospital charges $61.65; one suit of clothes $45; one raincoat $17.50, and one hat $7, making a total of such property loss of $183.90, together with general losses and damages in the further sum of $10,000.

Defendant's demurrer to the amended complaint was sustained, without leave to amend, upon the evident theory that the cause abated upon the death of Richard D. Bishop, the alleged tort feasor. Judgment was rendered accordingly.

Plaintiff asserts that the cause of action survived, under Section 574 of the Probate Code, as held by Hunt v. Authier, 28 Cal. 2d 288, 169 P.2d 913, 171 A.L.R. 1379, because the complaint alleged destruction and loss of property as a result of the negligence and tort of the deceased, and that a claim for said losses had been duly presented to the estate and rejected. The claim was properly pleaded.

[1] We are of the opinion the court erred in sustaining the demurrer to the amended complaint without leave to amend the pleading. It has been recently held the right of action for the loss or destruction of property, either in existence or in expectancy, survives the death of the tort feasor, and may be maintained against his estate as provided by Section 574 of the Probate Code. Hunt v. Authier, supra; Moffat v. Smith, Cal., 206 P.2d 353; Nash v. Wright, 82 Cal.App.2d 475, 186 P.2d 691. In the Hunt case, supra, the complaint alleged that Dr. Verne C. Hunt was shot and killed by Ephrem Mounsey, who then took his own life. The doctor's

surviving widow and children brought suit against the duly appointed administratrix with the will annexed of the estate of Mounsey, deceased, based on a rejected claim which was filed in that estate for $150,000 damages "for waste and destruction of their property, property rights and estate." The trial court sustained defendant's demurrer to the complaint without leave to amend. On appeal the Supreme Court held that the action for wrongful death of Dr. Hunt, under Section 377 of the Code of Civil Procedure survived the death of the tort feasor. It was held that the action was properly maintained under Section 574 of the Probate Code, since the complaint alleged waste and destruction of plaintiffs' property and estate. The word "property" as it is used in the last mentioned section was construed to include property in being or in expectancy. In the present case the destruction of tangible personal property in existence at the time of the accident is alleged and relied upon. In the Hunt case the judgment which was rendered pursuant to the order sustaining the demurrer was reversed.

In the Moffat case, supra, which was based upon facts similar to those of the present action, a judgment of dismissal which was rendered pursuant to an order sustaining a demurrer to the complaint without leave to amend the pleading was reversed by this court with direction to overrule the demurrer. That suit also grew out of an automobile collision in which the plaintiff was personally injured as the result of alleged negligence of the defendant, who subsequently died. A claim for said damages was duly filed against the estate of said deceased. It was rejected. The complaint and the claim included alleged property damages in the sum of $50,000 for loss of earning ability as a result of the personal injuries received. This court held, in accordance with the Hunt case, that the action survived the death of the tort feasor, and that the suit was properly maintainable under Section 574 of the Probate Code. Upon hearing of the Moffat case by the Supreme Court, the decision of this court was approved and adopted.

In the case of Nash v. Wright, 82 Cal.App.2d 467, 186 P.2d 686, the surviving widow and children of Ned A. Nash, who was killed in an automobile casualty, brought suit for damages for unlawful death caused by the negligence of the alleged tort feasor. The trial court directed a verdict for the defendants. On appeal that judgment was reversed. After the appeal in that case had been taken, one of the defendants, B. W. Belyea, died, and the executor of his will was appointed and qualified. The executor was substituted as a party defendant. A claim was then presented to the estate for damages growing out of said automobile casualty, and disallowed. A separate appeal was taken from the order substituting the executor for said deceased defendant, Belyea. It was contended the cause of action against Belyea abated upon his death, since the action was founded on tort. C.C.P., sec. 340, subd. 3. But the Appellate Court decided, Nash v. Wright, 82 Cal.App.2d 475, 186 P.2d 691, that the cause survived under Section 574 of the Probate Code, since the action included a demand for damages and destruction of plaintiff's property rights and estate, to wit, the loss of society, comfort and support of the plaintiffs, on account of the wrongful death of Mr. Nash. Upon the authority of the Hunt case, supra, the order of substitution of the executor was affirmed.

[2] The foregoing authorities determine that, regardless of the proportion of damages sought for personal injuries as compared with damage to property, in a suit founded on tort, if the complaint alleges destruction of property interests or estate, the cause does not abate at the death of a tort feasor, but may be maintained under Section 574 of the Probate Code. Those cases appear to be conclusive of this appeal, adversely to the respondent.

[3, 4] In this case it is further urged by the respondent that no cause for damage to property rights was adequately alleged because the claim which was filed in the estate states mere conclusions in that regard and therefore fails to sufficiently state

a good cause of action. Assuming, without so deciding, that the presenting of a claim in the estate of a deceased tort feasor is a prerequisite to the maintenance of a suit for damages growing out of a tort, we are of the opinion the claim which was filed in this case was sufficient to inform the defendants and the administrator of the nature and amounts of the claim, including destruction and damage to the estate and property rights of plaintiff. The sufficiency of the claim which was filed in this case was not raised by special demurrer. It was therefore waived. Hunt v. Authier, supra. The Probate Code does not prescribe the details with which a claim against an estate must be presented. It is necessary to specify only such details as will inform the representative of the estate and the Probate Court of the amount and nature of the indebtedness. A creditor's claim is not required to be stated with the same detail and exactness of a pleading. Tabata v. Murane, 24 Cal.2d 221, 230, 148 P.2d 605. In the case of Syler v. Katzer, 12 Cal.2d 348, 84 P.2d 137, 119 A.L.R. 422, it is said in that regard: "The contention is then, that the claim was insufficient in form, and reliance is placed on such cases as Etchas v. Orena, 127 Cal. 588, 60 P. 45, and Estate of Steuer, 77 Cal.App. 584, 247 P. 211. Without discussing these in detail, it may be said that there is no necessity that a creditor's claim be drafted with precision and completeness of a pleading. The only requirement is that it state such facts as will apprise the executor or administrator of the amount of the demand. See Standiford v. Cantrell, 87 Cal.App. 736, 262 P. 800; United States Gypsum Co. v. Shaffer, 7 Cal.2d 454, 60 P.2d 998. The claim in the instant case clearly called to the attention of the executor the fact of the services, the period during which they were rendered (up to the time of death), and the amount demanded. If any uncertainty remained, it was incumbent upon the executor to call for clarification. * * *"

Regarding the waiver of a more specific claim, the court further said in the preceding case that: "* * * No demurrer was filed to the complaint on the ground relied upon herein, and the case was tried on other issues. The present contention appeared for the first time on motion for new trial. Under such circumstances, any formal defects in the creditor's claim must be deemed waived by the trial on the merits." See, also, Tabata v. Murane, supra.

In this case the demurrer to the complaint failed to specify the insufficiency of the claim.

[5] Moreover, since the present case is founded upon damages arising solely from alleged tort, and not upon contract, we are of the opinion it was not necessary to file a claim with the estate of the deceased tort feasor, under Section 707 of the Probate Code, as a prerequisite to maintaining the action against the estate under Section 574 of that Code. Kagee v. Bencich, 27 Cal.App.2d 469, 81 P.2d 265; Thompson v. Byers, 116 Cal.App. 214, 218, 2 P.2d 496; Hardin v. Sin Claire, 115 Cal. 460, 47 P. 363; Millar v. Millar, 51 Cal. App. 718, 728, 197 P. 811; People v. Hochwender, 20 Cal.2d 181, 184, 124 P.2d 823; Leverone v. Weakley, 155 Cal. 395, 401, 101 P. 304; 11A Cal.Jur. 713, sec. 506; Pierce v. Johnson, 136 Ohio St. 95, 23 N.E. 2d 993, 125 A.L.R. 871.

The judgment is reversed, and the court is directed to overrule the demurrer to the amended complaint and permit respondent to answer the pleading.

ADAMS, P. J., and PEEK, J., concur.

MOORE v. SATIR.

Civ. 3930.

District Court of Appeal, Fourth District, California.

July 11, 1949.

Rehearing Denied Aug. 4, 1949.

Hearing Denied Sept. 8, 1949.

1. Accord and satisfaction ⚷1, 27

Whether agreement amounts to accord and satisfaction is question of parties' intention and hence a fact question.

2. Appeal and error ⚷1001(1), 1012(1)

A jury's or trial court's determination of issue as to existence of accord and satisfaction will not be disturbed on appeal, unless there is no evidence supporting it.

3. Accord and satisfaction ⚷1

The elements of "accord" are proper subject matter, competent parties, consent or meeting of minds of parties, and consideration.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Accord".

4. Accord and satisfaction ⚷9

A ranch foreman's receipt of full amount of his employer's bonus check in cash on day following their settlement of bonus account for such amount and foreman's return of note previously given him by employer sufficiently showed consideration constituting element of accord.

5. Accord and satisfaction ⚷26(3)

In action for balance due for services as defendant's ranch foreman, evidence supported trial court's finding of accord and satisfaction of plaintiff's claim for bonus of 10 per cent of net profits from defendant's farming operations.

◆

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Action by John D. Moore against George Satir for accounting and recovery of a balance due for services as defendant's ranch foreman. Judgment for defendant, and plaintiff appeals.

Affirmed.

D. M. McGahey, El Centro, for appellant.

Clarence B. Smith, C. W. Dickenson, El Centro, for respondent.

MUSSELL, Justice.

Plaintiff brought this action for an accounting, and to recover a balance claimed to be due for services rendered as ranch foreman for the defendant over a period of approximately four years. The parties agreed that plaintiff was employed by defendant as general foreman in defendant's farming operations in Imperial Valley in December, 1939, and remained so employed until about the first of August, 1944; that plaintiff received an agreed wage of $25.00 per week, a house and a car furnished, and the privilege of keeping a cow and poultry upon the ranch; that in the summer of 1942 the weekly wage was increased to $30.00 per week and that the weekly wages were all paid.

The controversy herein arises from the claim of plaintiff that defendant promised and agreed to pay him, in addition to said weekly wages, a bonus of 10% of all net profits from defendant's farming operations, beginning in December, 1940, and payable at the end of each crop season on or about July of each year.

The testimony of plaintiff on this subject was vague and indefinite. He testified that defendant said he was willing to pay a percentage of his business if plaintiff made it earn money for him, and that defendant didn't exactly say "I will give you a certain amount", but said, "My business should stand 10%"; that some time in July of 1941, defendant hired another man to assist plaintiff and stated that the business would stand 15% bonus to be paid to the "two of you" and that plaintiff was to receive 10%.

Defendant testified that in July of 1941, he told plaintiff that he was going to get more land and that if plaintiff would stay and help him out he would give him 7% on the net profit of the farm. When questioned as to how the net earnings would be ascertained defendant stated, "I told him take expenses out and if there is any profit left I will give him 7%. Anything the cost of the crops or anything else, any profit I give you 7%." Defendant denied having agreed to pay plaintiff a bonus of

10%. No accounting was made by the parties at any time but it is conceded that plaintiff received a promissory note from defendant in the sum of $1250.00 at the close of the 1941 harvest, and various sums of money as bonus payments during 1942, 1943 and 1944, which sums amounted to $1055.00.

In July of 1944, shortly before the crop season was over, plaintiff and defendant participated in a final discussion as to the bonus account. At that time defendant wrote out a check payable to plaintiff for the sum of $6000.00 in full settlement of the bonus account and demanded as a part of the settlement that plaintiff return the promissory note for $1250.00. Plaintiff cashed the check the day following the discussion and sent the promissory note to defendant.

Plaintiff contends that the check was not accepted in full settlement of the bonus due him, but that he took the check as part payment. However, it appears from his testimony that both he and defendant expected, and agreed to, a settlement at the time of the final discussion; that the check for $6000.00 was for four years bonus; that neither of the parties knew the amount of bonus and that it would take some months to get an accurate audit; that defendant considered the acceptance of the check and the return of the note as a full settlement. Plaintiff further testified that the day following the receipt of the check he was told by defendant to take what had been given him or return the check and have the books audited.

Defendant's testimony was that he gave plaintiff the $6000.00 check in full payment of the bonus, plus the return of the note, and that he so informed plaintiff at the time.

There was a conflict in the evidence as to whether plaintiff accepted the check for $6000.00 and returned defendant's note in full satisfaction of the amount due him as a bonus. The conflict was resolved in favor of the defendant by the trial court by its finding that "plaintiff agreed to accept the sum of Six Thousand ($6,000.00) in extinction of all obligations owed by defendant to plaintiff for percentage bonus, and did accept the same and has retained the benefits thereof, and defendant's obligation to plaintiff is thereby satisfied. Each of the parties have executed and performed their respective duties and obligations under the contract of employment, and defendant has paid to plaintiff all compensation required thereunder. The aforesaid settlement is an accord and satisfaction between the parties."

The only issue involved in this appeal is whether there is any substantial evidence to support the trial court's finding and conclusion that an accord and satisfaction was effected between the parties. If there is such evidence, the judgment must be affirmed.

[1, 2] The question, whether an agreement amounts to an accord and satisfaction, is a question of intention of the parties and is therefore a question of fact. D. E. Sanford Co. of San Francisco v. Cory Glass Coffee Brewer Co., 85 Cal.App.2d 724, 730, 194 P.2d 127. As was said in Kinkle v. Fruit Growers Supply Co., 63 Cal.App.2d 102, 112, 146 P.2d 8, 13:

"The question of the existence of an accord and satisfaction depends on the mutual intention of the respective parties, and unless there is a lack of evidence to support the finding of the jury or the decision of the trial court in that regard, their determination of that issue will not be disturbed on appeal."

[3] The elements of an accord are: (1) A proper subject matter; (2) competent parties; (3) consent, or meeting of the minds of the parties, and (4) consideration. Gibbons v. Brewster, 82 Cal.App.2d 435, 442, 186 P.2d 459.

[4] Plaintiff concedes that there were competent parties and a proper subject matter in the instant case but argues that there was no consideration shown and that there was no assent or meeting of the minds of the parties. The evidence shows clearly that neither of the parties knew the amount, if any, due plaintiff at the time of the July, 1944, settlement. Plaintiff was not compelled to accept the check for $6000.00 and we conclude that a consideration was sufficiently shown by the fact that plaintiff received the full amount of the check in cash the day following the settlement and

the amount which plaintiff might ultimately recover at some future date might be more or less than the cash received. Plaintiff's contention that there was no assent or meeting of the minds of the parties is directed principally to the proposition that his acceptance of the check did not amount to an accord and satisfaction. However, there was evidence before the trial court of the relationship and dealings of the parties for several years; that the parties were both unaware of the amount due plaintiff at the time of the acceptance of the check; that an accountant's report, from which the correct amount of bonus could be ascertained, was not available for several months after the settlement; that after cashing the check plaintiff returned defendant's promissory note in the sum of $1250.00 as agreed; that plaintiff had never insisted on an accounting from the time of his first employment and that plaintiff kept a partial record of produce sold.

[5] The trial court had both parties before it and evidently believed the testimony of defendant. We cannot here say that there was no substantial evidence to support the court's finding that there was an accord and satisfaction.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

92 Cal.App.2d 455

LONG v. STANDARD OIL CO. OF CALIFORNIA et al.

Civ. 16672.

District Court of Appeal, Second District, Division 3, California.

June 16, 1949.

Rehearing Denied July 5, 1949.

Hearing Denied Aug. 11, 1949.

1. New trial 🔑163(1)

Memorandum of decision of defendant's motion for new trial, deciding that judge had considered question of sufficiency of evidence of defendant's negligence and had concluded that he could not determine it insufficient, and referring to certain instructions and deciding that court was required to grant motion on ground instruction was erroneous and had misled the jury was sufficient direction to justify clerk in making minute entry of order granting motion. Code Civ.Proc. § 166.

2. Trial 🔑199

Charge that father could maintain action for injury or death of minor child when caused by wrongful act or neglect of another and that in action such damages could be given as under all circumstances might be just should not have been given. Code Civ.Proc. §§ 376, 377.

3. Appeal and error 🔑930(2)

If rule of law is stated in one instruction and a pertinent exception to the rule is stated in another, it is to be assumed that jurors of ordinary intelligence would consider the two together and would not disregard the exception.

4. Trial 🔑296(4)

In father's action for death of four-year-old boy by drowning in water-filled excavation, omission of element of contributory negligence from instruction that father could maintain action for death of minor child when death is caused by wrongful act or neglect of another and that damages may be given did not render instruction prejudicially erroneous in view of other adequate given instructions. Code Civ.Proc. §§ 376, 377.

5. Trial 🔑253(9)

In father's action for wrongful death of four-year-old son, instructions stating that burden was on defendant to establish defense of contributory negligence by preponderance of evidence were not objectionable as permitting jury to understand that defendant's evidence alone was to be considered on issue of contributory negligence.

6. Trial 🔑236(1)

In charge that testimony of one witness worthy of belief was sufficient for proof of any fact and "would justify a verdict in accordance with such testimony" even if a number of witnesses testified to the contrary if from whole case considering credibility of witnesses jury believed balance of probability pointed to accuracy of the one witness, quoted phrase was improperly included.

7. Appeal and error ⚷1064(1)

In wrongful death action, charge improperly indicating that testimony of one witness worthy of belief would justify verdict in accordance with such testimony even if a number of witnesses testified to the contrary, though improper, was not prejudicial.

8. Negligence ⚷47

Landowner may not construct or maintain a trap or pit fall into which he knows or has reason to believe a trespasser will probably fall.

9. Negligence ⚷136(15)

Whether excavation made by oil company for pipe line repair, which filled with oil and water and remained open for three weeks while guarded by low hanging rope involved unreasonable risk of death to children so as to impose liability on oil company for death of four-year-old child by drowning was for the jury.

◆

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by Marion C. Long, Jr., against the Standard Oil Company of California, a Delaware corporation, and others, to recover damages for the drowning of plaintiff's minor son. Verdict for plaintiff and from an order granting a motion for a new trial, plaintiff appeals, and named defendant appears as respondent.

Order reversed.

Licker & Bernstein, Los Angeles, David Licker, Los Angeles (William M. Wallace, Los Angeles, of counsel), for appellant.

Reginald I. Bauder, Los Angeles (Henry E. Kappler, Los Angeles, of counsel), for respondents.

SHINN, Presiding Justice.

Plaintiff was awarded judgment on a verdict for damages resulting from the drowning of his four-year-old son. Defendant's motion for new trial was granted and plaintiff appeals from the order.

The order granting a new trial did not specify insufficiency of the evidence as one of the grounds. The trial judge stated in a memorandum of his ruling, and an entry in the minutes of the department clerk also stated, that the order was granted upon the ground that an instruction that was given was deemed to be erroneous and prejudicial to the defendant.

The contentions of the parties are the following: Plaintiff denies that the court made the order within 60 days after the filing of defendant's motion for new trial, and seeks a reversal of the order upon that ground. He also claims that there was no error in the instructions which would warrant the granting of a new trial. Defendant insists that the order was made in time and seeks to justify it upon two grounds, namely, that the court committed prejudicial error in its instructions, and even if no error had been committed the order should be affirmed for the reason that there was no evidence whatever that defendant was guilty of negligence or breach of duty in maintaining the premises upon which the boy was drowned.

[1] Defendant's motion for new trial was filed February 10, 1948. April 10, 1948, was the last day upon which the court could grant the motion. On April 9, the motion was argued and submitted. On the same day the judge filed a "Memo of Decision of Defendant's Motion for a New Trial." It appears from the memorandum that the judge considered the question of the sufficiency of the evidence of defendant's negligence and concluded that he could not determine it to be insufficient. The memorandum referred to a certain instruction and concluded: "Under such circumstances I am compelled to grant defendant's motion for a new trial on the ground that said instruction was erroneous and misled the jury." On the same day the department clerk made the following entry: "Motion of defendant for a new trial, heretofore submitted, is granted on the grounds that an instruction given, requested by the plaintiff, was erroneous and misled the jury. Memorandum of decision

is signed and filed and copies are mailed to the attorneys." Plaintiff's argument appears to be that the memorandum itself was not a written order granting the motion, and that the clerk took it upon himself to make the minute order without any direction from the judge that he do so. The judge's memorandum, it is claimed, only indicated his intention to make an order, and did not constitute authority to the clerk to make the minute entry. The answers to the argument are obvious and conclusive. The memorandum, when handed to the clerk for filing, constituted a direction to the clerk to make a minute entry of an order granting the motion. A clerk who would not so understand it would be sadly lacking in intelligence. It must be presumed either that the clerk and the judge understood such to be the effect of the memorandum, or that they discussed it and the judge informed the clerk that the motion was granted. Since the 1929 amendment of section 166 of the Code of Civil Procedure, Stats.1929, Ch. 487, p. 849, it is settled that a motion for new trial may be disposed of in chambers by informal oral directions to the clerk. Hackel v. Los Angeles Ry. Corp., 31 Cal. App.2d 228, 88 P.2d 178. The cases relied upon by plaintiff were decided prior to the amendment and are not in point. The record discloses nothing whatever in conflict with, or much less to overcome, the presumption that official duty was regularly performed. Further discussion of the point is unnecessary. See Monterey Club v. Superior Court, 44 Cal.App.2d 351, 354, 112 P. 2d 321; Hart v. Capital Film Co., Inc., 54 Cal.App. 659, 664, 202 P. 483; Spaulding v. Howard, 121 Cal. 194, 197, 53 P. 563.

Before we enter upon a discussion of the other points, a statement of the nature of the action is required. A leak developed in an oil pipeline of defendant. In order to repair it, defendant made an excavation some 8 or 10 feet wide from east to west, 12 to 15 feet long from north to south, and about 8 feet deep. The leak was repaired on the day following the making of the excavation. The hole filled with water and some oil to a depth of about 8 feet at the south end, and it remained open until after the fatal accident to plaintiff's son three weeks later. Defendant drove into the ground several half-inch pipes which extended about three feet above the ground. One was located near the southeast corner of the excavation, one near the southwest corner, one near the northwest corner, with two posts in between. A rope was strung from post to post, fastened near the top of each post, but hung loosely to within about one foot of the ground between posts. On the east side, there was one additional post a short distance from the southeast corner with a rope stretched between the two posts. The north end of the hole was unguarded—likewise a greater part of the east side, although there was located along the east side a pile of dirt that had been excavated in making the hole. The excavation was located eight or ten feet east of the edge of the pavement on Gaffey Avenue in San Pedro. There was no sidewalk at the location. From the edge of the pavement there was a noticeable slope downward toward the excavation for a short distance, and from there on a comparatively level space. The terrain was rough and there were weeds and long grass in the vicinity, some of which extended to the edge of the excavation. The banks of the hole were vertical, or nearly so. In photographs that were taken shortly after the accident, and which were in evidence, the surface of the water was shown to be from two to three feet below the surface of the surrounding area. The witnesses described the water as muddy and brown, with traces of oil floating on top. It was also described by plaintiff as having about the same color as the surrounding earth, and there was some debris floating on top of the liquid.

It will be important to mention the character of the neighborhood. There was evidence that approximately 100 yards to the west of the excavation there were several hundred small houses constituting what is known as the Western Terrace project. Within a quarter of a mile there was another housing project known as the Banning Homes. These were veterans' housing projects. There was evidence that signs were maintained indicating that there were 1500 children living in the Banning

Homes, and 1200 in Western Terrace. There was testimony that there were several paths between the two housing locations, and that one of them extended over the spot where the hole was dug, and that this path was used by people residing in the vicinity to pass from one housing project to the other. A police officer, one of those who had searched for the body of the child and who arrived shortly after it was recovered, testified that he had traveled on Gaffey Avenue past the excavation each day, and had never noticed the hole until after the occurrence of the accident. Marion C. Long, Jr., plaintiff, lived in the Banning Homes project with his wife, Bert Long the deceased child, an older boy, a daughter, and Mrs. Long's mother. He was in the trucking business and was away from home on the day of the accident. Mrs. Long had gone into town for a dental appointment, leaving Bert with her mother, Mrs. Webb. The child was playing in front of the house, occasionally coming inside. While Mrs. Webb was feeding the baby and giving the other boy some medicine, Bert disappeared, and his body was not found until the following day. He was aged about three years and ten months. He was described as an intelligent, obedient boy, and had been told by his grandmother not to leave the vicinity of the house.

[2] The instruction which the trial court considered to be erroneous and prejudicial was given at the request of plaintiff and reads as follows: "I instruct you that a father may maintain an action for the injury or death of his minor child when such injury or death is caused by the wrongful act or neglect of another, and in such action, such damages may be given as under all of the circumstances of the case may be just." The trial court was unquestionably correct in ruling that the instruction should not have been given. Plaintiff insists that it was a proper instruction because it states the substance of sections 376 and 377 of the Code of Civil Procedure. This was not a good reason for requesting the instruction. The codes are replete with provisions relating to the rights of litigants and matters of procedure which do not relate to the duties of juries and with which they are not concerned. Statements of general principles which furnish no assistance in the determination of the issues are likely to result in confusion and should be avoided. It served no purpose to inform the jury that plaintiff had the right to maintain the action. If he had not had that right the action would not have been on trial.

[3, 4] Defendant contends that the instruction set up a formula under which plaintiff would be entitled to a verdict, and that the omission of the element of contributory negligence rendered it prejudicially erroneous. The trial court was of the same opinion and placed the order granting a new trial upon that ground. We would not hesitate to agree with this view if the issue of contributory negligence had not been covered by other instructions. The matter was, however, the subject of several instructions. We do not deem it necessary to set them out at length. The jury was instructed that one who is guilty of contributory negligence may not recover from another for the injury suffered, and that contributory negligence is negligence which, cooperating in some degree with the negligence of another, helps in proximately causing the injury of which the former thereafter complains. Another instruction was to the effect that a child is not held to the same standard of conduct as an adult, and is only required to exercise that degree of care which ordinarily is exercised by children of like age, mental capacity and experience. It was stated in another instruction that the burden was upon defendant to prove negligence on the part of plaintiff, and that such negligence contributed in some degree as a proximate cause of the death of the child. Again, the jury was instructed that if both parties were found to have been negligent the question of liability was to be determined without comparing the negligence of one with that of the other. The instructions to which we have referred sufficiently emphasized the issue of contributory negligence to bring it forcibly to the minds of the jurors. We regard it as altogether improbable that the instructions as a whole misled them or resulted in confusion. There was no conflict between the instruc-

tions on contributory negligence and the criticized instruction. If a rule of law is stated in one instruction and a pertinent exception to the rule is stated in another, it is to be assumed that jurors of ordinary intelligence would consider the two together, and not disregard the exception. Furthermore, the erroneous instruction must have been regarded by the jury as an abstract statement as to the general nature of the action. And if it is not a fact of general knowledge that parents may sue for the wrongful death of a minor child the jury, as we say, would have understood that the instruction stated only what they would have known from the mere fact that the case was on trial. We think the possibility that the jury was misled into the belief that plaintiff could recover even if his contributory negligence was shown by a preponderance of the evidence was so remote that it should have been disregarded entirely. See Stephenson v. Southern Pac. Co., 102 Cal. 143, 34 P. 618, 36 P. 407.

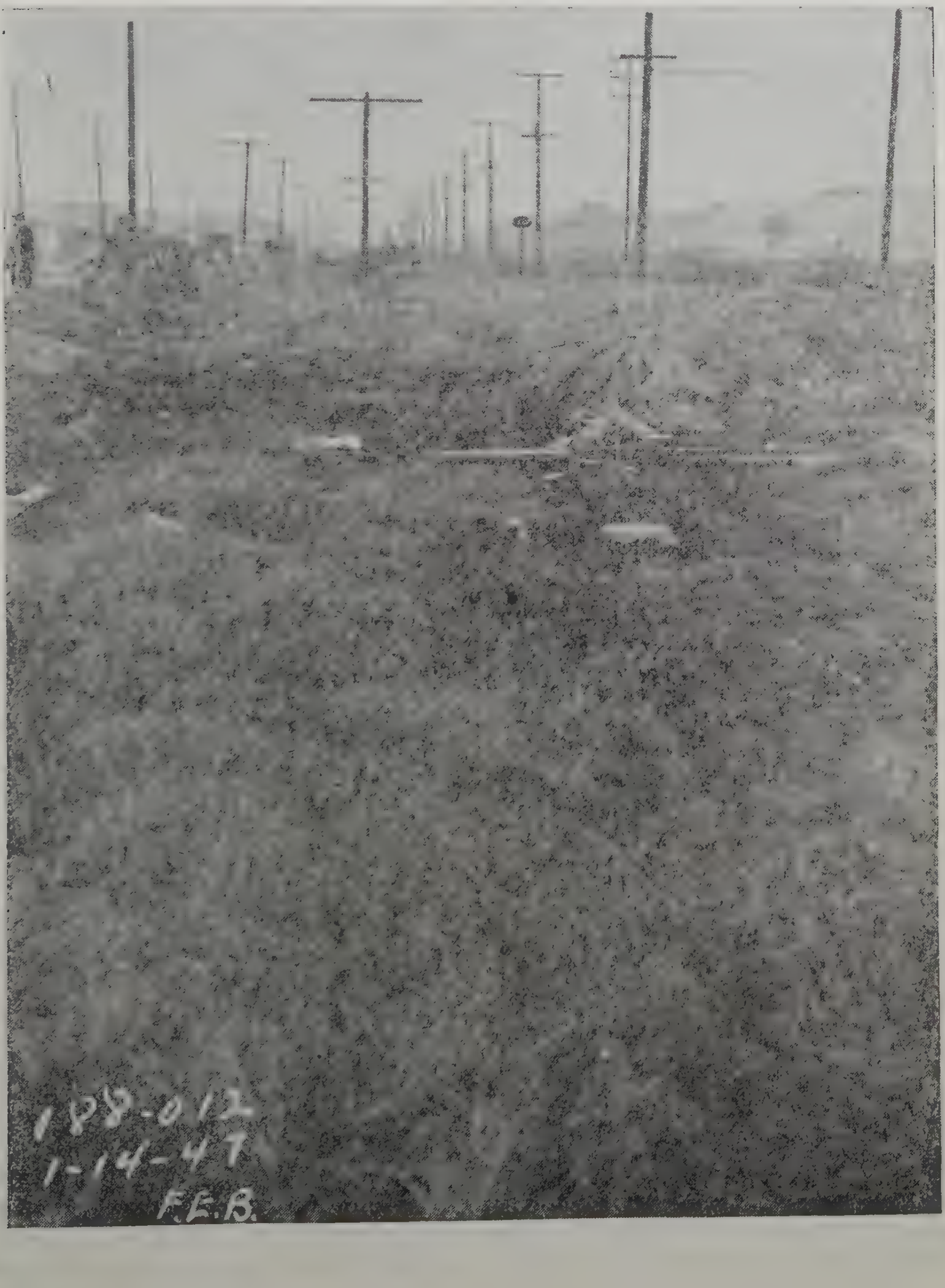
[5] Defendant also claims that the court erred in stating in several instructions that the burden was upon it to establish the defense of contributory negligence by a preponderance of the evidence. The contention is that the jury might have understood that defendant's evidence alone was to be considered in determining the issue of contributory negligence. There was nothing in the instructions which suggested the construction defendant places upon them. Moreover, the jury was instructed that in determining whether negligence, proximate cause or contributory negligence, had been proved by preponderance of evidence, they should consider the evidence of both parties, each of them being entitled to "the same benefit from evidence that favors his cause or defense when produced by his adversary as when produced by himself." The latter instruction was properly given as a separate instruction and the subject was correctly and fully covered.

[6, 7] Another instruction claimed to be erroneous reads as follows: "The testimony of one witness worthy of belief is sufficient for the proof of any fact and would justify a verdict in accordance with such testimony even if a number of witnesses have testified to the contrary, if from the whole case considering the credibility of witnesses and after weighing the various factors of evidence you should believe that there is a balance of probability pointing to the accuracy and honesty of the one witness." The words "would justify a verdict in accordance with such testimony" have no proper place in a statement of the rule. As defendant correctly says, proof of a single fact would not warrant a verdict unless it was the sole determinative fact in the case. But we cannot see how the erroneous clause could have been applied to the evidence in the case to the prejudice of defendant. It is not reasonable to believe that the jurors refrained from deciding any of the factual issues upon which liability depended. We find no error in the instructions which was sufficient to furnish a ground for a new trial.

[8] Defendant urges as an independent ground for affirmance of the order that the evidence was insufficient to justify a verdict in favor of plaintiff. As we have already stated, the trial court in ruling upon the motion expressed the opinion that there was no insufficiency of evidence to justify a finding of defendant's negligence and the absence of contributory negligence. Stated briefly, the contention is that the child was a trespasser, and that defendant had no duty to protect him from any injury he might sustain by falling into the excavation and the water contained therein. It is conceded that if the physical conditions were such as to constitute an attractive nuisance in the legal acceptation of that term, the fact that the child was a trespasser would not be a sufficient defense. However, many cases are cited by defendant in support of the rule which was stated in Demmer v. City of Eureka, 78 Cal.App.2d 708, 178 P.2d 472, 473, as follows: "It is a well settled rule of law under the decisions of the courts of this state, and one which is no longer open to question, that a pond or pool of water is not per se an 'attractive nuisance' which will subject the owner of the land upon which it is located to liability in the event that a child trespassing upon the property is attracted and lured to play therein and is injured or drowned. [Citing cases.]" Defendant says: "To impose liability upon

the defendant in this case would be to give 'lip service' to the well established rules relating to trespassers, and in effect place on the defendant the same duty imposed upon invitors." Two instructions were given upon this subject which, when read together, purported to state the issue to be determined by the jury. An instruction given at the request of defendant read as follows: "You are instructed that the mere fact that the excavation in question on the property of defendants was adjacent to a public highway is not alone sufficient to constitute the defendants liable for injuries resulting from it. Regardless of the location of said excavation and the water contained therein, if the same was open and obvious and was not a hidden or concealed contrivance or did not constitute a trap, then the defendant would not be liable for injury to a trespasser resulting from the maintenance of said excavation." The one given at the request of plaintiff read as follows: "I instruct you that, as to common danger existing in the order of nature, it is the duty of parents to guard and warn their children. But with regard to dangers which are concealed or hidden especially created by the act of the owner of land which are in character novel and attractive and dangerous to children and which may be easily guarded and rendered safe, the said owner should take such reasonable precautions against injury as would be suggested to a reasonable person in view of the surrounding circumstances." The instructions drew a proper distinction between conditions which are open and obvious and those that are concealed or hidden. It is not open to question that a pond of water has a natural attraction for children, but it cannot be successfully asserted that the doctrine of attractive nuisance is applicable to the ordinary pond or body of water, whether natural or artificial, which is distinctly open to the view of those who encounter it. Upon the other hand, an accumulation of water may be maintained under such conditions as to come within a recognized exception to the rule which bars recovery of damages by trespassers. Paragraph 339, Volume 2, Restatement, Torts, reads: "A possessor of land is subject to liability for bodily harm to young children trespassing thereon caused by a structure or other artificial condition which he maintains upon the land, if (a) the place where the condition is maintained is one upon which the possessor knows or should know that such children are likely to trespass, and (b) the condition is one of which the possessor knows or should know and which he realizes or should realize as involving an unreasonable risk of death or serious bodily harm to such children, and (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling in it or in coming within the area made dangerous by it, and (d) the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein. * * * Comment on Clause (c): [p. 925] A possessor of land is, under the statement made in Comment a, under a duty to keep so much of his land as he knows to be subject to the trespasses of young children, free from artificial conditions which involve an unreasonable risk of death or serious bodily harm to them. This does not require him to keep his land free from conditions which even young children are likely to observe and the full extent of the risk involved in which they are likely to realize. The purpose of the duty is to protect children from dangers which they are unlikely to appreciate and not to protect them against harm resulting from their own immature recklessness in the case of known danger. * * *" It was held in Blaylock v. Jensen, 44 Cal.App.2d 850, 113 P.2d 256, that liability existed for maintenance of a sump in the vicinity of a highway, where the surface of the sump had the appearance of earth and a 13-year-old girl became mired in the oil and tar while endeavoring to rescue her dog therefrom. The court said (44 Cal.App.2d at page 852, 113 P.2d at page 257): "The conclusion of the trial court may be sustained under the general rule that a landowner may not construct or maintain a trap or pitfall into which he knows or has reason to believe that a trespasser will probably fall. The liability of the owner in such cases depends upon the circumstances surrounding the maintenance of the 'trap', the extent of the danger involved and the comparative ease or difficulty of preventing the danger without disturbing or impairing the usefulness of the thing which is claimed to be a trap or pitfall."

[9] We have examined six photographs of the excavation which were introduced as exhibits. They were taken from different angles and no one of them gives a complete picture of the appearance of the hole when viewed from different directions. The child's body was found at the south end of the pool about midway between the two sides. We have selected for publication the photograph which best represents the appearance of the excavation, viewed from the south.



It is obvious that the picture shows more of the excavation than would be within the sight of a four-year-old boy. The condition shown is clearly not one which could be said, as a matter of law, to be either obvious or hidden. Whether the condition was one which defendant should have known involved an unreasonable risk of death or serious injury to children was a question of fact. It appears to us that there was real and apparent danger that a young child might suddenly come upon the pool and fall into it without discovering it in time to avoid it. The water was muddy and by no means as clearly within the view of a small child as surface water would have been. One may see in examining the picture that the excavation might prove to be a pitfall for a child approaching it from any direction, especially if running. The picture speaks for itself. We hold that the condition could reasonably be regarded as one which involved an unreasonable risk of death or serious bodily harm to children.

We may note here that defendant's instruction omitted the element of its knowledge, actual or constructive, of the extent of the danger, but this omission is one of which it does not, and could not well complain. However, defendant did take some precautions to prevent accidents, as already described. It was a question for the jury whether they met the requirements of ordinary care. It may be remarked however that the rope that hung almost to the ground would have furnished little protection to a child who had run across the street and might in fact have tripped a running child approaching from some other direction.

We do not give approval to either of the instructions last quoted. They do not, as we have said, include the element of knowledge of unreasonable risk of death or serious bodily harm. This is a proper element where death or serious bodily harm has occurred. They omit also the element of knowledge, actual or constructive, whether children were likely to trespass on the particular locality. Defendant's instruction refers to a "hidden or concealed contrivance" which did not constitute a "trap," without defining those terms. The proper test was whether the condition created an unreasonable risk of death or serious bodily harm to children. Instructions in accordance with the rules of the Restatement would have been appropriate and sufficient. Those rules are not in conflict with the doctrine that a pond or pool of water is not per se an attractive nuisance from which the landowner must, by fence or other devices, endeavor to exclude trespassing children.

The order granting a new trial is reversed.

WOOD and VALLÉE, JJ., concur.

Hearing denied; EDMONDS and SPENCE, JJ., dissenting.

COOPER v. BOARD OF MEDICAL EXAMINERS.

Civ. 16668.

District Court of Appeal, Second District, Division 2, California.

July 8, 1949.

Hearing Granted Sept. 1, 1949.[*]

1. Administrative law and procedure 🔑445
Physicians and surgeons 🔑11(3)

Where statute required that board of medical examiners, consisting of ten members, have a majority of seven members to pass a motion or resolution and prohibited a member who did not hear evidence from voting in contested case, but five members of board were replaced between original hearing, on charge against drugless practitioner, at which evidence was heard and adjourned hearing when vote was taken, revocation of license on such charge was void. Government Code, §§ 11501(a), 11517(a–c), 11521(b); Business and Professions Code, § 2100, 2119.

2. Constitutional law 🔑251

A hearing is an element of due process.

3. Administrative law and procedure 🔑445
Physicians and surgeons 🔑11(3)

Where five members of board of medical examiners were replaced between original and adjourned hearings on charges against drugless practitioner, and at adjourned meeting practitioner's counsel requested disclosure as to members who had read and considered transcript of evidence taken at original hearing, but objection was ruled premature, practitioner's right to have evidence heard by voting members was not waived. Government Code, §§ 11501(a), 11517(a–c), 11521(b); Business and Professions Code, §§ 2100, 2119.

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[*] Subsequent opinion 217 P.2d 630.

4. Administrative law and procedure ⚷445

Under statute prohibiting member of administrative body from voting in contested case where oral evidence was offered unless he has heard all evidence, reading evidence is not permitted to be substituted for hearing the witnesses. Government Code, § 11517(a).

5. Administrative law and procedure ⚷445
Physicians and surgeons ⚷11(3)

Where five members of board of medical examiners were replaced between original hearing on charge against drugless practitioner of unauthorizedly using prefix "Dr." and suffix "M.D." and adjourned hearing at which vote was taken to revoke license, that photographs, letterheads and billheads were submitted to and examined by new members of board without any explanation did not satisfy statutory requirement that evidence should be heard by voting members. Government Code, §§ 11501 (a), 11517(a–c), 11521(b); Business and Professions Code, §§ 2100, 2119.

6. Administrative law and procedure ⚷445
Physicians and surgeons ⚷11(3)

Where five members of board of medical examiners were replaced between original and adjourned hearings on charges against drugless practitioner, but before adjourned hearing amended accusation was filed and all statutory steps were taken as if amended count had been a new and independent case, and eight voting members heard all evidence in connection with amended count, there was no irregularity in procedure as to such count. Government Code, §§ 11501(a), 11517(a–c), 11521 (b); Business and Professions Code, §§ 2100, 2119.

7. Physicians and surgeons ⚷11(2)

Where drugless practitioner injected human blood into another human's blood vessels by penetration of the tissue, the transfusion was accomplished by "surgical means", an act which drugless practitioner is forbidden to perform. Business and Professions Code, § 2138.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Surgical Means".

8. Physicians and surgeons ⚷11(2)

Where statute forbade administration of blood transfusions by drugless practitioners, giving of transfusion by drugless practitioner under direction of licensed osteopathic physician and surgeon but not under latter's supervision justified revocation of drugless practitioner's license. Business and Professions Code, § 2138.

9. Physicians and surgeons ⚷11(2)

Liniment and aspirin given by drugless practitioner and used by patient to relieve pain constituted "drug" within statute defining term drug as including all medicines for internal or external use. Pen.Code, § 383.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Drug".

10. Administrative law and procedure ⚷461
Physicians and surgeons ⚷11(3)

In proceeding before Board of Medical Examiners for revocation of drugless practitioner's license because he performed blood transfusion on certain individual, permitting reading of evidence given in hearing with reference to practitioner's license as laboratory technologist before board of health relating to his medical and surgical treatment of same individual was not an abuse of discretion where practitioner cross-examined witnesses at hearing before board of health and introduced evidence given by himself and his witnesses at such hearing. Government Code, § 11513(c).

11. Administrative law and procedure ⚷757
Physicians and surgeons ⚷11(3)

Where statute lodged disciplinary action for unprofessional conduct with Board of Medical Examiners, even in case in which penalty imposed may seem to court to be out of proportion to offense, action of board is final and court cannot substitute its judgment for that of the board. Business and Professions Code, § 2372.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Proceeding for writ of mandate by William LaGrande Cooper against the Board of Medical Examiners of the State of California to compel the Board to rescind an order revoking the petitioner's license as a drugless practitioner. From a judgment denying the petition, the petitioner appeals.

Affirmed.

French & Indovina, F. Walter French, Frank J. Indovina, Santa Monica, and Walter N. Anderson, Manhattan Beach, for appellant.

Fred N. Howser, Attorney General, J. Albert Hutchinson, Deputy Attorney General, for respondent.

WILSON, Justice.

Appellant, licensed as a drugless practitioner, was convicted by respondent board of unprofessional conduct (1) in that, as charged in count 7 of the accusation, he used the prefix "Dr." and the suffix "M.D." contrary to sections 2142, 2396 and 2409 of the Business and Professions Code, and (2) in that, as charged in count 9, he injected into the blood vessels of one Michael F. Toros human blood for the treatment of a physical condition, in violation of sections 2138 and 2141 of said code. Pursuant to such conviction his license was revoked. His petition to the superior court for a writ of mandate to compel the board to rescind its order of revocation having been denied he brings the matter here by appeal.[1]

Appellant contends that the motion or resolution revoking his license as a drugless practitioner is void for the reason that it was not passed and adopted by a vote of the number of members of respondent board required by law.

[1] Respondent is one of the agencies to which the provisions of the Government Code relating to administrative procedure is applicable. Government Code, sec. 11501(a). Respondent board consists of ten members. Business and Professions Code, sec. 2100. The hearing upon the charges against appellant began at a meeting of the board held in August, 1947, at which nine members were present and heard the evidence. The trial was adjourned to March, 1948, for further hearing. Between the August and March meetings five members of the board had retired and had been replaced by five new members. Two members disqualified themselves and took no part in the proceedings. The remaining eight voted to revoke appellant's license. The affirmative vote of seven is necessary to carry a motion or resolution. Business and Professions Code, sec. 2119. The five new members did not hear the evidence taken

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[1] In respondent's brief there appears the statement that after the hearing before respondent board the State Board of Health revoked appellant's license as a clinical laboratory technologist. There is a further statement that since the trial in the superior court appellant was convicted in the municipal court of the city of Los Angeles of violations of sections 2141 and 2142 of the Business and Professions Code. If these statements be true they are not matters for discussion on this appeal, since the dates on which the occurrences are stated to have taken place are subsequent to the hearing before respondent board and to the trial in the superior court. Therefore no reference thereto could or would appear in the record before the board or before the court. Counsel for respondent is apparently not aware of some of the fundamentals governing appeals: (1) A reviewing court takes into consideration only such matters as are contained in the record on appeal; (2) unauthenticated statements in the briefs, not supported by the record, are improper and have no influence on the court; (3) Cannon 22 of the Canons of Professional Ethics adopted by the American Bar Association in 1908 provides "The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness. It is not candid or fair for the lawyer * * * in argument to assert as a fact that which has not been proved, * * *. A lawyer should not * * * address to the Judge arguments upon any point not properly calling for determination by him." The appeal will be decided upon its merits without reference to such extraneous matters.

at the meeting held in August, 1947. Appellant's contention that the motion to revoke his license is void, since only four members voting therefor had heard the evidence at the first meeting, must be sustained as to count 7.

"Where a contested case is heard before an agency itself, no member thereof who did not hear the evidence shall vote on the decision." Government Code, sec. 11517 (a). If a contested case is heard by a hearing officer alone he shall prepare a proposed decision which the agency may adopt in its entirety or may reduce the proposed penalty. Sec. 11517(b). If the proposed decision is not adopted the agency itself may decide the case on the record with or without taking additional evidence, or may refer the case to a hearing officer to take additional evidence, but "If additional oral evidence is introduced before the agency itself no agency member may vote unless he heard the additional oral evidence." Sec. 11517(c). The agency may order a reconsideration and may hear additional evidence. "If oral evidence is introduced before the agency itself, no agency member may vote unless he heard the evidence." Sec. 11521(b).

[2] It is manifest that by these provisions the Legislature intended that those who judge must hear, and to abolish an abuse that had existed in administrative hearings prior to the adoption of the Administrative Procedure Act, Government Code, sec. 11500 et seq., in 1945, to wit, that members who had not attended a hearing voted in passing judgment on a licensee. The legislative object was accomplished in clear and unmistakable language by requiring in every case that when oral evidence is offered a member is not permitted to vote unless he has heard all the evidence. A hearing is an element of due process.

[3, 4] Respondent contends that the objection now made by appellant was waived at the hearing. At the adjourned meeting in March the prosecuting officer before the board stated "I want the record to show the members of the board not present at the last meeting have read the transcript of the board hearing which is on file and has been submitted to them for that purpose." Appellant's counsel stated he would like to know "from the members of the board those members who have read and considered that transcript." No response was made by any member of the board. The hearing officer stated "The objection Mr. Anderson has made is a little premature. The matter is not now ready for submission. * * * At the proper time that objection may be considered." This colloquy did not constitute a waiver of appellant's right guaranteed him by statute. It was not necessary that his objection should have been made at that time or at any other time during the hearing. The obligation rested on the board to conduct its proceedings in the manner required by law. If members voted to revoke appellant's license who had not heard the evidence, appellant had a right to rely on the error when the case reached the courts for review. Reading the evidence is not permitted by the statute to be substituted for hearing the witnesses.

[5] Respondent claims that evidence concerning count 7 was supplied to the five new members by showing them exhibits consisting of photographs of appellant's office door and his letterheads and billheads having thereon the prefix "Dr." and the suffix "M.D." attached to his name. No oral evidence was given in the presence of the five new members in any manner connecting the exhibits with appellant. The photographs, letterheads and billheads were submitted to and examined by the new members of the board without any explanation whatsoever.

[6] As to count 9 the situation is different. An amendment to the accusation consisting of this count was filed with respondent board on February 13, 1948. On the same day a copy of the amendment, together with the statutory notice of the pendency of the charge and the time and place of hearing, were served on appellant and in addition a notice of intention to add that charge and to join it with the pending charges. All statutory steps were taken as if count 9 had been a new, original and independent case, as well as a notice of intention to amend the original accusation. Five days before the hearing petitioner filed a demurrer and answer to count 9. The hearing proceeded and all eight members heard all the evidence in connection

with that count. There was no irregularity in the procedure.

[7] The evidence sustained the allegations in count 9. Appellant performed a blood transfusion on Michael F. Toros by injecting human blood into the latter's blood vessels for the purpose of resisting disease. The transfusion was accomplished by surgical means—by the penetration of the tissue of a human being, an act which a drugless practitioner is forbidden to perform. Business and Professions Code, sec. 2138. Toros died shortly thereafter.

[8] Appellant attempts to escape the consequences of his illegal and unauthorized act by contending that the transfusion was done under the direction of a licensed osteopathic physician and surgeon, Dr. Couturier. The latter testified that Toros had been his patient; that he considered blood transfusion desirable; that in order that Toros should not lose any time from his work it was arranged that the transfusion should be made on a week-end; that he directed appellant to give 250 cubic centimeters of whole blood with the usual proceeding of typing and cross-matching; that he believed appellant's status to be a laboratory technologist and did not know that appellant held a license as a drugless practitioner. Appellant testified that he performed the blood transfusion as Dr. Couturier had directed. At the time of the operation Dr. Couturier was at Lake Arrowhead, some 80 miles from Los Angeles where it was performed by appellant. Dr. Couturier may have directed that the operation be performed but it was not done under his supervision. He further testified that he believed the blood transfusion would raise the general body resistance of Toros and would have a therapeutic value in the treatment of his case; that blood was introduced into the body by piercing the skin and the wall of a vein. In appellant's testimony he expressly adopted the evidence given by Dr. Couturier. The evidence is conclusive that appellant's penetration of the tissue of Toros' body in making the blood transfusion was an act which he as a drugless practitioner was expressly forbidden to perform. Business and Professions Code, sec. 2138. Respondent board was therefore justified in revoking his license.

Appellant maintains that his penetration of the human tissue in making the blood transfusion was not a forbidden surgical operation and compares his act with the drawing of blood by hospital technicians for the purpose of making blood tests. He also makes the absurd comparison of the penetration of the skin by tattooing. Such acts are so different from the injection of a half pint of blood into the system that they need not be further considered, and are mentioned only for the purpose of illustrating the tenuousness of appellant's defense to the charge made against him.

King v. Board of Medical Examiners, 65 Cal.App.2d 644, 151 P.2d 282, is not comparable to the instant proceeding. In that case a drugless practitioner, during a lecture, punctured a person's ear lobe and drew a drop of blood for comparison with a hemoglobin chart, for which no charge was made—an act entirely different from the introduction of blood into a person's system for therapeutic purposes.

[9] The evidence further showed (appellant admitted) that he also recommended and delivered liniment (constituents unknown) and aspirin to Toros. "The term 'drug' includes all medicines for internal or external use. Pen.Code, sec. 383. * * * The use of a substance determines its classification. If a substance is used for medicinal purposes, it is a drug." Downing v. California State Board of Pharmacy, 85 Cal.App.2d 30, 33–34, 192 P.2d 39, 41, and cases cited. Aspirin, acetylsalicylic acid, is a drug and is used for medicinal purposes. People v. Garcia, 1 Cal.App.2d Supp. 761, 766, 32 P.2d 445. The liniment was given and used to relieve pain and under the definition was also a drug.

[10] Appellant contends that the board committed error in permitting the reading of evidence of witnesses given in a hearing with reference to appellant's license as a laboratory technologist before the State Board of Health relating to his medical and surgical treatment of Toros—the same subject as that before respondent board. This contention is invalid for several reasons.

The reading of such evidence did not deprive appellant of the right of cross-examination since he cross-examined the witnesses at length at the hearing before the Board of Health. He introduced the evidence given by himself and his witnesses at such hearing. Portions of the record were received and read by stipulation. Such evidence is admissible under the express terms of the statute. Government Code, sec. 11513(c). Respondent did not abuse its discretion in admitting such evidence.

[11] Finally appellant contends that the penalty of revocation of his license, as distinguished from suspension, is too severe and is disproportionate to the violation. Disciplinary action is lodged with respondent board, Business and Professions Code, sec. 2372, and even in cases in which the penalty imposed may seem to the court to be out of proportion to the offense of which the practitioner has been found guilty, the action of the board is final and the court cannot substitute its discretion for that of the board. Fuller v. Board of Medical Examiners, 14 Cal.App.2d 734, 742, 59 P.2d 171.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

KOBE v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

(three cases).

Civ. 16943–16945.

District Court of Appeal, Second District, Division 3, California.

June 28, 1949.

Rehearing Denied July 18, 1949.

Hearing Granted Aug. 25, 1949.*

1. Workmen's compensation ⚷736

An injury sustained while going to or coming from work is compensable only if at time it occurs, employee is engaged in employer's business within contemplation of employment agreement, and there must be an actual or constructive furnishing of transportation by employer as an incident to the contract and not as a mere matter of convenience to the employee; and means of transportation must be under control of employer. Labor Code, § 3600.

2. Workmen's compensation ⚷719

Mere fact that employer adds something to wages of employee who has to travel some distance to work, in order to equalize wages of those of employees who live within convenient distance, does not imply agreement that service of employee commences when he leaves home and continues until he has returned so as to render employer liable under the compensation statute for injuries sustained by employee during travel to and from work. Labor Code, § 3600.

3. Workmen's compensation ⚷1409

Workmen's compensation award cannot rest on surmise or conjecture. Labor Code, § 3600.

4. Workmen's compensation ⚷746, 747

Where employer paid extra hour's wages to roofing employees at regular rates as compensation for travel time, leaving them free to arrange own transportation to and from job, without retaining right to inspect vehicle used, select driver, regulate speed, or choose route, injuries and death resulting when automobile of one employee, used by all under common understanding that expenses would be shared, was struck by locomotive during journey from work to homes, were not compensable as "arising out of and in course of employment". Labor Code, § 3600.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Arising Out Of and In Course Of The Employment".

5. Workmen's compensation ⚷3, 616

The Workmen's Compensation Act does not transform employer into an insurer of employees at all times, but award must be supported by showing that at time of injury employee was performing service growing out of and incidental to his employment, and was acting within course of

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* Subsequent opinion 215 P.2d 736.

the employment, and that injury was proximately caused thereby. Labor Code, § 3600.

6. Workmen's compensation ⚷53

Statute providing that provisions of the labor code affecting workmen's compensation shall be liberally construed to extend benefits for protection of persons injured in course of their employment does not permit unwarranted liability to be imposed on employer in form of award of unearned compensation based on a liberal interpretation of legally insufficient evidence. Labor Code, §§ 3202, 3600.

◆

Three proceedings in certiorari by T. R. Kobe, doing business as Federal Roofing & Siding Company, employer, and Pacific Employers Insurance Company, a corporation, insurance carrier, to review orders of the Industrial Accident Commission of the State of California awarding compensation to Betty J. Ruble and Lois Jeanne Ruble, by her guardian ad litem and trustee, Betty J. Ruble, for the death of Nelson O. Ruble, employee, and to Augustine Padilla, employee, and Alfred Bjerke, employee, for injuries.

Awards annulled.

Kearney, McCartney, Scott & Clopton, Los Angeles, for petitioners.

T. Groezinger and Robert Ball, San Francisco, for respondents.

SHINN, Presiding Justice.

On August 8, 1947, an automobile owned and driven by Alfred Bjerke, in which Nelson O. Ruble, Augustine Padilla, and Homer D. Van Zandt were passengers, was struck by a locomotive while enroute from San Bernardino to Pomona. At the time of the accident the four men were returning to their homes after completing the day's work in San Bernardino where they were employed by Federal Roofing and Siding Company in repairing the roof of the county courthouse. They were all injured in the accident and Ruble subsequently died from its effects. Applications for compensation benefits were duly filed with the Industrial Accident Commission. The four claims were consolidated for the purpose of hearings, and it was stipulated that all evidence introduced in any one of the cases might be used in the others insofar as material. Considerable evidence was taken and in October and November of 1948 findings and awards were made in favor of Bjerke, Padilla, and Ruble's surviving wife and minor child. A rehearing was denied in each case. By the present proceedings in certiorari petitioners seek to annul the awards on the ground that the commission's findings that the respective injuries arose out of and occurred in the course of the employment are not supported by the evidence.

Viewing the record most favorably to respondents, the following facts were before the commission: Meredith Bowdish, was the general supervisor for T. R. Kobe, doing business as Federal Roofing and Siding Company, with power to hire and set the wages of employees. On August 4, 1947, he employed Ruble and Alphonso Tafoya for the courthouse roof job and authorized them to hire additional labor. Ruble was the foreman on the job and Tafoya worked under him. It was agreed that the men would work nine hours a day and receive ten hours pay and that the extra hour would be for traveling time. Tafoya hired Bjerke and Van Zandt, stating to each that they would be paid one hour's driving time; and Padilla was hired by Ruble on the same terms. Wages were paid upon this agreed basis.

When Bjerke was hired he was asked if he minded taking "a couple of more guys" to work with him in his car. Bjerke said he did not mind. Nothing was said about paying him for driving others to the job. Tafoya told Van Zandt that a man would pick him up on August 5th and take him to work. This was done by Bjerke. On August 6th, at Padilla's request, Bjerke also picked him up at his home in West Pomona and took him to work. West Pomona is not on a direct route from Bjerke's residence to San Bernardino. Bjerke received no reimbursement for the cost of operating his car and nobody told him what route to take. Van Zandt and Padilla offered to share the cost of transportation but no specific amounts were agreed upon.

On August 7th, Ruble, who usually drove his own car to work, asked if he could ride with Bjerke the next day. Bjerke agreed. Van Zandt was instructed that on the following morning he was to drive a truck to work and bring a load of materials from Ruble's house. On the morning of August 8th, Bjerke picked up Padilla and then called at Ruble's residence. Certain tools and burlap sacks were placed in the trunk of Bjerke's car and the three men then drove on to work. Van Zandt arrived separately by truck as instructed. The four men left work at 4:30 p. m. that day in Bjerke's car. The collision with the locomotive occurred 10 or 15 minutes later while they were driving on the shortest route to Pomona.

[1] It is well established that injuries received while going to and coming from work are not compensable. 27 Cal.Jur. sec 84, p. 380. Like most general rules, the "going and coming" rule is not of inevitable application, but in special circumstances is subject to exceptions. Familiar examples involve injuries received during special missions or service in extra hours, Western Pipe & Steel Co. v. Ind. Acc. Comm., 49 Cal.App.2d 108, 121 P.2d 35; Voehl v. Indemnity Ins. Co., 288 U.S. 162, 53 S.Ct. 380, 77 L.Ed. 676, 87 A.L.R. 245; accidents occurring within the "zone of employment," Smith v. Industrial Acc. Comm., 18 Cal.2d 843, 118 P.2d 6, or while on an errand reasonably necessary to comfort and convenience in the discharge of the work, Leffert v. Industrial Acc. Comm., 219 Cal. 710, 28 P.2d 911; and injuries suffered during the course of transportation furnished as an incident of the employment by, and under the control of, the employer. California Cas. Indem. Exch. v. Ind. Acc. Comm., 21 Cal.2d 461, 132 P.2d 815. The principle uniformly recognized by all of the cases is that an injury sustained while going to or coming from work is compensable only if at the time it occurs the employee is engaged in the employer's business within the contemplation of the employment agreement. Dellepiani v. Industrial Acc. Comm., 211 Cal. 430, 295 P. 826; Campbell, Workmen's Compensation, sec. 175, p. 166.

The commission seeks to justify the present awards as being within the scope of the "transportation exception." The contention is unsound. The requirements of the exception are twofold. In the first place, there must be an actual or constructive furnishing of transportation by the employer. Campbell, ibid., secs. 173, 180, pp. 160, 169, and cases cited. The transportation must be furnished as an incident of the contract of employment, and not as a mere matter of convenience or accommodation to the employee. Boggess v. Ind. Acc. Comm., 176 Cal. 534, 169 P. 75, L.R.A.1918F, 883; Rader v. Keeler, 129 Cal.App. 114, 18 P.2d 360. The basis of the requirement is that where the employer furnishes transportation, it is a possible, although not a necessary, inference therefrom that he has impliedly agreed that service to him shall include the time spent traveling to and from work by the means of transport so provided; and it may fairly be said that injuries incurred while so traveling are in the course of the employment.

[2, 3] It is conceded that the means of transportation were not actually furnished by the employer in the present cases. In view of the evidence, the commission necessarily relies upon the proposition that the payment of an extra hour's wages at the regular rate as compensation for travel time, leaving the individual employees free to arrange their own transportation to and from the job, amounts to a constructive furnishing of transportation. The contention finds no support in principle or authority. The Supreme Court, in Smith v. Industrial Acc. Comm., 18 Cal.2d 843, 847, 118 P.2d 6, 8, stated, "[t]he payment to the employee of the cost of public transportation to and from his place of residence to the place of work does not ordinarily in itself, furnish a basis for concluding that an injury sustained during such transportation arose out of the course of employment. Trussless Roof Co. v. Ind. Acc. Comm., supra, [119 Cal.App. 91, 6 P.2d 254]." Accord: Kerin v. Industrial Commission, 239 Wis. 617, 2 N.W.2d 223; Guenesa v. Ralph v. Rulon, Inc., 124 Pa.Super. 569, 189 A. 524; Public Service Co. v. Industrial Commission, 370 Ill. 334, 18 N.E.2d 914; Baumbach v. Industrial Commission of Ohio, 59 Ohio App. 101, 17 N.E.2d 389; Republic Underwriters v. Terrell, Tex.Civ.App., 126

S.W.2d 752; Orsinie v. Torrance, 96 Conn. 352, 113 A. 924. The rule enunciated in these cases has been repeatedly recognized and followed by the commission. Emmert v. Allen, 14 I.A.C. 57; London Guarantee & Acc. Co. v. Bini, 12 I.A.C. 178; Joe Samorano v. Grant Eyre, 11 I.A.C. 125; see also cases cited in 27 Cal.Jur., sec. 85, p. 385, and Campbell, op. cit., sec. 180, p. 169. The rule is common sense. For various reasons, an employer may find it expedient to pay additional compensation due to the distance of the place of work. The mere fact that an employer adds something to the wages of an employee who has to travel some distance to work in order to equalize his wages with those of employees who live within a convenient distance does not imply an agreement that the service of the employee commences when he leaves home and continues until he has returned. The principle is the same whether the amount added is one hour's pay or merely the amount of carfare or other expense of transportation. No legitimate inference as to the employer's agreement can logically be drawn from such payment, standing alone. An award of compensation cannot rest on surmise or conjecture. Children's Hosp. Soc. v. Indus. Acc. Comm., 22 Cal. App.2d 365, 71 P.2d 83.

Turning to the present record; we find a conclusive showing that the extent of the employer's undertaking was the payment of an extra hour's wages. The extra compensation was to be paid regardless of what means the men used to travel to work, and irrespective of the distance covered or the time consumed enroute. Tafoya testified without contradiction that he informed Bjerke that the men "could arrange to trade rides, or pay one another, however they saw fit, but that was up to them to find transportation the best way they could." Bjerke also testified that Tafoya "said they didn't have any transporation for us and if we could furnish our own it was swell. Other than that he didn't know how we were going to get there." There is nothing in evidence to support an inference that any different understanding was had with Ruble or Padilla when they were hired. Nor does the subsequent conduct of the parties afford a basis for a conclusion that the service continued to the time of the accident. Although on the morning of August 8, Van Zandt may have been within the protection of the act while driving the truckload of equipment to work, see Dauphine v. Ind. Acc. Comm., 57 Cal.App.2d 949,135 P.2d 644, it is highly questionable whether the status of employment attached at that time to Bjerke, Ruble, and Padilla merely because they were also taking to work with them some tools and burlap sacks for use on the job. See Eby v. Industrial Acc. Comm., 75 Cal.App. 280, 282, 242 P. 901. In any event, the special circumstances attending the trip to work on the day of the accident were absent on the homeward journey. They were not the usual course of events, and have no rational bearing upon the issue of the employment relationship existing at the time of the accident.

The commission relies heavily upon evidence showing that Kobe was a party to a Master Labor Agreement between the Los Angeles Union Roofing Contractors and the local Roofers' Union, under which he was obligated to pay travel time for a distance of more than 15 miles fom his Los Angeles place of business on out-of-town jobs to employees who traveled back and forth each day. In connection therewith, Charles E. Young, the union business representative, testified that the work contracted for by Kobe, which consisted of the removal of a gypsum fill, preparatory to laying a new roof, was within the jurisdiction of the union; Kobe paid travel time to other employees on other jobs; the union contract was in effect for the year ending August 15, 1947; any men hired by an employer who is a party to the union contract are entitled to the pay provided for therein; and it is common practice in the business to pay one hour's extra pay in lieu of travel time. Ruble was a member of the union but the others were not. Bowdish testified without contradiction, however, that he and Ruble had agreed that it was not in violation of the union contract to use non-union men up to the time of the actual laying of the roof, and Ruble had stated that he was not "running a union job." The record contains no evidence from which it could be inferred that the provisions of the Master

Labor Agreement were intended, either expressly or impliedly, to govern or be incorporated in the terms of employment of Ruble, Bjerke or Padilla. The uncontradicted evidence is to the exact contrary. If the agreement is at all material it is so only insofar as it tends to indicate that it was customary for roofing contractors to pay additional compensation for travel time on out-of-town jobs. As such, it is merely cumulative and adds nothing to the effect of the evidence previously related. The implied finding of the commission that the employer furnished the transportation in the course of which the accident occurred is not upported by the evidence.

The cases upon which the commission relies do not require a contrary conclusion. In Cardillo v. Liberty Mut. Ins. Co., 330 U.S. 469, 67 S.Ct. 801, 91 L.Ed. 1028, pursuant to a union contract providing that "Transportation * * * shall be furnished" by the employer for out-of-town work, the sum of two dollars a day was agreed upon as travel expense and "was paid in lieu of the employer's furnishing transportation." Page 472 of 330 U.S., page 804 of 67 S.Ct. In sustaining the award of compensation, the court expressly held that "there is more here than mere payment of transportation costs. It was found that Ticer's employer paid the costs as a means of carrying out its contract obligation to furnish the transportation itself." Page 482 of 330 U.S., page 809 of 67 S.Ct. In the present case, on the other hand, there is no evidence of any contract obligation of the employer to provide transportation. Breland v. Traylor Eng., etc., Co., 52 Cal.App.2d, 415, 126 P.2d 455, and Trussless Roof Co. v. Indus. Acc. Comm., 119 Cal.App. 91, 6 P.2d 254, are cases where the employer paid a specified sum per mile traveled, rather than a lump sum unrelated to the distance covered or expense involved. In neither case, however, in upholding findings that at the time of an auto accident on the highway the employees were in the course of their employment, did the court rely solely on the payment of travel expense. In the Breland case, the employee was sent from Pennsylvania to California on a special work assignment, at his employer's expense, and was paid all his living expenses while here plus five cents a mile for transportation to and from work. The court held that these special circumstances, together with the presumptions to be derived from the failure of the employer to produce any evidence at all on the issue of the relationship between it and the employee, were sufficient to support a finding that, while driving to work the employee was acting within the course and scope of his employment. In the Trussless Roof Co. case, where the employees were reimbursed on the basis of either six cents per mile or the cost of round trip trolley fares, there was evidence tending to show that a term of the contract of employment was that the employer would furnish transportation. In a few instances such transportation had actually been furnished by company trucks. The holdings in the two cases, apart from language unnecessary to the decisions therein, give no support to the commission's argument.

In the second place, in order to be within the exception, the means of transportation must be under the control of the employer. California Cas. Indem. Exch. v. Ind. Acc. Comm., supra, 21 Cal.2d 461, 132 P.2d 815; Dominguez v. Pendola, 46 Cal.App. 220, 188 P. 1025; Dellepiani v. Ind. Acc. Comm. supra, 211 Cal. 430, 295 P. 826; California Highway Comm. v. Industrial Acc. Comm., 61 Cal.App. 284, 214 P. 658; Rader v. Keeler, supra, 129 Cal.App. 114, 18 P.2d 360; Konopka v. Jackson County Road Comm., 270 Mich. 174, 258 N.W. 429, 97 A.L.R. 552; Phifer's Dependents v. Foremost Dairy, 200 N.C. 65, 156 S.E. 147; 62 A.L.R. 1438; Campbell, ibid., sec. 180, p. 169, and cases cited. In the California Highway Commission case, the court pointed out the reason for this requirement—that when the employer has the instrumentality under his control, he may be held responsible for its safe condition and for the skill and care of the operator; "But when the employer does not own nor control the vehicle, does not even know that the employee will elect to use it, does not know whether it shall be driven by a reckless or a careful driver, or by a man who is intoxicated, or by one who is sober, how can it be either logical or just to hold him responsible for injuries occurring to the employee while riding to and from his work in such a vehicle?" 61 Cal.App. 288-289, 214 P. 660; see also Dominguez v. Pendola, supra, 46 Cal.App. 220, 223, 188 P. 1025. The requirement recognizes that it would be wholly unreasonable, where control is lacking, to imply an agreement by the employer that the employment should continue during travel to and from the job, thereby exposing himself to extensive potential liability without the means of self-protection normally available to one with control over the means of transportation.

We cannot agree with the commission's contention that the cases of City and County of S. F. v. Ind. Acc. Comm., 61 Cal.App. 2d 248, 142 P.2d 760, and Trussless Roof Co. v. Ind. Acc. Comm., 119 Cal.App. 91, 6 P.2d 254, have rejected the reasoning of the Highway Commission case or discarded the control requirement. In the former case, the employee was riding on a streetcar admittedly controlled and operated by his employer at the time of the injury, thus rendering discussion of the point unnecessary. In the course of its opinion, however, the court twice referred to the control requirement with evident approval. In the Trussless Roof Co. case, the court expressly held that "the situation was within his [the employer's] control, within the reason for the rule given in [California] Highway Comm. v. Industrial Acc. Comm., supra * * *." Page 95 of 119 Cal.App, page 255 of 6 P.2d. Insofar as the majority opinion in Cardillo v. Liberty Mut. Ins. Co., supra, 330 U.S. 469, 67 S.Ct. 801, 91 L.Ed. 1028, which dealt with the District of Columbia Workmen's Compensation Act, is inconsistent with the cited decisions of our own courts, it cannot be deemed controlling.

[4] The commission does not contend that the present evidence would support a finding that the employer had control over the means of transportation, nor do we think it could successfully so contend. It is clear from the record that Bjerke agreed to carry his fellow employees as a matter of personal accommodation to them. The discussion as to sharing of expenses demonstrates their common understanding that transportation to and from work was a matter for individual arrangement. Nothing in the record remotely tends to show that the employer had any right to inspect or repair the car used, select the driver, regulate the speed of travel, choose the route to be followed, or in any way govern the actions of the employees in the course of their travel to and from work. For this additional reason the awards in the present cases cannot stand.

[5, 6] In applying the "going and coming" rule, and its various so-called exceptions, certain fundamental principles must be steadfastly kept in mind. It was not intended by the Workmen's Compensation Act to transform the employer into an insurer of his employees at all times. An award of compensation benefits must be supported by a concurrence of the statutory conditions; inter alia, it must be shown that, "at the time of the injury, the employee is performing service growing out of and incidental to his employment and is acting within the course of his employment. * * * [and that] the injury is proximately caused by the employment * * *." Lab. Code, sec. 3600; see California C. I. Exch. v. Indus. Acc. Comm., 190 Cal. 433, 435, 213 P. 257. Where transportation to and from work is either actually or constructively furnished by the employer as an incident of the employment, and is under his control, it may fairly be said that a highway accident is one of the risks of the service, and that the statutory conditions to compensation are satisfied. Where these elements are lacking, however, and the employees are traveling according to their own arrangements and by whatever means are conveniently available, the opposite is true. The risk is no longer an industrial one, but is one shared at large with the commonalty, and hence not governed by the compensation law. In our opinion, the present cases are clearly within the latter category. We deem it appropriate to observe also that the rule of liberal construction enjoined upon the courts by section 3202 of the Labor Code applies only to the "provisions" of the Workmen's Compensation Act, and only for the purpose of extending its benefits to "persons injured in the course of their employment." It does not permit an unwarranted liability to be imposed upon an employer in the form

of an award of unearned compensation based upon a "liberal" interpretation of legally insufficient evidence.

The awards are annulled.

WOOD and VALLÉE, JJ., concur.

92 Cal.App.2d 547

HAERDTER v. JOHNSON et al.

No. 13975.

District Court of Appeal, First District, Division 1, California.

June 24, 1949.

Rehearing Denied July 23, 1949.

Hearing Denied Aug. 18, 1949.

1. Automobiles 🔑246(58)

In action arising out of automobile accident, whether trial court erred in refusing to instruct on last clear chance depended upon whether the requested instructions were applicable to the evidence.

2. Negligence 🔑135(6)

Notwithstanding there may be a total absence of any positive testimony that defendant actually knew of plaintiff's danger, and even though defendant definitely denies seeing plaintiff, doctrine of last clear chance may be invoked where facts are such as would justify jury in finding that despite defendant's denial of knowledge or absence of direct testimony on subject, he was actually aware of plaintiff's danger in time to avert accident.

3. Automobiles 🔑246(58)

In action for injuries resulting when automobile driven by defendant struck plaintiff at night when plaintiff was crossing street near intersection, evidence would not justify finding that defendant was aware of plaintiff's danger in time to avoid striking plaintiff, so that requested instructions as to last clear chance were properly refused. Vehicle Code, § 85.

4. Negligence 🔑97

The comparative negligence doctrine is not applied in California.

5. Automobiles 🔑246(50)

In action for injuries sustained when automobile driven by defendant struck plaintiff at night when plaintiff was walking across street in front of defendant's moving automobile near intersection of streets meeting at approximately right angles, trial court properly instructed jury under evidence that plaintiff at time and place of accident was not in a marked or unmarked crosswalk and therefore had statutory duty to yield right of way to defendant's moving automobile and properly failed to instruct that if plaintiff was walking from corner toward traffic signal on other side of street, defendant had duty to yield right of way to plaintiff. Vehicle Code, §§ 85, 562.

6. Automobiles 🔑243(1, 4)

In action for injuries sustained when automobile driven by defendant struck plaintiff at night, trial court properly refused to admit evidence concerning custom of traveling public to cross street plaintiff was crossing to traffic signal on other side of street, and existence at the time of the trial, of a marked crosswalk along that route, which plaintiff claimed was pertinent to existence of an unmarked crosswalk within which plaintiff could walk with defendant having statutory duty to yield right of way, in view of statutory definition of an unmarked crosswalk. Vehicle Code, §§ 85, 562.

PETERS, P. J., dissenting.

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Appeal from Superior Court, San Francisco County; William F. Traverso, Judge.

Action by William Haerdter against Maxwell Johnson and C. M. Bartholomew for injuries arising out of an automobile accident. From an adverse judgment, plaintiff appeals.

Judgment affirmed.

Alfred F. Breslauer, Appel, Dains & Liebermann, San Francisco, George Liebermann, San Francisco, for plaintiff and appellant.

Dana, Bledsoe & Smith, San Francisco, Paul Dana, A. Dal Thomson, San Francisco, for defendants and respondents.

WARD, Justice.

Plaintiff appeals from the judgment entered on a verdict in favor of defendants in a personal injury action arising out of an accident involving an automobile owned by defendant Bartholomew which was being driven by his employee, defendant Johnson.

The points urged by plaintiff are as follows: The court erred in refusing to instruct on last clear chance; the court erred in instructing that the plaintiff was not in an unmarked crosswalk and hence was required to yield the right of way to defendant Johnson rather than giving plaintiff's instructions to the contrary, and the court erred in rejecting evidence pertinent to the existence of an unmarked crosswalk.

[1] The last clear chance instructions requested by plaintiff stated that the plaintiff's negligence would not bar his recovery if the jury found, among other facts, "That the defendant Johnson had *actual* knowledge of plaintiff's perilous situation" and "That after the defendant Johnson acquired *actual* knowledge of plaintiff's perilous situation, he had a clear opportunity to avoid the accident and could have done so by exercising ordinary care." Emphasis added. See, California Jury Instructions Civil, 1943, pp. 310–312; Girdner v. Union Oil Co., 216 Cal. 197, 13 P.2d 915. Whether the court erred in refusing to give such instructions depends upon whether they are applicable to the evidence produced in the trial court. Jones v. Heinrich, 49 Cal.App. 2d 702, 122 P.2d 304; Vitali v. Straight, 21 Cal.App.2d 253, 68 P.2d 746; Rather v. City & County of San Francisco, 81 Cal. App.2d 625, 184 P.2d 727; Dickey v. Thornburgh, 82 Cal.App.2d 723, 187 P.2d 132.

Evidence of the location of the accident in question included a photograph and two diagrams which reflected conditions as of the date of the accident. The accident occurred while plaintiff was walking across Army Street, which runs East and West, near the intersection of a thoroughfare running in a northerly direction to the North of Army Street and in a southeasterly direction South of Army Street, thereby making a bend. North of Army Street this thoroughfare is Potrero Avenue and to the South it is Bayshore Boulevard.

Plaintiff testified that at about 11 p. m. of a fogless and rainless night he descended from a street car on the westerly side of Potrero Avenue at Army Street. After waiting a few minutes for a bus he determined to cross Army Street to catch a bus or street car which he though would stop slightly west of the traffic signal on the southerly side of Army Street. No lines or other markings existed at this time to indicate the pedestrian crossing between the northerly and southerly sides of Army Street at the intersection in question. Instead of crossing over that portion of Army Street "ordinarily included within the prolongation or connection of the boundary lines" of the westerly sidewalks of Potrero Avenue and Bayshore Boulevard, Vehicle Code, § 85, plaintiff crossed from a point slightly west of the westerly sidewalk of Potrero Avenue towards a point slightly west of the traffic signal on the southerly side of Army Street and considerably west of the prolongation of the westerly sidewalk of Bayshore Boulevard at Army Street. The jury could reasoably infer from plaintiff's testimony that when he started across the traffic light was against him. When he left the northerly sidewalk of Army Street he looked to the right and saw automobile lights 400 to 450 feet away. He walked "as fast as he could walk" always continuing in the same direction at the same speed. After crossing the street car tracks he again looked to the right and saw the lights of defendants' car 150 feet away. He was about five feet from the southerly sidewalk when he was knocked over and rendered unconscious.

Defendant Johnson testified that at the time in question he was driving at 20 to 25 miles an hour in high gear in an easterly direction on Army Street with the intention of making a right hand turn on Bayshore Boulevard. The 1936 Packard 120 which he was driving was in good mechanical condition and his headlights, which were on high beam, had been recently inspected. When he first saw plaintiff he was about five feet from the front right fender or headlight. Johnson's explanation for not having seen plaintiff sooner was that the lights of the automobiles coming up Bayshore Boulevard obstructed his vision and caused "a glare from your windshield glass." He did not have this problem when he was three or four hundred feet west of the corner and veered slightly to avoid a woman pedestrian, because the "lights don't affect you back there." He was driving six or seven feet from the southerly curb at the time of the impact. The point of impact was west of the traffic signal referred to above. The car went twenty feet from the time it struck plaintiff until it came to a stop, plaintiff being carried this distance on the right front fender. When it came to a stop, plaintiff rolled onto the pavement near the traffic signal. After the accident Johnson observed skid marks about fifteen feet in length made by the car which were approximately fifteen feet to the west of the traffic signal.

The member of the Accident Investigation Bureau who arrived at the scene of the accident after plaintiff had been conveyed to the hospital testified that the right front fender of defendants' car was damaged and that the street lights were lit on each of the four corners of the intersection. At the hospital he saw plaintiff who was wearing a brown suit, black shoes, and a brown hat at the time of the accident. His report contains the following statements: The accident occurred "50 feet west of intersection." "Pedestrian stated that he did not know status of the signals when he started to cross street." The report was checked at the printed statement, "Crossing not at intersection," and the word, "no", followed the question, "Was pedestrian inside the markings or extension of sidewalk lines."

[2] Plaintiff contends that the triers of the fact were entitled to find that defendant Johnson saw the plaintiff sooner than he admitted and at a time when, by the exercise of ordinary care, he could have avoided the accident, and that therefore the jury should have been instructed as to the doctrine of last clear chance. There is abundant authority that "notwithstanding there may be a total absence of any positive testimony that the defendant actually knew of plaintiff's danger, and even though the defendant definitely denies seeing the plaintiff at all, the doctrine of the last clear chance may be invoked and applied where the *facts and circumstances* are such as *would justify the jury in finding that* despite the defendant's denial of knowledge or the absence of direct testimony on the subject, *he was actually aware of plaintiff's danger* in time to avert the accident; in other words, that he 'must have known' of plaintiff's danger." (Emphasis added.) Gillette v. City of San Francisco, 58 Cal. App.2d 434, 442, 136 P.2d 611, 615, second Gillette appeal; see prior appeal, 41 Cal. App.2d 758, 107 P.2d 627; Accord, Pire v. Gladding McBean & Co., 55 Cal.App.2d 108, 130 P.2d 143, 981; Bailey v. Wilson, 16 Cal.App.2d 645, 61 P.2d 68; Handley v. Lombardi, 122 Cal.App. 22, 9 P.2d 867; Smith et al. v. Los Angeles Ry., 105 Cal. App. 657, 288 P. 690; Darling v. Pacific Electric Ry. Co., 197 Cal. 702, 242 P. 703; and Wahlgren v. Market Street Ry. Co., 132 Cal. 656, 657, 62 P. 308, 64 P. 993. This line of cases does "not hold that a defendant is liable because he *ought* to have known of plaintiff's danger, or because the circumstances were such as to put him on notice of the danger, or because he was remiss in failing to discover the danger; but in effect hold that under all the facts and circumstances shown by the evidence it was proper to find that the defendant, despite his denial of knowledge, or despite the absence of direct testimony on the subject, was actually aware of the plaintiff's danger in time to avert it." (Mark A. Hall, Last Clear Chance, p. 61.)

What facts and circumstances must the evidence show to justify a finding that defendant Johnson was aware of plaintiff's danger in time to avert the accident? In Bailey v. Wilson, supra, skid marks extended back from the place of impact for a distance of 56 feet and the car stopped less than a foot from the point of impact. In the present case the evidence of skid marks indicates that defendant Johnson did not apply the brakes until just about the time of the impact. In Gillette v. City of San Francisco, supra, 58 Cal.App. at page 438, 136 P.2d at page 613, the defendant motorman testified that he rang the car bell and made a "check stop" by slowing down and then going ahead, because he saw "carmen standing out alongside of their cars like carmen always do." Similarly in Darling v. Pacific Electric Ry. Co., supra, and in Webb v. Los Angeles Ry. Corp., 134 Cal. App. 637, 26 P.2d 26, the motorman rang the bell to warn plaintiff of the approach of the street car. In the present case there is no evidence that defendant Johnson sounded his horn or otherwise indicated that he saw plaintiff until plaintiff was only five feet in front of the automobile. In Argo v. Southern Pacific Co., 39 Cal.App.2d 706, 104 P.2d 77, the engine fireman testified that he was looking straight down the track which was unobstructed for approximately a mile before the crossing where the train collided with plaintiff's automobile, and did not see it approach the tracks. In Handley v. Lombardi, supra, the defendant, with a clear view for over 300 feet, drove his automobile from the right towards plaintiff's truck which he claimed he did not see until it was too late to avoid the accident. Similarly, in Pire v. Gladding McBean & Co., supra, and in Hoy v. Tornich, 199 Cal. 545, 250 P. 565, there was no obstruction to defendant's view from his automobile of objects on the highway. In the present case the lights of automobiles turning up Bayshore Boulevard obstructed defendant Johnson's vision.

It thus appears that in each of the above cited cases in which the last clear chance doctrine was held to be applicable, the facts developed in the trial court either indicated that the defendant saw the plaintiff prior to the time that he admitted or they failed to establish any reasonable explanation for the defendant's failure to see the plaintiff. In the present case, not only is there no indication from the application of brakes or the sounding of a horn or otherwise that defendant Johnson saw plaintiff prior to the time that he testified he did, but there is evidence of a physical obstruction to his vision. Defendant Johnson's testimony concerning the glare from the lights of automobiles turning up Bayshore Boulevard stands uncontradicted. While plaintiff urges on appeal that it is incredible that lights from stopped automobiles on a street intersecting at about a right angle got into his eyes, the exhibits introduced in the trial court show that Bayshore Boulevard curves from a southeasterly direction as it runs into Potrero Avenue at the intersection in question, and Johnson did not complain of lights getting into his eyes but rather of lights causing a glare on his windshield. On the present record, the fact that the jury may disbelieve defendant Johnson's testimony does not mean that facts contrary to his testimony have been established which would justify the giving of an instruction on the last clear chance doctrine.

[3] As the record is devoid of such evidence as would justify the jury in finding that defendant Johnson was aware of plaintiff's danger in time to avert the accident no error was committed by the trial court in refusing to instruct as to the doctrine of last clear chance. A similar conclusion was reached in Vitali v. Straight, supra, where the defendant was driving at from 40 to 45 miles per hour on a clear night with lighted headlights, brakes and horn [21 Cal.App.2d 253, 68 P.2d 747] "in good working order", but where he testified that "he did not see Vitali until his automobile was within 40 to 45 feet from him, at which time Vitali was running diagonally across the main highway," and that he sounded his horn and applied the brakes so that at the time of impact he was traveling at from 20 to 25 miles per hour. This court noted in Simon v. City & County of San Francisco, 79 Cal. App.2d 590, 601, 180 P.2d 393, that if the only evidence in that case had been plaintiff's testimony that he was sober and the motorman's testimony that until just before the moment of impact, and too late to prevent it, plaintiff was in an apparent place of safety and was not in an apparent position of peril, these "facts would probably have precluded the doctrine from applying. Dalley v. Williams, 73 Cal.App.2d 427, 166 P.2d 595."

[4] A contrary holding in the present case would throw open almost every personal injury case involving street cars or motor vehicles to the application of the last clear chance doctrine and to verdicts by guess and conjecture rather than by evidence. This would be, in effect, an application of the comparative negligence doctrine,

which doctrine may be just and fair, but which California's Legislature has not seen fit to adopt, and an ignoring of the fact that in this state the last clear chance doctrine only applies where the jury can find that the defendant is actually aware of the plaintiff's peril in time to avert the accident.

[5] There is no merit to plaintiff's contention that the court erred in instructing the jury "that the plaintiff at the time and place of the happening of the accident was not in a marked or unmarked crosswalk and therefore that he was under the duty [expressed in Vehicle Code, § 562] to yield the right of way to the automobile of defendant Maxwell Johnson," and in failing to instruct that if plaintiff was walking from the northwest corner of Potrero Avenue and Army Street toward the traffic signal on the south side of Army Street, it was defendant Johnson's duty to yield the right of way to plaintiff. Even had the jury found that this was the path followed by plaintiff—although there is considerable evidence indicating that plaintiff was walking to the west of said path—it would not follow that as a matter of law plaintiff had the right of way. Section 562 of the Vehicle Code provides that (a) "Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway." An unmarked cross-walk is "That portion of a roadway ordinarily included within the prolongation or connection of the boundary lines of sidewalks at intersections where the intersecting roadways meet at approximately right angles * * *." Vehicle Code, § 85. It is not disputed that the intersecting roadways involved herein meet at approximately right angles. Accordingly, for plaintiff to have been within the unmarked crosswalk across Army Street and thus entitled to the right of way, plaintiff was required to proceed along the prolongation of the boundary lines of the westerly sidewalks of Potrero Avenue and Bayshore Boulevard. All the evidence indicates that he chose another path.

Nothing in Kashevaroff v. Webb, 73 Cal. App.2d 177, 166 P.2d 306, is inconsistent with the conclusion that no error was committed by the trial court. In that case the trial court left it to the jury to determine whether the plaintiff crossed at a marked or unmarked crosswalk. On appeal, defendants contended that the jury should have been instructed as a matter of law that there was no crosswalk at this intersection. In holding that the court should have instructed that there was an unmarked crosswalk, the appellate court said, "This is true because the open area and Bernal Avenue, both of which are roadways, intersect at that point and 'meet at approximately right angles.' That Diamond Street intersects both the open area and Bernal Avenue at angles which are not approximately right angles is immaterial, since the intersection of the open area and Bernal Avenue is at right angles and it was across that intersection that respondent was traveling at the time that his injuries were received." 73 Cal.App. at pages 182–183, 166 P.2d at page 309.

Plaintiff appears to have lost sight of the fact that in the present case the court did not instruct that there was no unmarked crosswalk. Here the court correctly instructed that plaintiff was not in a marked or unmarked crosswalk.

In concluding this examination of plaintiff's contentions with respect to alleged errors in the instructions, it may be observed that at plaintiff's request the following instruction was given: "The court also instructs you that notwithstanding the provisions of subdivision (a) of section 562 of the Vehicle Code in reference to right of way, if you find from the evidence in this case that Mr. Johnson, the driver of the automobile in question, failed to exercise ordinary care for the safety of William Haerdter while Mr. Haerdter was crossing Army Street at the time and place in question, and if you further find that such failure of Mr. Johnson is the sole proximate cause of any injuries sustained by Mr. Haerdter at that time and place, then and under those circumstances your verdict should be in favor of Mr. Haerdter for such damages as you believe the evidence entitles him to."

[6] With respect to plaintiff's contention that the court erred in refusing to ad-

mit evidence which plaintiff urges was "pertinent to the existence of an unmarked crosswalk", it appears that such evidence concerned the custom of the traveling public to cross Army Street from the northwest corner of Potrero Avenue and Army Street to the traffic signal on the south side of Army Street and the existence at the time of the trial of a marked crosswalk along this route. The admissibility of such evidence is largely within the discretion of the trial court. Barone v. Jones, 77 Cal.App.2d 656, 176 P. 392, 177 P.2d 30; Hayes v. Emerson, 110 Cal.App. 470, 294 P. 765. As section 85 of the Vehicle Code gives an express definition of an unmarked "crosswalk", the trial court did not abuse its discretion in refusing other evidence which might have confused or misled the jury. Plaintiff's Exhibit No. 3 for identification, a photograph of the intersection in question as it existed at the time of the trial, which plaintiff claims should have been admitted in evidence, shows not only a new marked crosswalk from the northwest corner of Potrero Avenue and Army Street to the traffic signal on the south side of Army Street, but also reveals a partly obliterated former marked crosswalk between the westerly sidewalks of Potrero Avenue and Bayshore Boulevard.

The judgment is affirmed.

BRAY, J., concurs.

PETERS, Presiding Justice.

I dissent.

In my opinion the trial court should have instructed the jury on the doctrine of last clear chance.

There is evidence from which the jury could have found that plaintiff was negligent, but that evidence does not compel the conclusion that such negligence was a proximate cause of the accident. On the date of the accident there was no marked crosswalk across Army Street. Plaintiff crossed this eighty-foot street at a point where pedestrians, acting reasonably, would normally cross. While the evidence is not clear on the point, it is susceptible of the interpretation that, when plaintiff started to cross, the traffic light was red for Army Street traffic approaching from the west. When plaintiff had passed the center of the street he observed the approaching vehicle about 150 feet away. He proceeded rapidly across the street and was within five feet of the gutter when he was hit by the right front fender of defendant's car. In other words, plaintiff had crossed in front of the left fender of defendant's car, passed in front of the radiator, and was within a foot of safety when he was hit. The slightest swerve to the left by defendant would have avoided the accident.

As to defendant's negligence there can be no doubt. Army Street at the scene of the accident is straight, level, and well lighted. Defendant testified that the night was dry and clear, that his lights were on high beam and that he was traveling at between twenty to twenty-five miles per hour. He admitted that when he was about 300 feet from the scene of the accident he saw a woman pedestrian about 75 to 80 feet in front of his car, and swerved to avoid hitting her. There was no physical obstruction between defendant's car and plaintiff. Defendant's explanation as to why he did not see the plaintiff, although he was looking straight ahead, was that, at some undisclosed place within the last 300 feet, he was blinded by the glare from the lights of vehicles approaching from the right on Bayshore Boulevard. Even though blinded by this glare, the defendant, if his story is to be believed, proceeded ahead at twenty to twenty-five miles an hour, in complete disregard of what might be on the street ahead. He testified, in an obvious attempt to preclude the application of the doctrine of last clear chance, that he did not see the plaintiff until plaintiff had crossed in front of the automobile and was five feet in front of the right fender.

If there were a doctrine of comparative negligence in this state, which there is not, there could be no reasonable doubt but that the negligence of defendant was greater than that of plaintiff. The rule is that, if the plaintiff is guilty of contributory negligence of any degree that proximately causes the accident, he is barred from recovery no matter how great the negligence of the defendant may have been. But, for that rule to apply, the contributory negligence of the plaintiff must have been a proximate cause of the accident. Accordingly, even though the plaintiff may have been negligent, if the defendant had the last clear chance to avoid the accident he is liable under the theory that, in such event, the negligence of the defendant is the sole proximate cause. These principles are elementary, but must be kept in mind in ascertaining whether the jury should have been instructed on the doctrine in this case.

In this state, in order that the doctrine may be applicable, the defendant must have actually seen the plaintiff in time to avoid the accident under circumstances that defendant knew or should have known of the danger to plaintiff. It is not sufficient that the defendant should have seen the plaintiff—the evidence must be reasonably susceptible of the interpretation that defendant actually saw the plaintiff. But, in this connection, the jury is not bound to believe the testimony of defendant that he did not see the plaintiff, nor is the jury bound to believe defendant's explanation of why he did not see. The majority opinion does not challenge these fundamental principles. In fact, it quotes the proper rule as stated in Gillette v. City of San Francisco, 58 Cal.App.2d 434, 136 P.2d 611, but then, in my opinion, fails to apply the rule. The rule as there stated is that: "* * * notwithstanding there may be a total absence of any positive testimony that the defendant actually knew of plaintiff's danger, and even though the defendant definitely denies seeing the plaintiff at all, the doctrine of the last clear chance may be invoked and applied where the facts and circumstances are such as would justify the jury in finding that despite the defendant's denial of knowledge or the absence of direct testimony on the subject, he was actually aware of plaintiff's danger in time to avert the accident; in other words, that he 'must have known' of plaintiff's danger." 58 Cal.App.2d 434, 442, 136 P.2d at page 615. The other cases cited in the majority opinion, and many others that could be cited, abundantly support that rule.

Now how does the majority opinion purport to apply that rule? It says that there is no fact or circumstance contained in the evidence from which the jury could have inferred that defendant actually saw plaintiff in time to avoid the accident. In this connection that opinion states that defendant's testimony on this point is "uncontradicted," and apparently for that reason must be believed. Now let us see what the record discloses. The defendant testified that he was looking straight ahead, on a straight, level, well-lighted street, on a clear, dry night, and that shortly before the accident he could see a pedestrian 75 to 80 feet in front of him. But I did not see the plaintiff because, says defendant, I was blinded by the glare of lights from vehicles approaching from the right on Bayshore Boulevard. Even if that testimony were completely uncontradicted by any evidence, the jury was not bound to believe it. The jury is the sole judge of the credibility of a witness and may disbelieve even uncontradicted evidence. But, in this case, that evidence is not uncontradicted. Various diagrams and photographs of the scene of the accident were introduced into evidence. They disclose that Bayshore Boulevard, itself a very wide street, comes into Army Street at an angle. It was from the lights of automobiles traveling on Bayshore Boulevard that defendant claims he was blinded. To say the least, it is doubtful, since light travels in approximately a straight line, that headlights from cars on Bayshore Boulevard could have, under fundamental laws of physics, blinded the defendant. To say the least, it was for the jury to determine whether defendant's testimony that he was blinded by such lights was true or false. A finding that he was not so blinded could find ample support in the diagrams and photographs. The question was at least debatable. This being so, the evidence is susceptible of the reasonable interpretation, and the jury could have found, that defendant was not blinded, but proceeded to run the plaintiff down under circumstances where if, as he testified, he was looking straight ahead, he must have seen the plaintiff.

There can be no doubt that if a defendant testified that he was looking straight ahead and did not see what was plainly obvious, that his failure to see is negligence—in fact, his failure to see under such circumstances is negligence as a matter of law. Huetter v. Andrews, 91 Cal. App.2d 142, 204 P.2d 655,—hearing denied by Supreme Court.

In this case, if the jury disbelieved the testimony that defendant was blinded, it would have to find that defendant was negligent. That, of course, is not sufficient to make the doctrine of last clear chance applicable. As already pointed out, for that doctrine to be applicable, the jury must find not only that defendant was negligent in not seeing, but that he actually did see the plaintiff in time to avoid the accident. In this connection the majority opinion falls into fundamental error. It holds, in cases where the defendant denies seeing the plaintiff, that before the jury can find he actually did see him, there must be some fact or circumstance that demonstrates he actually did see. Thus, it is stated that, in cases where the doctrine has been held applicable, there was evidence that prior to the accident the defendant swerved, blew his horn, put on his brakes, or some such evidence. Unless some such fact or circumstance is shown, according to the majority opinion, the defendant's testimony that he did not see must be believed, and the doctrine of last clear chance is not applicable. That is not the law. There is no such artificial and illogical limitation on the doctrine. If the plaintiff is in a position of danger that would be plainly obvious to a careful driver, and there is testimony that defendant was looking straight ahead, the law is and should be that the jury may infer that defendant's testimony that he did not see is false and that in fact he did see. The true rule, supported by many authorities, is thus stated in 2 Cal.Jur. 10 Yr. Supp., § 128, at p. 189: "Again, where it appears that the victim was in the path of the vehicle and plainly visible to the driver, the trier of facts may properly conclude that the driver 'must have seen' him. Hence, the jury may be instructed as to the Doctrine of Last Clear Chance although there is no direct evidence that the defendant actually knew of the victim's presence in the roadway, and, indeed, although he may have testified that he did not see the victim in time to avert the collision." This is sound law and supported by many cases. In addition to the cases cited in support of the above quotation, and which do support it, there are several other cases where the only evidence was that the view of defendant was unobstructed, that he was looking straight ahead, but that he did not see the plaintiff in time to avoid the accident. Nevertheless, it was held that it was for the jury to determine whether defendant in fact did see the plaintiff in time to avoid the accident. These cases all hold that from evidence that the defendant should have seen, the jury may infer that he, in fact, did see. See Argo v. Southern Pacific Co., 39 Cal.App.2d 706, 104 P.2d 77; Pire v. Gladding McBean & Co., 55 Cal.App.2d 108, 130 P.2d 143, 981, and cases cited in those opinions. Another excellent case on the subject is Handley v. Lombardi, 122 Cal.App. 22, 9 P.2d 867. There the defendant testified that he did not see plaintiff's truck until just before the collision. There was no evidence that defendant swerved, blew his horn, put on his brakes, or did any other act that would indicate that he saw plaintiff in time to avert the accident. Nevertheless, the doctrine of last clear chance was held applicable. In so holding, Mr. Justice Dooling stated 122 Cal.App. at page 26, 9 P.2d at page 868:

"The court instructed the jury on the last clear chance doctrine and appellant claims error on that ground. The case is on all-fours with Smith et al. v. Los Angeles Ry. [Exp. Co.], 105 Cal.App. 657, 288 P. 690, 691, wherein it was held that the jury was properly instructed on the doctrine of last clear chance. In the Smith case a horse-drawn vehicle traveling at the rate of three miles per hour was struck by an electric car traveling at the rate of twenty-five miles per hour. Substitute slow-moving truck for slow-moving horse and wagon, and rapidly moving automobile for rapidly moving street car, and the cases are not distinguishable on their facts, with the exception that appellant had the additional opportunity to avoid a collision afforded by his ability to turn his automobile so as to pass to the rear of the truck which is denied to a street car confined as it must be to its own tracks.

"Specifically, appellant claims that since appellant testified that he did not see the truck until he was almost upon it, there was no evidence from which the jury could find that he had actual knowledge of the danger of collision before it was too late to avoid it. A similar claim ws disposed of in the Smith case in the following language: 'The motorman testified that he did not see plaintiff on the tracks until the car was within some 30 feet of the wagon, and that the horses were then upon the track. It is contended that there is no other evidence in the record which would justify a contrary finding. The track, for some blocks leading to Third street, was straight; one could see for several blocks; the motorman himself admitted he could see for some 150 feet ahead. He was sitting on his chair at the front of the car, with his hand on the control, for several hundred feet while approaching the scene of the injury. The wagon was moving at the very slow speed of 3 miles per hour. The car was moving about eight times as fast, or some 25 miles per hour. The wagon had proceeded some 12 feet into the path of danger before being struck. Under all the circumstances * * * the jury might have found that the motorman saw plaintiff in time to have avoided the injury, and while plaintiff was actually in peril.' The same inference could have been drawn in the case in hand. It is obvious, with the truck moving ten or twelve miles per hour, that there would be an appreciable time when the truck would be in a position of danger from which nothing that the driver of the truck could do could possibly extricate it. From the time that the front end of the truck was too close to the path of the on-coming automobile to stop before entering that path, until it was actually struck in the rear wheel, the driver of the truck was helpless to avoid the collision. During the same period appellant, by either applying his brakes or swerving behind the truck, could have avoided striking it. The truck was there in plain sight; appellant was sitting at the wheel of the on-coming automobile; there was no obstructions to his view. The jury was not bound to accept his testimony that he did not see the truck until just before he struck it."

The rule of these cases is fundamentally sound, and conclusive of the instant case. Once it is admitted that the jury could have found that defendant's uncorroborated and, in my opinion, inherently improbable testimony that he was "blinded" was false, then we have a case where the evidence shows that defendant ran the plaintiff down on a level, straight, well-lighted street, on a clear, dry night, where he could see pedestrians and did see one at least 75 to 80 feet ahead of his car, and where he was looking straight ahead. Under such circumstances the jury could, under the rule of the cases cited, find that defendant did see plaintiff and could reasonably infer that he proceeded straight ahead in the erroneous belief that plaintiff would clear the fender. The evidence is reasonably susceptible of the interpretation that defendant saw plaintiff, but simply guessed wrong by misjudging the distance. According to the illogical rule contained in the majority opinion, if defendant had swerved, blown his horn or put on his brakes, then the last clear chance doctrine would have been applicable, but where the defendant makes no effort to avoid the accident after seeing the plaintiff, the doctrine is not applicable. That is not and should not be the law.

This case falls precisely within the rule of cases cited. This being so, it was for the jury to determine whether defendant did or did not have the last clear chance to avoid the accident, and the jury should have been so instructed. Failure to do so was most serious error requiring a reversal.

Hearing denied; CARTER, J., dissenting.

92 Cal.App.2d 599

HUGGANS v. SOUTHERN PAC. CO. et al.

Civ. 13954.

District Court of Appeal, First District,
Division 1, California.
June 27, 1949.

Rehearing Denied July 27, 1949.

Hearing Denied Aug. 26, 1949.

1. Railroads 🔑338.3

Ordinarily, the operator of a railroad train has right to assume that one seen approaching track in front of on-coming train will stop before he reaches a point of danger and hence last clear chance doctrine has no application unless operator has opportunity to avoid injury after pedestrian or traveler actually reaches a position on or near track within area in which train must strike him if it proceeds.

2. Negligence 🔑83.7

The last clear chance doctrine applies to a person discovered in a position of present physical danger and it applies to a person discovered unaware of his peril approaching a place of danger in such fashion that if he remains oblivious he will put himself in a position from which an injury to him will result.

3. Railroads 🔑338.2

The last clear chance doctrine is applicable to a person seen approaching a railroad track where circumstances are such to bring home to operator of train that the other is unaware of his peril and will heedlessly bring himself into path of train unless steps are taken by operator to prevent his being struck.

4. Railroads 🔑351(2)

Where boy struck by train testified that he observed train over 400 feet away and concluded that he had ample time to cross in front of it and under evidence jury might reasonably have concluded that engineer seeing boy walking rather fast diagonally toward track with back toward him also saw boy pay no heed to sharp warning whistles of locomotive but with eyes on train moving in opposite direction on further track continue to walk blindly and heedlessly in path of danger and that train could have been stopped, instruction on last clear chance doctrine was authorized.

5. Negligence 🔑7

The quantum of care to be exercised toward children, from whom is to be expected the natural heedlessness of youth, is greater than that required to be exercised toward adult persons.

6. Trial 🔑191(1)

Requested instruction which assumed as a true fact that which jury was not required under evidence to find was properly refused.

7. Trial 🔑261, 267(2)

Where a portion of a proposed instruction is erroneous and should not be given, the court may properly refuse the entire instruction, there being no duty on court to cull out what is proper from what is not.

8. Trial 🔑143

In action for injury to boy struck by train, testimony of the plaintiff and other witness that they heard no whistle was sufficient to create a conflict on issue as to whether warning was given.

9. Railroads 🔑351(2)

In action for injury to boy struck by train, where jury could reasonably have concluded that engineer discovered plaintiff heedlessly approaching the track in such manner as to bring home to knowledge of engineer that the boy was unaware of the train's near approach and of his consequent imminent peril, instruction that it appeared without conflict from evidence that plaintiff knew that train was approaching and that in such state of evidence it was entirely immaterial whether whistle or bell on train was sounded was properly refused.

10. Damages 🔑132(10)

Award of $91,000 for seriously crippling and disfiguring injuries to 12 year old boy including loss of left leg below knee and major portion of right foot was not excessive.

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Personal injury action by Earl Maurice Huggans, by his guardian ad litem, Mabel E. Huggans, against Southern Pacific Company and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Lawrence L. Howe, San Francisco, James T. O'Keefe, Jr. Redwood City, for appellants.

Ivan N. Maroevich, San Francisco, William E. Barden, San Francisco, for respondent.

DOOLING, Justice.

The plaintiff, a boy 12 years of age, was struck by a southbound locomotive of defendant Southern Pacific Company at its Redwood City station and suffered severe injuries including the loss of the left leg below the knee and the major portion of the right foot. After a jury trial a verdict for $91,000 was returned in favor of the minor against the Southern Pacific Company and its engineer and both defendants have appealed.

The injured boy was engaged in selling an evening newspaper at the railroad station. He had certain customers in a business block near the station and on the afternoon in question he started to leave the station to deliver papers to these customers. In order to do so it was necessary for him to cross the tracks of the defendant railroad company. Three lines of track run in front of the station. Nearest the station is a "house track" used for switching and spotting freight cars bearing freight for delivery to Redwood City. Next beyond the "house track" is the southbound main line and beyond that the northbound main line of the railroad.

The passenger station as it faces these tracks has an over all length of approximately 70 feet from its northern to its southern end. Approximately 40 feet southerly of the southern end of the station building there is a wooden crosswalk extending across the two main lines of the railroad. The minor plaintiff testified that he started from a point near the station building walking in a diagonal direction toward this crosswalk intending to pass over it. When he arrived at a point which he estimated as six to eight steps north of the cross walk and when he was some six to eight feet from the westerly rail of the southbound main line he looked over his shoulder to the north and saw the southbound passenger train approaching somewhere north of the Broadway crossing The northerly side of the Broadway crossing scales on a diagram introduced into evidence more than 400 feet from the crosswalk in question. At that time the plaintiff concluded that he had time to get across the crosswalk in front of this train and he did not look to the north again but proceeded to the crosswalk where he was struck. At the same time a northbound freight train was passing the Redwood City station and just before the southbound locomotive struck him a man in the caboose of this train waved to the plaintiff and the plaintiff waived in return. The plaintiff at no time heard the bell or whistle of the southbound train before he was struck.

The defendant engineer testified that he was drawing a train of four passenger coaches; that his train was scheduled to stop at Redwood City; that before reaching the Broadway crossing he reduced the speed of his train to 15 miles per hour and maintained that speed as he approached the station; that when the pilot or cowcatcher of his engine was about opposite the north end of the station building he saw the plaintiff walking toward the rails at a 45 degree angle in a southeasterly direction at a rather rapid gait and looking at the northbound freight train; that he gave three or four short blasts of the whistle to warn plaintiff and plaintiff stopped about 7 feet from the southbound track and looked over his shoulder at the southbound train; that when plaintiff turned and looked at the train he was 100 feet from the pilot of the locomotive; that the train proceeded at 15 miles per hour and when it was about 15 feet from him plaintiff suddenly stepped in front of it a little north of the crosswalk. The witness then "big-holed" the train and brought it to an emergency stop. Traveling at 15 miles per hour the engineer testified that the train could make an emergency stop in from 75 to 80 feet. The evidence given by other witnesses will be discussed in connection with the points made by appellants.

[1, 2] The trial court gave an instruction on the doctrine of last clear chance. Appellants argue that under the evidence the giving of this instruction was prejudicial error. Ordinarily the operator of a railroad train has a right to assume that one seen approaching a railroad track in front of an on-coming train will stop before he reaches a point of danger, 22 Cal. Jur., Railroads, sec. 88, p. 348 et seq., and hence the doctrine of last clear chance has no application unless the operator of the train has an opportunity to avoid the injury after the pedestrian or traveler actually reaches a position on or near the track within the area in which the train must strike him if it proceeds. However the last clear chance doctrine has two phases. It applies to a person discovered in a position of present physical danger and it applies to a person discovered unaware of his peril approaching a place of danger in such fashion that if he remains oblivious he will put himself in a position from which an injury to him will result.

The latter phase of the rule is exemplified by the companion cases of Girdner v. Union Oil Co., 216 Cal. 197, 13 P.2d 915, and Center v. Yellow Cab Co., 216 Cal. 205, 13 P.2d 918. The Girdner case arose out of a collision of motor vehicles at an intersection. The plaintiff drove toward the intersection unaware of the defendant's approach. The defendant saw the plaintiff approaching in such a manner that the paths of the vehicles would cross and saw that the plaintiff was not looking in defendant's direction. The trial court gave judgment to plaintiff under the doctrine of last clear chance and this judgment was affirmed on appeal on the theory that plaintiff was unaware of his peril and that defendant seeing him approaching the point of collision without looking knew or should have known that he was unaware of the peril toward which he was driving and so knowing defendant had the last clear chance to avoid the collision. The court said, 216 Cal. at page 203, 13 P.2d at page 917: "It would be a strange case indeed, to say the least, that would declare it to be permissible to run down and injure one simply because he was in a position of peril of which he was unaware, without responding in damages for his willful act."

The Center case was one in which a pedestrian plaintiff was seen by the driver of a taxicab walking heedlessly toward the path which the cab was taking and the doctrine of last clear chance was held applicable on the ground that the cab driver seeing plaintiff approaching and knowing that he was unaware of his peril had the last clear chance to avoid the casualty.

[3] In a proper case this doctrine is applicable to a person seen approaching a railroad track where the circumstances are such as to bring home to the operator of a train or car that the other is unaware of his peril and will heedlessly bring himself into its path unless steps are taken by the operator to prevent his being struck.

The classic case in this state is Harrington v. Los Angeles Ry. Co., 140 Cal. 514, 74 P. 15, 63 L.R.A. 238, 98 Am.St.Rep. 85. In that case a number of men engaged in a bicycle race were known by the motorman of a street car to be approaching the crossing and in disregard of their safety the motorman ran his car onto the crossing and one of the contestants was killed. The court held the last clear chance rule applicable, saying, 140 Cal. at page 523, 74 P. at page 18:

"It is, of course, true, as urged by defendant, that it is essential to such liability that the defendant did actually know of the danger, and that there is no such liability where he does not know of the peril of the injured party, but would have discovered the same but for remissness on his part. (Citation.) This, however, does not mean, as seems to be contended, that defendant must know that injury is *inevitable* if he fails to exercise care, and the decisions indicate no such requirement. It is enough that the circumstances *of which the defendant has knowledge* are such as to convey to the mind of a reasonable man a question as to whether the other party will be able to escape the threatened injury. One in such a situation is in a dangerous position." (Italics are the Supreme Court's.)

The Harrington case involved a street railway but the rule that the operator may ordinarily assume that one approaching a track will not place himself on the track at such time as to incur injury is applicable to street railways as well as interurban trains, 23 Cal.Jur. 884, and the rule was so stated in the Harrington case, 140 Cal. at page 520, 74 P. at page 17.

The application of the branch of the last clear chance doctrine which depends on the injured person's unawareness to peril and the railroad operator's realization thereof is thus stated in 3 Shearman & Redfield on Negligence, Rev.Ed., Zipp, sec. 480, p. 1193:

"Where it is realized by the operatives in time to avoid injury by the means within their power, that one is probably about to go into a place where he would be in danger of being struck by the cars, a case of discovered peril has already arisen, and the company will be liable for an injury thus inflicted if, by the use of all the means at hand, without endangering the safety of the train or passengers, it could have been avoided."

In 2 Restatement of Torts, sec. 480, Comment b we find at pp. 1259-1260:

"The defendant is entitled to assume that the plaintiff is paying or will pay reasonable attention to his surroundings; until he has reason to suspect the contrary, he has no reason to believe the plaintiff is in danger. * * * Thus, if an engineer of a train approaching a level highway crossing sees a traveler approaching the track on foot or in a vehicle, he is not required to take any steps either to warn the traveler by an additional blast of his whistle or to bring the train under special control, since he is entitled to assume that the traveler has discovered or will discover the oncoming train and will stop before reaching the crossing. However, it is not necessary that the circumstances be such as to convince the defendant that the plaintiff is inattentive and, therefore, in danger. It is enough that the circumstances are such as to indicate a reasonable chance that this is the case. Even such a chance that the plaintiff will not discover his peril is enough to require the defendant to make a reasonable effort to avoid injuring him. Therefore, if there is anything in the demeanor or conduct of the plaintiff which to a reasonable man in the defendant's position would indicate that the plaintiff is inattentive and, therefore, will or may not discover the approach of the train, the engineer must take such steps as a reasonable man would think necessary under the circumstances. If a train is at some little distance, the blowing of a whistle would ordinarily be enough, until it is apparent that the whistle is either unheard or disregarded. The situation in which the plaintiff is observed may clearly indicate that his inattention is likely to persist and that the blowing of the whistle will not be effective. If so, the engineer is not entitled to act upon the assumption that the plaintiff will awaken to his danger but may be liable if he does not so reduce the speed of his train as to enable him to stop if necessary. Thus, if the engineer sees a vehicle with the side curtains so drawn as to obstruct the driver's view approaching on a day so windy as to make it doubtful whether the whistle will be heard, he may not be entitled to assume that the driver will discover the approach of the train and may be liable if he fails to exercise reasonable care to bring his train under the necessary control."

The application of the last clear chance doctrine to persons seen approaching railroad tracks under such circumstances as to suggest to a man of ordinary prudence that they were unaware of the peril into which they were proceeding is illustrated by the following cases, a brief notice of the circumstances being appended to each: Colorado Springs & I. Ry. Co. v. Merrill, 27 Colo.App. 382, 149 P. 843 (pedestrian heedlessly approaching track in a fashion to indicate unawareness); Nichols v. Chicago, B. & Q. R. Co., 44 Colo. 501, 98 P. 808 (heedless pedestrian under similar circumstances); Bremmerman v. Georgetown & T. Ry. Co., 50 App.D.C. 378, 273 F. 342 (pedestrian diagonally approaching track with back to on-coming car); Terre Haute I. & E. Traction Co. v. Stevenson, 189 Ind. 100, 123 N.E. 785 (buggy approaching tracks with curtains up and horse trotting); Little v. Boston & M. R.R., 72 N.H. 61, 55 A. 190 (plaintiff turned horses toward track and motorman decided that he intended to cross); Cavanaugh v. Boston & M. R.R., 76 N.H. 68, 79 A. 694 (13 year old girl continued to drive horses toward track heedless of warning signals from train); Ross v. Sibley, L. B. & S. Ry. Co., 116 La. 789, 41 So. 93 (engineer saw man approaching track with large bundle on shoulder which obscured his vision); Browne v. Texas & P. Ry. Co., La.App., 193 So. 511 (pedestrian seen approaching track with back to train); State v. Shain, 349 Mo. 27, 159 S.W.2d 582 (automobile rapidly approaching track with side curtains up); Woods v. Kurn, Mo. App., 183 S.W.2d 852 (automobile stopped 30 feet from track and then started forward again); Atchison, T. & S. F. Ry. Co. v. Baker, 21 Okl. 51, 95 P. 433, 16 L.R.A., N.S., 825 (engineer concluded that man driving toward track intended to cross); St. Louis-San Francisco Ry. Co. v. Bryan, 113 Okl. 39, 237 P. 613, 615 (engineer seeing man approaching track "realized then that there was going to be an accident"); Galveston City Ry. Co. v. Hanna, 34 Tex. Civ.App. 608, 79 S.W. 639 (boy running toward track gave no heed to warning signals); Galveston, H. & S. A. Ry. Co. v. Wagner, Tex.Com.App., 298 S.W. 552 (postmistress seen running toward track with sack of mail for approaching train); Missouri-Kansas-Texas Ry. Co. of Texas v. Cunningham, 118 Tex. 607, 23 S.W.2d 343 (pedestrians walking toward track started to run); Panhandle & Santa Fe Ry. Co. v. Napier, Tex.Civ.App., 117 S.W.2d 826 (automobile seen approaching track in front of dimly lighted backing engine on dark night); Locke v. Puget Sound International Ry. Power Co., 100 Wash. 432, 171 P. 242, L.R.A. 1918D, 1119 (cripple on tricycle continued to approach track despite warning signals).

Speaking of the area of danger in such cases of discovered unawareness the Supreme Court of Colorado said in Nichols v. Chicago, B. & Q. R. Co., supra, 44 Colo. 501, 98 P. at pages 814-815:

"Ordinary care on the part of an engineer requires vigilance to guard against a dangerous situation reasonably to be apprehended as well as one actually imminent, so that it becomes the duty of an engineer, when he sees a pedestrian approaching a public crossing under circumstances which would lead him to believe, as an ordinarily prudent person, that such pedestrian is not aware of the approaching train, to take such steps as an ordinarily prudent person would under similar circumstances to prevent the traveler from placing himself in a situation of danger from which it will be impossible to extricate himself."

On the same subject the Missouri Supreme Court used the following language in State v. Shain, supra, 349 Mo. 27, 159 S.W. 2d at page 586:

"This fact of obliviousness in and of itself can place a plaintiff in a position of peril. In other words, under the cited decisions, if a plaintiff is approaching the pathway of the defendant on a course which, unless he stops, will produce a collision and if he is at the time oblivious to the presence and approach of the defendant, this in itself will cause him to be in a position of peril and not merely approaching a position of peril."

The Supreme Court of New Hampshire put the matter tersely in Cavanaugh v. Boston & M. R. R., supra, at page 696 of 79 A.:

"In this situation, the cases cited hold that if ordinary men, with the information the trainmen have, would anticipate a collision at the crossing and avoid it, the trainmen's negligent failure to do so is the responsible cause of the injury."

So the Supreme Court of Washington in Locke v. Puget Sound International Ry. & Power Co., supra, 171 P. at page 243, said:

"But the continued movement of a person toward a place of danger after a warning sound is notice that he is unaware of his peril, and is enough to break the reciprocal balance of duty, and, if it can be said that he had the time to do so, puts upon the motorman the positive duty of avoiding an accident."

Finally the Texas Court said in Galveston, H. & S. A. Ry. Co. v. Wagner, supra, 298 S.W. at pages 553–554:

"In order for a person to be in peril, it is not necessary that bodily injury will certainly be suffered by him. He is in peril whenever he is pursuing a course which probably will terminate in serious bodily injury to him. Whenever it reasonably appears to a second person, from facts and circumstances within his knowledge, that a person is pursuing such a course and probably will pursue it to the end, then, in such event, the second person is held to have knowledge of the peril of the other."

The elements of the last clear chance rule are stated in Girdner v. Union Oil Co., supra, 216 Cal. at page 202, 13 P.2d at page 917, as follows: "That plaintiff has been negligent and, as a result thereof, is in a position of danger from which he cannot escape by the exercise of ordinary care; and this includes not only where it is physically impossible for him to escape, but also in cases where he is totally unaware of his danger and for that reason unable to escape; that defendant has knowledge that the plaintiff is in such a situation, and knows, or in the exercise of ordinary care should know, that plaintiff cannot escape from such situation, and has the last clear chance to avoid the accident by exercising ordinary care, and fails to exercise the same, and the accident results thereby, and plaintiff is injured as the proximate result of such failure."

If the jury could reasonably find from all the evidence in the case the existence of the several elements of the last clear chance doctrine the instruction on last clear chance was properly given. The existence of the first element may be found from the evidence of the minor plaintiff. From that evidence the jury could find that having observed the approaching southbound train over 400 feet away and erroneously concluding that he had ample time to cross in front of it plaintiff continued to walk diagonally toward the track with his back to the train unaware of its near approach and the consequent peril in which he was placing himself. Appellants argue that having once observed the southbound train the minor plaintiff cannot be said to have been unaware of his peril. This confuses knowledge that the train was coming with knowledge that it was approaching so rapidly that it would strike him if he continued heedlessly on his course. Although plaintiff knew that the train was behind him he erroneously formed the conclusion that he had ample time to cross in front of it and he was therefore unaware of his danger.

Plaintiff testified that in concluding that he had sufficient time to cross in front of the southbound train he "guessed" wrong, his "judgment" was wrong, and in answer to a leading question on cross-examination he "just took a gamble" that he could get across. These answers do not compel the conclusion, as appellants argue, that the minor plaintiff was actually aware of his peril when he stepped in front of the approaching train. The boy gave the following answer to the following question just before answering "yes" to the leading question of the cross-examiner "and you just took a gamble":

"Q. Now, Tommy, after looking over your shoulder * * * and seeing this train coming, why didn't you ever look again to see where the train was before you stepped afoul of the track? A. Because when I looked the first time it was so far away I thought I had plenty of time."

The jury could properly conclude that the answer "yes" to the question "you just took a gamble" was "the obliging answer(s) of a timid youth" Shannon v. Central-Gaither U. School Dist., 133 Cal.App. 124, 131, 23 P.2d 769, and that in fact as he consistently testified the child having once observed the train at such a distance that he thought he had plenty of time to cross in front of it thereafter proceeded heedlessly unaware of its near approach and his consequent peril.

The second element: "that defendant has knowledge that the plaintiff is in such a situation, and knows, or in the exercise of ordinary care should know, that plaintiff cannot escape from such situation" might be found from the testimony of defendant engineer and the inferences reasonably drawn therefrom, together with other evidence in the case. We quote from the engineer's testimony:

"Q. * * * Now, which direction was the boy facing when you saw him? A. He was facing south.

"Q. Facing south? A. The southeast.

"Q. Southeast; was he standing or walking when you saw him? A. He was walking.

"Q. And in what direction was he walking? A. In a southerly east direction—southeast about a 45 degree angle.

* * * * * *

"Q. Now was he headed in the direction of the tracks on which your train was coming in then? A. Yes, he was. * * *

"Q. * * * Now, did the boy stop at that point or did he continue his walk toward your rail? A. He continued.

"Q. Did you do anything as the boy continued to draw near your rail? A. Yes, when I saw him getting into a point of danger I blew the whistle.

* * * * * *

"Q. Can you describe whether he was walking slowly or how he was walking? A. No, he was walking rather fast.

* * * * * *

"Q. He was headed in a general southeasterly direction or edging toward the tracks? A. Kind of edging towards the tracks, yes.

"Q. And looking at this freight train? A. Yes."

It is true that the engineer also testified that when he blew his whistle the boy stopped and looked over his shoulder at the approaching train, but the jury were not bound to believe this testimony. It was contradicted by the testimony of the plaintiff that having observed the train north of the Broadway crossing he did not look toward it again. Appellants insist that the plaintiff's testimony that he observed the train when it was over 400 feet from him in some fashion corroborates the testimony of the engineer that he saw the boy look toward his train when the train was less than half that distance from him. The testimony of the two witnesses is conflicting and flatly contradictory and the jury were entitled to believe the boy and disbelieve the engineer. They were entitled to find that the boy looked toward the train long before the engineer sounded the warning whistle and that when the engineer did blow his whistle the boy did not stop and did not look toward the approaching train but instead with his back to the train heedlessly continued toward the point where he was struck.

This conclusion would find support in the testimony of the witness McDonald, called by the defendants, who testified:

"Q. When the whistle blew on the train you say he didn't move? A. He did not appear to turn and see if there was another train coming. * * *

"Q. Well, when the whistle blew, he didn't make any attempt to get out of the way? A. No." (This witness put the train much nearer the boy when the whistle blew but that was a fact question for the jury.)

[4] Weighing all the evidence the jury might reasonably conclude that the engineer seeing the boy walking rather fast diagonally toward the track with his back toward him also saw him pay no heed to the sharp warning whistles of the locomotive but with his eyes on the freight train going in the opposite direction on the further track continue to walk blindly and heedlessly into the path of danger.

If the jury concluded to draw these inferences from the evidence they could reasonably infer that the engineer knew or as a reasonable man should have known, particularly after the plaintiff ignored the warning whistle, that the plaintiff was unaware of his danger and was proceeding heedlessly into the path of the on-coming train. This conclusion would satisfy the second element of the last clear chance doctrine, that the defendant seeing the plaintiff approaching the point of danger knew or should have realized that he was unaware of his peril and because of his unawareness was about to step into the path of the train.

It is to be remembered in this connection that the train was not running at normal speed in the open country where the opportunity for nice observations of the conduct and demeanor of a pedestrian approaching the tracks does not exist. It was coasting into the station at not more than 15 miles per hour intending to stop. The opportunities for the engineer to observe and appraise the conduct and demeanor of the plaintiff as he heedlessly walked toward the track were certainly as great as those of the driver of the truck in Girdner v. Union Oil Co., supra, 216 Cal. 197, 13 P.2d

915, who was approaching the intersection at the same rate of speed.

[5] Added to this is the fact that the plaintiff was obviously a child and that the quantum of care to be exercised toward children, from whom is to be expected the natural heedlessness of youth, is always greater than that required to be exercised toward adult persons. Brizzolari v. Market St. Ry. Co., 7 Cal.App.2d 246, 248, 46 P.2d 783; Satariano v. Sleight, 54 Cal.App.2d 278, 283–284, 129 P.2d 35; 19 Cal.Jur. 623.

The third element of the last clear chance doctrine remains to be considered: after observing the plaintiff in a position of danger did the engineer have a clear chance in the exercise of ordinary care to avoid the injury? The engineer testified that running at 15 miles per hour by "big-holing" the train he could stop in between 75 and 80 feet. This was corroborated by the testimony of the fireman on the train and the station agent both of whom testified that after the brakes were set the train stopped in less than or about a car length. (The cars are 80 feet 7½ inches in length.) The engineer testified that when he first saw the boy, when he sounded the whistle and when the boy stopped and looked toward the train the pilot of the locomotive was about opposite the north end of the station and about 100 feet from the boy. All three statements obviously cannot be true. The train was advancing about 22 feet per second and from the time the engineer first saw the boy to the time he finished blowing 3 or 4 short blasts on the whistle one or two seconds would doubtless elapse. The jury however were entitled to construe the testimony of the engineer most strongly against him and to conclude that when he finished blowing the whistle his train was still 100 or more feet from the boy. (We have already indicated that the jury were entitled to disbelieve the engineer's testimony that when the whistle was blown the boy stopped and looked toward the train, but the distance of 100 feet might be accepted by them as the distance when the whistle stopped blowing and the engineer saw that the boy was paying no heed.) The defendants called a witness Hadley who first testified that his attention was attracted by the sharp blasts of the whistle, that he looked up and saw the train 150 or more feet away when the boy was already on the track. This witness was afterwards recalled by defendants and, on being shown a written statement which he had given defendants' agent shortly after the tragic occurrence, he testified that he did not at any time see the boy on the track and that the train was somewhat nearer when he first observed it, but he still testified that when the whistling attracted his attention the train was between 100 and 150 feet away and his written statement made shortly after the event placed the train 100 feet more or less from the point of the accident "when I looked up after I heard the whistles." Corroboration might also be found in the testimony of the witness La Barbara that when the train was about 44 feet from him the boy was already on the track, a position which he could not have reached without an appreciable lapse of time from a point 6 or 7 feet away. Other witnesses placed the locomotive much nearer the point of impact when the whistle was blown but the weight of their testimony was for the jury. Reconciling the testimony in an attempt to arrive at the truth the jurors could reasonably conclude that after the whistle had been sounded and when it appeared, or should have appeared to the engineer as a reasonably prudent person, that the plaintiff was unaware of the peril into which he was obliviously walking, the train was still 100 or more feet from the point of impact and could have been stopped in the exercise of ordinary care in time to avert the calamity. At that time the engineer should have been thoroughly alerted and able to act in an instant.

Appellants argue that Rather v. City & County of San Francisco, 81 Cal.App.2d 625, 184 P.2d 727, is a parallel case on its facts and controls this one. The Rather case did not involve the question of knowledge on the part of the operator of the car that the plaintiff was oblivious to his peril and that question was not discussed or considered by this court. The same observation is equally applicable to other California cases cited by the appellants.

The true rule was stated in Cate v. Fresno Traction Co., 213 Cal. 190, 199, 2 P.2d 364, quoting from Arnold v. San Francisco-Oakland T. Rys., 175 Cal. 1, 164 P. 798, and Billig v. Southern Pac. Co., 192 Cal. 357, 219 P. 992:

"He (the motorman) had the right to presume that Arnold (the driver of the automobile) would stop or turn aside, *until the conduct of Arnold was such as should reasonably have led him to apprehend the contrary.*" [213 Cal. 190, 2 P.2d 367] (Italics ours.)

The qualification which we have italicized is an important part of the rule. It has been omitted from the statement in some of the cases where this question was not involved, but where the facts are sufficient to charge the operator of the train or car with knowledge that a person approaching the tracks is oblivious to his peril and will probably cross the track in such fashion as to be struck and injured the operator can obviously no longer assume that he will stop before he reaches a place of danger and if in the exercise of ordinary care the operator then has a clear chance to avert the casualty the last clear chance doctrine becomes applicable.

[6] Appellants proposed the following instruction which the trial court refused to give:

"The plaintiff admits that while he was near the southbound track, but still in a position of safety, he looked to his rear and saw the approaching passenger train. The engineer of this passenger train admits that he saw the plaintiff in a position of safety in the vicinity of the southbound track and also admits seeing the plaintiff look toward the approaching passenger train.

"I instruct you, as a matter of law, that such locomotive engineer had the right to assume that the plaintiff saw the passenger train and would thereafter exercise ordinary care for his own safety, and that the plaintiff would not thereafter move himself to a position where he would be struck by the passenger train. The engineer's right to so assume continued thereafter until the plaintiff reached that point where the engineer knew, or in the exercise of ordinary care should have known, that the plaintiff could not, by exercising ordinary care for his own safety, avoid being struck by the passenger train."

The instruction was properly refused. In the first sentence it assumed as proved facts which we have already indicated the jury was not required under the evidence to find. The testimony of the engineer and the plaintiff was not consistent as this instruction would have led the jury to believe but flatly contradictory. If the testimony of the plaintiff was believed he last looked at the train when it was over 400 feet away and thereafter walked heedlessly toward the track without looking back again until he was struck. If the jury accepted this testimony it could not also believe the testimony of the engineer that when his train was near the north end of the station building and after the whistle had been blown the boy stopped and looked toward the train. If they believed the plaintiff they must disbelieve the engineer and they were entitled to find that the engineer did not see the plaintiff look toward the train because in fact the boy did not do so at the time and place specified by the engineer. Under the evidence the first sentence of the proposed instruction would have been a prejudicially erroneous and misleading instruction upon the facts.

[7] Where a portion of a proposed instruction is erroneous and should not be given the court may properly refuse the entire instruction, there being no duty on the court to cull out what is proper from what is not. In Wiley v. Young, 178 Cal. 681, 683, 174 P. 316, 317, the Supreme Court stated the rule in one sentence: "If the instruction was offered as a whole, then, if any one of these paragraphs is erroneous, the whole was properly refused." Hart v. Farris, 218 Cal. 69, 75, 21 P.2d 432; Paine v. Bank of Ceres, 59 Cal.App.2d 242, 247–248, 138 P.2d 396; Johnson v. Southern Pac. Co., 105 Cal.App. 340, at pp. 356–357, 288 P. 81, collecting earlier cases.

Appellants complain of the court's failure to give the following instruction:

"It appears without conflict from the evidence, and the plaintiff himself admits, that while he was in a position of safety he knew that the passenger train, which later struck him, was approaching from the south (sic). In view of this state of the evidence I instruct you that it is entirely immaterial to any issue in this case whether the whistle or bell on that train was sounded or not."

[8, 9] The instruction was properly refused. The plaintiff and some of the other witnesses testified that they heard no whistle. This was sufficient under the established law of this state to create a conflict on that issue. Peri v. Los Angeles Junction Ry., 22 Cal.2d 111, 119, 137 P.2d 441. While ordinarily the failure to sound a warning of an approaching train is obviously immaterial where the plaintiff has seen the train, McCune v. Pacific Elec. Ry. Co., 87 Cal.App.2d 201, 196 P.2d 634; Rather v. City & County of San Francisco, supra, 81 Cal.App.2d 625, 184 P.2d 727, under the peculiar facts of this case the rule would not be applicable if, as the jury must be presumed to have found, the engineer discovered the plaintiff heedlessly approaching the track in such a manner as to bring home to the knowledge of the engineer that the boy was unaware of the train's near approach and his consequent imminent peril. To hold otherwise would be to hold that the engineer had a legal right to run down without warning one who, he knew, was helpless to avoid catastrophe because he was unaware of the peril which he was obliviously approaching.

[10] The award of $91,000 is attacked as excessive. The plaintiff suffered frightful and seriously crippling and disfiguring injuries. These are to be measured against a normal life expectancy of nearly 54 years, at 12 years of age the normal expectancy is 53.68, 58 C.J.S. page 1212. The special damages pleaded were $11,000 and over $17,000 were proved at the trial without objection. By limiting the special damages to $11,000 and arbitrarily taking $10,000 as the measure for past and future pain and suffering appellants arrive at a figure of $70,000 for general damages. Then by a series of calculations they seek to prove that amortizing $70,000 over 54 years the income to plaintiff will be extravagant. "The question of what may be reasonable compensation in cases of this kind is a matter on which there legitimately may be a wide difference of opinion." Roedder v. Rowley, 28 Cal.2d 820, 823, 172 P.2d 353, 354. The trial judge's denial of a motion for new trial is to be weighed in determining whether the judgment is excessive. Johnston v. Long, 30 Cal.2d 54, 76, 181 P.2d 645. The award for past and future pain and suffering including the mental anguish and humiliation to be reasonably expected cannot be arbitrarily limited to $10,000 for a 54 year period. We suggest only one element of shame and humiliation: the boy now goes swimming but he crawls between the dressing room and the pool. On the whole case unless we can find that the award shocks one's sense of justice and raises the presumption that it was the result of passion and prejudice our duty is to affirm the award. Roedder v. Rowley, supra, 28 Cal.2d 820, 823, 172 P.2d 353; Johnston v. Long, supra, 30 Cal.2d 54, 76, 181 P.2d 645. Applying that rule we cannot find the award excessive.

The judgment is affirmed.

GOODELL, J., concurs.

Hearing denied; EDMONDS, SCHAUER, and SPENCE, JJ., dissenting.

PETERS, Justice pro tem. sitting in place of SHENK, J.

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93 Cal.App.2d 8

MATLIN et al. v. CRESCENT COMMERCIAL CORPORATION.

Civ. 16724.

District Court of Appeal, Second District, Division 3, California.

July 18, 1949.

Rehearing Denied Aug. 9, 1949.

Hearing Denied Sept. 15, 1949.

1. Cancellation of Instruments 🔑55

In action for cancellation of instruments, court may grant any monetary relief necessary to do complete equity between the parties.

2. Cancellation of Instruments 🔑58

Where court in cancelling contracts declared them to be null and void, but obviously meant that contracts were of no further force or effect, and reading of findings as a whole indicated that there was a material breach by defendant in failing to supply good quality of product under the contracts for which plaintiffs were entitled to cancellation, judgment could properly grant plaintiffs a refund of deposits made by them.

3. Appeal and error ⚷219(2), 293

Where defendant neither proposed amendments to findings nor raised objections to their form, and made no motion for new trial, objection that findings were fatally defective could not be raised for the first time on appeal.

4. Appeal and error ⚷1071(1)

Where alleged error resulted from omissions in a finding which if corrected would nevertheless have been adverse to appellant, error would not warrant a reversal.

5. Sales ⚷181(12)

In action for cancellation of contracts for purchase of beer, evidence supported findings with respect to poor quality and unsalability of the beer.

◆

Appeal from Superior Court, Los Angeles County; Ellsworth Meyer, Judge.

Action by Edward Matlin, Angelo J. Police, and John B. Avian against the Crescent Commercial Corporation, a corporation, in which each plaintiff sought declaratory relief, cancellation of a contract and recovery of monies deposited with defendant pursuant to contracts entered into between each plaintiff and defendant. From the judgment, defendant appeals.

Judgment affirmed.

Don Lake, Los Angeles, for appellant.

David A. Matlin, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal by defendant Crescent Commercial Corporation from a judgment for plaintiffs in an action in which each plaintiff sought a cancellation of a contract and the recovery of monies deposited with defendant pursuant to a contract entered into between him and appellant.

In 1946, 1947, and the early part of 1948, there was a decided shortage of beer for sale in the Los Angeles area. In March of 1946, the defendant corporation (Crescent) entered into an agreement with a Wisconsin brewing company to take over its entire output of 520 Premium beer, an eastern beer. Immediately thereafter Crescent sent telegrams to a number of liquor retailers in the Los Angeles area, including plaintiffs, informing them they could buy all the beer they wanted from it. As a result, each plaintiff entered into a contract with Crescent.

The contracts called for the delivery of a specified number of cases of eastern beer in 18 equal monthly installments, required each customer to deposit a sum equal to $1.00 for each case of beer to be purchased, the deposit to be applied against the total cost of the merchandise purchased, on which Crescent agreed to pay 5% interest per annum, payable quarterly. Deliveries were made by Crescent shortly after the execution of each contract. The beer delivered in 1946 was a good quality eastern beer, with an excellent flavor. Shortly after the first of 1947, due to the substitution of grains and the use of synthetic ingredients as a result of a governmental order restricting the use of grains, malts and other products in the manufacturing of beer, the beer delivered by Crescent was of inferior quality in taste and color, was unpalatable and unsalable, and Crescent was so advised by each plaintiff. Each plaintiff was thereupon assured by Crescent that the inferior grade beer would be replaced by, and future deliveries consist of, a good grade of eastern beer. The quality of the subsequent deliveries of beer did not improve and each plaintiff thereupon informed Crescent that because of his inability to sell the inferior beer he would not accept further deliveries and requested it to pick up the "empties." The president of Crescent admitted that in March and April of 1947, Crescent commenced receiving complaints from some of its customers that the beer was not good and that in July and August, 1947, many customers refused to accept further shipments. After its customers stopped accepting deliveries, Crescent refused to pick up any more "empties", although it had been customary to do so and to return to the customers an amount equal to $1.00 for each case.

Each plaintiff had been engaged in the cafe and liquor business for a period of not less than ten years. Plaintiff Matlin entered into his contract with Crescent on April 9, 1946, depositing $1800. Plaintiff Police entered into his contract on May 15, 1946, depositing $2700. Plaintiff Avian entered into his contract on August 7, 1946, depositing $1800.

The action was one for declaratory relief, cancellation of each contract, and a refund on the deposit monies held by Crescent. The declaratory relief count on behalf of each plaintiff set forth the making of the contracts. It alleged the inferior quality of the beer in the early part of 1947 and the inability of each plaintiff to sell it. The count further alleged that although the agreement called for eastern beer, defendant did not deliver the type, quality and grade commonly known as eastern beer; that defendant contended in this regard that it had the right to deliver any grade of beer, regardless of quality, as long as it was manufactured in the east and that the deposit retained by it constituted liquidated damages and was retained as a penalty for each plaintiff's refusal to order more beeer. The second count of each plaintiff sought recovery of the balance of the deposit. The complaint prayed that (1) the agreement entered into by each plaintiff be declared null and void and of no further force or effect; (2) defendant be required to repay to each plaintiff the deposit left with it; (3) defendant be required to pick up all cases of "empties"; (4) plaintiff Matlin recover the sum of $1200; (5) plaintiff Police recover the sum of $1530; (6) plaintiff Avian recover the sum of $1734.

The court found substantially in accord with the allegations of the complaint. From its findings it concluded that the contract entered into by each plaintiff was "null and void, and of no further force or effect whatsoever," that defendant was entitled to pick up all cases, full or empty, in possession of plaintiffs, and rendered judgment in favor of each plaintiff for the amount prayed for in the complaint, which represented the balances of the deposits remaining in defendant's possession.

[1, 2] So far as we are able to determine from appellant's brief, it contends that because the trial court, in cancelling the instruments, declared the contracts to be "null and void", it did so ab initio, and that plaintiffs, therefore, are precluded from obtaining a refund of the deposits made by them. The use of the words "null and void" in this connection, following the wording of the prayer of the complaint, is an unfortunate, but not a prejudicial, one. Obviously what was meant, as the court stated, was that the contracts were of no "further" force or effect. A reading of the findings as a whole indicates that there was a material breach of the agreement on the part of Crescent in failing to supply a good quality eastern beer, for which the plaintiffs were entitled to a cancellation of the contracts and recovery of all monies deposited thereunder. It is elementary that in actions for cancellation of instruments the court may grant any monetary relief necessary to do complete equity between the parties. 4 Cal.Jur. 797, sec. 29, and cases cited therein. The judgment, based upon the findings and conclusions, is, therefore, a correct and proper one.

[3, 4] Appellant's argument that the money judgment is based upon findings which are fatally defective in that they fail to state that the monies deposited with Crescent were for the use of the three plaintiffs, is without merit. Crescent neither proposed any amendments to the findings nor raised any objections to their form, and made no motion for a new trial. Under these circumstances, this objection may not be raised for the first time on appeal. Moore v. Craig, 5 Cal.App.2d 283, 286, 42 P.2d 647; In re Estate of Perry, 64 Cal.App. 21, 27, 220 P. 321; Sweet v. Hamilothoris, 84 Cal.App. 775, 782, 258 P. 652. Where an alleged error results from omissions in a finding which, if corrected, would nevertheless have been adverse to the appellant, the error will not warrant a reversal. Sweet v. Hamilothoris, 84 Cal. App. 775, 781, 258 P. 652; Chamberlain v. Abeles, 88 Cal.App.2d 291, 198 P.2d 927. Such would have been the result in the present case.

[5] There is ample evidence, contrary to appellant's contention, to support the findings with respect to the poor quality and unsalability of the beer.

Judgment affirmed.

SHINN, P. J., and WOOD, J., concur.

93 Cal.App.2d 453

COPLEY et al. v. PUTTER.*

COPLEY v. PUTTER.

Civ. 16930.

District Court of Appeal, Second District,
Division 2, California.

July 8, 1949.

Rehearing Granted July 18, 1949.

As Refiled Aug. 23, 1949.

Hearing Denied Oct. 29, 1949.

1. New trial 🔑6

Wide discretion is vested in trial court to grant new trial.

2. Appeal and error 🔑933(1), 978(1)

Order granting new trial will not be reversed unless manifest and unmistakable abuse of discretion clearly appears, and since a new trial is properly granted where jury was erroneously instructed upon matters of law, and since on appeal presumptions favor the order, it will not be set aside if court's charge is erroneous with respect to substantial issues.

3. Appeal and error 🔑1015(5), 1170(9)
New trial 🔑41(3)

Provision of constitution prohibiting reversal of judgment for misdirection of jury except to avoid miscarriage of justice is binding upon trial court as well as on reviewing court, although if error in instructions could have been prejudicial, trial court's decision that jury may have been misled thereby is final. Const. art. 6, § 4½.

4. Automobiles 🔑172(7), 242(1)

Where two motorists were traveling on same highway and first saw second violate law by steering his automobile into that of third which was proceeding in front of first who had time enough but failed to stop his automobile before reaching that of third and struck it within a second of collision between second automobile and third, both first and second motorists were negligent, and burden was on each to absolve himself from charge of negligence.

5. Torts 🔑27

Law imposes upon each of several tort-feasors the burden of proving his own innocence or his own limited liability.

6. New trial 🔑39

Where first motorist saw on-coming motorist steer his automobile into that of third motorist ahead of first, and first had time but failed to stop and struck third motorist's automobile shortly after it collided with on-coming automobile, and court improperly placed burden on third motorist to prove that concurrent negligence was proximate cause of injury and gave conflicting instructions relative to liability of first and on-coming motorist for concurrent negligence and jury found against third motorist, court properly ordered new trial.

Appeal from Superior Court, Santa Barbara County; Louis C. Drapeau, Judge.

Action by Lois Copley against F. A. Putter for personal injuries sustained in an automobile collision wherein John H. Copley was joined as coplaintiff to recover against the same defendant for the loss of coplaintiff's mother in the same collision. From an order granting a motion for a new trial, defendant appeals.

Order affirmed.

Griffith & Thornburgh, Santa Barbara, for appellant.

Clarence A. Rogers, Santa Barbara, for respondents.

MOORE, Presiding Justice.

The question for decision is whether the trial court abused its discretion in granting a motion for a new trial against a concurrent tort-feasor on the ground that two instructions are contradictory in addition to the fact that a number of instructions effectually directed a verdict for appellants.

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* The court having granted a rehearing of this cause for the purpose of considering other arguments and having concluded that its original opinion is correct, the same is now refiled.

The accident occurred on a three-lane public highway while plaintiff Lois Copley was driving in her sedan northwesterly in a lawful manner. While she and her mother were thus proceeding, the car of defendant Martinez traveled southeasterly. As the latter approached Miss Copley he moved diagonally across the middle lane and into that of plaintiffs' vehicle where the two machines collided. While they were approaching the impact defendant Putter's sedanette followed about 100 feet behind Miss Copley. He saw Martinez 300 feet away and witnessed the latter leave the westerly lane and move toward the Copley car. Putter did not attempt to stop until he was about sixty feet from the point of his collision with the sedan. Although he could have come to a stand still within 60 feet, he did not fully apply his brakes until he was within about 15 to 20 feet away. While he was 40 or 50 feet distant from Miss Copley, he was watching the sunset. His collision with the sedan was a sharp blow, about one second after the impact of the other two automobiles. It threw Lois to the pavement causing serious injuries to her and severe shock to her mother from which the latter died. Lois' brother joined her as coplaintiff in the suit to recover for the loss of their mother.

Judgment on verdict in favor of appellant having been returned, motion for a new trial was duly presented by respondent on the grounds that (a) appellant and Martinez were joint tort-feasors; (b) Putter was liable for the entire damage regardless of which defendant caused the damage; (c) the court erred when it instructed the jury that the burden was on plaintiffs to prove which, if any, of the injuries complained of were caused by appellant who asserted at every stage of the trial the exact reverse of respondents' theses and now maintains the same position. In addition he contends that the court was without power to grant the motion for a new trial for the reason that "plaintiffs failed to prove a prima facie case."

[1-3] Inasmuch as a wide discretion is vested in the trial court to grant a new trial, its order will not be reversed unless a manifest and unmistakable abuse of discretion clearly appears. Since a new trial is properly granted where the jury has been erroneously instructed upon matters of law and since on appeal presumptions favor the order, it will not be set aside if the court's charge is erroneous with respect to substantial issues. Mazzotta v. Los Angeles Railway Corporation, 25 Cal.2d 165, 169, 153 P.2d 338. While section 4½ [1] of Article VI of the constitution is binding upon the trial as well as the reviewing court, yet if an error in the instructions could have been prejudicial the trial court's decision that the jury may have been misled thereby is final. Brown v. George Pepperdine Foundation, 23 Cal.2d 256, 262, 143 P.2d 929.

The trial court could not without error have denied the motion. It had instructed the jury in substance as follows: (a) The Copley car suffered two accidents, first its collision with the automobile of Martinez, the second with that of Putter. (b) If you cannot determine from a preponderance of the evidence that the second accident caused some of the injuries complained of you must find for Putter. (c) Even if Putter was negligent and his negligence contributed to the collision of his machine with the Copley car, this is of no consequence unless such collision is shown by the evidence to have inflicted the injuries for which Lois Copley seeks damages. (d) Negligence of Putter is of no consequence in the joint claim for the death of the mother unless it appears from a preponderance of the evidence that such negligence of Putter was a proximate cause of the death. (e) If the negligence of Martinez was the sole proximate cause of his collision with the Copley car, he is liable for all injuries proximately resulting from said collision including all injuries inflicted by the collision of the automobiles of Putter and Miss Copley. (f) If Putter's negligence was the proximate cause of the collision with the Copley car, he is liable only for those injuries which resulted from such collision. Putter is not liable for injuries already suffered by plaintiffs or by decedent to which he did not contribute. (g) The burden is on plaintiffs to prove by a preponderance of the evidence that defendants were, or that either defendant was negligent and that such negligence was a proximate cause of the injury.

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[1] This section enjoins appellate courts not to reverse a judgment for misdirection of the jury, unless after examination of the entire record it appears that the error complained of resulted in a miscarriage of justice.

At the same time the court rejected the following instruction offered by plaintiffs. "You are instructed that if you find that the accident complained of was proximately caused by concurrent negligence on the part of the defendants, Jesus Martinez and F. A. Putter, then I instruct you that neither defendant can escape liability by claiming that all the injuries were inflicted by the impact with the car of the other defendant, unless such defendant proves by a preponderance of the evidence that no injuries resulted from his negligence."

[4] Not only did the court erroneously declare the law to the jury, but it refused to state to them the law of this state. Where two motorists are traveling upon the same highway and A sees B violate the law by steering his car into that of C which was proceeding in front of A who has time enough but fails to stop his car before reaching that of C and strikes it within a second of B's impact with C, then both A and B are negligent and the burden is cast upon "each to absolve himself if he can." If one of the wrongdoers could escape on the plea that his negligence was independent of that of the other tort-feasor, both might leave the victim of their carelessness without a remedy. It would be a frustration of justice for the wronged person to be permitted to show his injury and the simultaneous negligence of the two tort-feasors and be required to demonstrate which of the two had caused the damage. The evidence of the true cause is practically accessible to the two actors but inaccessible to the injured party. Summers v. Tice, 33 Cal.2d 80, 199 P.2d 1; see also Ybarra v. Spangard, 25 Cal.2d 486, 490, 154 P.2d 687, 162 A.L.R. 1258.

[5] Appellant contends that he and Martinez were not joint tort-feasors and therefore the extent of damage caused by him must be clearly established by a preponderance of the evidence. This is not the rule announced under a similar factual situation: the law imposes upon each tort-feasor the burden of proving his own innocence or his limited liability. Cummings v. Kendall, 41 Cal.App.2d 549, 550, 553, 558, 107 P.2d 282.

[6] Aside from the rule of burden of proof the court erred in instructing the jury that "Putter is not liable in damages for any injuries * * * already suffered or sustained by any of the plaintiffs or by the deceased * * * and to which Putter did not contribute." Inconsistent with the foregoing, the court gave also the following instruction at plaintiffs' request: "If you find by a preponderance of the evidence that the defendants were guilty of concurrent negligence, which concurrent negligence combined to proximately cause the injuries to plaintiff, Lois Copley, and the death of Minnie Copley, there is no burden upon plaintiffs to segregate the damage between the defendants."

In view of the importance of the issues the court was warranted in ordering a new trial by reason of the conflict in the instructions as well as the unsoundness of some of them.

Order affirmed.

McCOMB and WILSON, JJ., concur.

STUCKER v. KATZ.

Civ. 14066.

District Court of Appeal, First District, Division 2, California.

July 15, 1949.

Rehearing Denied Aug. 13, 1949.

Hearing Denied Sept. 12, 1949.

1. Divorce ⚷4

Statute releasing husband from obligation to provide for support of wife after her remarriage applied to decree for alimony rendered before its enactment and automatically released husband from obligation of decree on remarriage of wife. Civ.Code, § 139.

2. Divorce ⚷331

Statute providing that court may from time to time modify its orders with respect to alimony, precludes a divorced wife from having a vested right in instalments of alimony not yet accrued and courts of another state are not obligated under full faith and credit clause to enforce such a decree of divorce as to future instalments of alimony. Civ.Code, § 139.

3. Constitutional law ⚷110
Divorce ⚷4

Divorce decree granting alimony to wife created no vested rights in future instalments of alimony so that statute subsequently enacted providing that obligation of husband to provide for wife's support would cease upon remarriage of wife was not unconstitutional as impairing wife's vested rights embodied in decree. Civ. Code, §§ 138, 139.

Appeal from Superior Court, San Francisco County; Thomas M. Foley, Judge.

Action by Myril Pollard Stucker against Phil C. Katz, as administrator of the estate of Emery Jordan Pollard, deceased, to recover accrued alimony instalments. From a judgment for the defendant, plaintiff appeals.

Affirmed.

Charles McLaughlin, A. J. Harwood, San Francisco, for appellant.

Henry F. Boyen, Frank J. Fontes, San Francisco, for respondent.

DOOLING, Justice.

Plaintiff and appellant procured an interlocutory decree of divorce from respondent's intestate in 1925 and the final decree was entered in 1926. The court awarded her $50 per month alimony. Only $55 was paid by the decedent to appellant and after his death in 1945 she sued his administrator for the accrued balance amounting to $11,850.

The court found that the claim to all instalments which accrued over 5 years before the intestate's death was barred by limitation and the correctness of this adjudication is not questioned. The court further found that appellant was remarried on August 28, 1937 and that by reason of such remarriage the obligation of the decedent to pay alimony was terminated on that date. This finding of the court was based on an amendment to section 139, Civil Code in 1933 which added the following language to that section: "Upon the remarriage of the wife, the husband shall no longer be obligated to provide for her support * * *."

Appellant contends: 1. That this statute is not self-executing and did not automatically release the decedent from the obligation of the judgment; and 2. That if so construed the amendment is unconstitutional as impairing her vested rights embodied in the judgment.

[1] A bare reading of the language of the amendment is sufficient answer to the first contention. It is couched in mandatory language, calls for no court action to make it effective and provides explicitly that the husband "shall no longer be obligated" to provide support for a divorced wife after her remarriage. The only question is as to the constitutional power of the legislature to provide for the automatic termination upon the divorced wife's remarriage of the continuing obligation to pay alimony imposed on a divorced husband by a judgment entered before the enactment of the statute providing for such termination.

Appellant relies on the rule that the plaintiff has a vested right in instalments of alimony already accrued. Keck v. Keck, 219 Cal. 316, 26 P.2d 300. Even before the amendment of Civ.Code, sec. 139 the courts of this state as a matter of public policy had held that the divorce court had power to set aside retroactively instalments of alimony which had accrued after the divorced wife's remarriage. Cohen v. Cohen, 150 Cal. 99, 88 P. 267, 11 Ann.Cas. 520; Atlass v. Atlass, 112 Cal.App. 514, 297 P. 53. Appellant argues that these cases are inconsistent with Keck v. Keck, supra, and Biewend v. Biewend, 17 Cal. 2d 108, 109 P.2d 701, 132 A.L.R. 1264, and must be considered overruled by them. We do not find it necessary to decide this point, bcause there is no question here of setting aside any instalment of alimony after it had accrued.

[2] By express provision of section 139 as it read when the divorce decrees in this case were entered in 1925 and 1926 there was no vested right in instalments not yet accrued, that section then providing as it still does that "the court may from time to time modify its orders in these respects." This provision constitutes a statutory reservation of the power of modification, including termination, of the provisions for future alimony instalments in all decrees of divorce entered in the courts of California. McClure v. McClure, 4 Cal.2d 356, 360, 49 P.2d 584, 100 A.L.R. 1257. It follows from this reservation of power that a divorced wife has no vested right in instalments of alimony not yet accrued and for that reason the courts of another state are not obligated under the full faith and credit clause to enforce such a decree of divorce as to future instalments of alimony. Biewend v. Biewend, supra, 17 Cal.2d 108, 112, 109 P.2d 701, 132 A.L.R. 1264.

[3] The amendment to sec. 139, Civil Code operates prospectively, from the date of remarriage, only upon instalments of alimony not yet accrued at that time. It therefore cannot be said to deprive the divorced wife of any right which has already vested in her by virtue of the decree. The case is controlled by Rosher v. Superior Court, 9 Cal.2d 556, 71 P.2d 918. The question involved in that case was whether a father had a vested right in a decree providing for the support of a female minor child so that future instalments provided for in the decree could not constitutionally be extended to include the three years between the date of the minor's reaching the age of 18 and the date of her becoming 21 by the adoption, after the making of the order, of the statute increasing the age of majority of women. The court held that there was no vested right as to unaccrued instalments because of the reservation of the power in the courts to change or modify their decrees for the support of minors contained in section 138, Civil Code. In doing so the court expressly overruled Kendall v. Kendall, 122 Cal.App. 397, 10 P.2d 131, a case strongly relied upon by appellant.

Judgment affirmed.

GOODELL, J., concurs.

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92 Cal.App.2d 697

VALENTIN v. VALENTIN.

Civ. 14002.

District Court of Appeal, First District,
Division 2, California.

July 1, 1949.

Appeal and error 🔑654

Where it appeared that certain documents should be included in the record, appellant's motion to augment the record would be allowed, and since it appeared that one or more of such documents might be lost or destroyed, the granting of the motion would be conditioned upon appellant's procuring an order of the Superior Court authorizing the use of necessary copy or copies. Code Civ.Proc. § 1045.

◆

Appeal from Superior Court, City and County of San Francisco; Milton D. Sapiro, Judge.

Action by Nina Valentin against Marcelino Valentin. From an adverse judgment, the plaintiff appeals. On appellant's motion to augment the record.

Motion granted.

Lelia R. Leep, San Francisco, for appellant.

Ferriter & Purcell, San Francisco, for respondent.

DOOLING, Acting Presiding Justice.

Appellant's motion to augment the record is granted and the clerk of the Superior Court is directed to forward to the clerk of this court the following documents:

Affidavit for writ of execution to issue, filed March 22, 1948;

Writ of Execution issued thereon by the Clerk of the Superior Court of the State of California in and for the City and County of San Francisco, and the Return of the Sheriff of said County endorsed thereon;

Notice of Motion for Reappraisement, filed April 19, 1948.

It further appearing that one or more of such documents may be lost or destroyed as to any such document this order is conditioned upon the appellant proceeding pursuant to section 1045, Code of Civil Procedure, to secure an order from the Superior Court authorizing the use of a copy thereof.

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93 Cal.App.2d 22

FORTE v. SCHIEBE.

Civ. 16779.

District Court of Appeal, Second District, Division 3, California.

July 18, 1949.

1. Judgment 🔑658

The findings constitute the decision of the trial court and are controlling.

2. Injunction 🔑94

Where complaint alleged that plaintiff almost daily had been vexed, harassed, assaulted and annoyed by the defendant, but the trial court found that the allegations were not true, and plaintiff did not thereafter claim that the findings were unsupported by the evidence, injunction was properly denied, regardless of statement by trial judge which plaintiff construed as indicating that the judge would have issued an injunction had he thought that the court had jurisdiction.

◆

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by Gilbert S. Forte against John Schiebe for damages and for injunction. Judgment for defendant and plaintiff appeals.

Affirmed.

A. Brigham Rose, Los Angeles, for appellant.

V. P. Lucas, Los Angeles, for respondent.

VALLÉE, Justice.

The complaint in this action alleged that within one year prior to the filing thereof the plaintiff almost daily had been vexed, harassed, assaulted and annoyed by the defendant. The acts and declarations which comprised the foregoing were specifically alleged. It was alleged that plaintiff was injured and damaged as a result thereof. The prayer was for damages and for an injunction. The court found that the allegations were untrue and that plaintiff had not suffered any injury or damage from any act or conduct of defendant. Judgment was for the defendant from which plaintiff appeals.

[1, 2] Appellant's contention appears to be that notwithstanding the court found that the allegations constituting the gravamen of the charge were not true, an injunction should have issued. It is not claimed that the findings are unsupported by the evidence. Appellant's claim is based on a statement made by the trial judge, after argument of the cause, to the effect that he did not see any monetary question involved in the case, that the court did not have jurisdiction "over the question of the conduct between the parties", and that

appellant had an adequate remedy at law. Appellant construes the statement as indicating that the judge would have issued an injunction had he thought that the court had jurisdiction. Assuming that appellant's construction of the statement is correct, it cannot avail him here. The findings constitute the decision of the court and are controlling. Boness v. Helphinstine, 132 Cal.App. 677, 680, 23 P.2d 420. In view of the finding that defendant did not commit any of the acts or make any of the declarations alleged, which finding is supported by the evidence, it would have constituted error to issue an injunction.

Judgment affirmed.

SHINN, P. J., and WOOD, J., concur.

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92 Cal.App.2d 593

MARSHALL v. CITY OF OAKLAND et al.

No. 13968.

District Court of Appeal, First District, Division 1, California.

June 25, 1949.

1. Municipal corporations 🔑187(6)

Where officer or patrolman of police department governed by pension law dies as result of pre-existing heart disease, and evidence establishes that disease was aggravated and death accelerated or precipitated by exertion in performing his duties, his widow is entitled to pension benefits, unless contrary provision appears in pension law.

2. Mandamus 🔑187(9)

Medical experts' testimony in accord with city police pension fund trustees' finding, accepted by superior court, that city police officer's death was not result of injury or disability incurred in performance of his duty, is binding on appeal from judgment denying peremptory writ of mandate to compel trustees to award a pension to petitioner as such officer's widow.

3. Appeal and error 🔑1011(1)

While appellate court has no power to set aside fact findings of judicial body vested with fact finding power, when based on conflicting evidence, conflict must be substantial and real, not fanciful or fictitious.

4. Municipal corporations 🔑220(9)

The burden of showing causal connection between person's death and work performed by him rests with person seeking pension as decedent's dependent.

5. Mandamus 🔑168(2), 187(9)

In mandamus proceeding to compel city police pension fund trustees to award pension to petitioner as deceased city police officer's widow, burden was on petitioner to establish cause of officer's death and on appeal from judgment denying writ, pursuant to court's finding that death was not result of injury or disability incurred in performance of decedent's duty, burden was on petitioner to show, not that evidence would support finding that decedent's service-connected injury caused death, but that evidence would not support contrary finding.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Proceeding by Myrtle Marshall against the City of Oakland, the Board of Trustees of the Police Relief and Pension Fund of such city, and others for a writ of mandate to compel award of a pension to petitioner as the widow of William Marshall, a deceased member of the city police department. From a judgment denying a peremptory writ, petitioner appeals.

Affirmed.

George C. Perkins, Oakland, for appellant.

John W. Collier, City Atty., for respondents.

WARD, Justice.

This is an appeal from the judgment denying the peremptory writ of mandate set forth in the petition, the basis of which was that the husband of petitioner, William Marshall, who was a member of the police department of the City of Oakland, "died as a result of an injury and a disability incurred in the performance of his duties."

Following the death of William Marshall petitioner filed an application, before respondents as trustees of the police relief and pension fund, that she be awarded a pension pursuant to section 96(1) (a) of the municipal charter. Petitioner's application was denied by the trustees and the mandate proceedings followed.

Section 96(1) (a) of the charter provides for a pension to a widow, as long as she shall remain unmarried, equal to one half of the salary attached to the rank held by the decedent at the time of his death if he died as the result of an injury or disability incurred while in the performance of his duty.

Irrespective of the manner in which appellant seeks to present the question on appeal the real issue is whether appellant has sustained the burden of proof that her husband died as a result of injury sustained in the performance of his duty as a member of the police department. Primarily this is a factual case. In the superior court the following evidence was admitted in the place of testimony of lay witnesses: "Transcripts of the testimony which has heretofore been heard in connection first with an application before the Industrial Accident Commission * * * for an award for compensation for the death of her husband; a deposition of the widow taken during this proceeding by the City Attorney's office; and the testimony produced before the Board of Trustees by the applicant and by the City Attorney's office, together with a report made by a physician concerning an examination made of the deceased, William Marshall, in February of 1941."

An "overall summary" of the evidence was introduced without objection before the superior court. In part it sets forth: "Marshall had been appointed to the Oakland Police Department on August 2nd, 1917, as a patrolman and served continuously thereafter as a member of said department until his death. He was appointed an Inspector of Police on July 1st, 1936, and was assigned to the Robbery Detail at the time of his death. Marshall was born August 21, 1890, and was 53 years and 7 months of age when he died. The immediate circumstances of his death were as follows: He had arrived home from work at approximately 5 P.M. on March 22nd, 1944, removed his coat and shirt and put on a sweater over his undershirt. He helped feed his youngest child, read the paper for a short while in the living room, ate only a dish of peaches, assisted his wife in cleaning and washing the dishes, and then went into the back yard of his home, picked up a garden hose preparatory to putting some water in the fish pond, when he suddenly slumped to the ground, gasping for breath for a short while, and then died before medical aid could be summoned. * * * No autopsy was performed. The death certificate was signed by Doctor Robert G. Libby, M. D., on March 23, 1944. Doctor Libby certified the immediate cause of death to be coronary occlusion, duration one-half hour, due to hypertensive heart disease, duration three years, and chronic myocarditis, duration three years. Doctor Libby had examined Marshall in his office in February, 1941, and had made the following report: 'Mr. Marshall first reported to this office in February of 1941, complaining of severe dyspnea, upon exertion, fatigue and occasional chest pains. The pertinent findings of my physical examination and x-ray, fluoroscopy of the heart and lungs, revealed an overweight male, approximately 50 years of age, with bad teeth and pyorrhea of the gums. The blood pressure was 190 cystolic over 110 diastolic. The heart was enlarged to the left. The radial blood vessels were moderately sclerosed. I made the following diagnosis: 1. Hypertensive heart disease. 2. Moderate arteriosclerosis. 3. Left ventricular hypertrophy. 4. Coronary artery insufficiency. The patient was given a reducing diet and dental care was advised. He was cautioned to restrict his activities. Digitalis and animophylin with luminal were prescribed. Mr. Marshall reported to this office at occasional intervals until his death in March, 1944, and he continued the above medication all during that period. In addition to the above diagnosis, he suffered from influenza in January and February, 1944. I prescribed a tonic of Abbots Elixir Cofron with Vitamin B for post influenza malaise on February 15, 1944. He passed away suddenly, on March 22nd, 1944.' "

From the time of his marriage to the applicant on July 26, 1936, until October 12, 1943 the deceased was never seriously ill. On that day he had a light attack of influenza. He began to lose weight, complained of what he called indigestion and began to tire more easily. About February 11, 1944 he went to Los Angeles with another Police Inspector by automobile. They were there three days during which time they did considerable walking between City Hall and the Federal Building and some stair climbing. While there Marshall contracted a lung congestion, had a slight fever, and his nasal passages seemed stopped up, but he did not consult a doctor or remain in bed during the day. Upon arriving home on February 14 he went right to bed and he appeared to be very sick. He went to work the following morning but was brought home at 1:30 p. m. He reported back to work on the 22nd. During the next two weeks he sat up all night on two occasions. On March 4, 1944 he investigated a robbery which required fast work combing an entire neighborhood of hotels and rooming houses, one of which was three stories high, none of which had elevators. The following day Marshall looked pale and tired and said that the exertion from climbing stairs the previous day had made his heart go faster.

Marshall and his partner, Inspector Eugene Murphy, handled the investigation of about 50 robberies from March 7th to 22nd, each involving the climbing of stairways. In his last days Marshall would remain in the automobile while Murphy went into the building, unless they feared gun play.

There is also evidence of a fall on the steps of the City Hall. Appellant refers to evidence that this occurred between March 4th and his death. Respondent, on the other hand, refers to the testimony of Inspector Vernon that it occurred in the spring of 1943. On March 22, 1944 Marshall went with Murphy to San Francisco. They worked with San Francisco and Los Angeles police investigating a Los Angeles murder case.

In his apartment house, of which he was the manager, Marshall went up and down five or six steps to a landing and then five or six more steps to the second floor. Every other Saturday when he was off duty he vacuumed the hall carpet and the stair runners which went up three flights. Once every two or six months he made minor plumbing repairs in the various apartments. He cut the small lawn every two weeks up to October of 1943, after which his stepson performed this work.

[1] Where an officer or patrolman of a police department governed by a pension law "dies as a result of a pre-existing disease of the heart and it is established that the disease has been aggravated and death accelerated or precipitated by exertion in performing the duties of his office" his widow is entitled to pension benefits, Naughton v. Retirement Board of San Francisco, 43 Cal.App.2d 254, at page 256, 110 P.2d 714; citing Buckley v. Roche, 214 Cal. 241, 4 P.2d 929, unless a contrary provision appears in the governing pension law. In this case it is not claimed that the charter of the City of Oakland providing for a police relief and pension fund contains such exception.

Four physicians appeared as witnesses, none of whom had examined Marshall. They may be referred to generally as specialists. They testified that evidence taken in other proceedings had been read and conclusions reached. The first expert witness testified that previous activities as a police inspector had hastened death. The second witness testified that such activities must have been a factor in producing an early death. The third witness testified, "No, I don't believe that his exertions as indicated in the testimony that I have read played any role whatsoever in the causation of his death." The fourth witness testified:

"Q. Doctor, there has been some evidence this morning as to four possible causes of death; one, a coronary artery thrombosis; two, a rupture of a previously damaged heart; three, a hemorrhage of a previously enlarged vessel some place in the body; and four, I am going to have to call on the Court again.

"The Court: A change in the rhythm of the heart.

"Mr. Collier: Q. Now, Doctor, in your opinion * * *

"The Court: (Interrupting) A physiological change.

"Mr. Collier: Q. Did the activities and exertions of Mr. Marshall, as indicated by the evidence in this case, precipitate his death as it occurred and under the conditions in which it occurred, from any one of those causes? A. No, I think not."

[2, 3] It may be assumed that there is no conflict in the evidence that the deceased was suffering from a preexisting heart ailment and no conflict as to the immediate cause of death. There is conflict as to the fact whether previous exertions of the deceased in the performance of his official duties aggravated the heart ailment and whether such aggravation precipitated death. There is some evidence from the physicians who testified that the "exertions" had not hastened death, that they would have restricted Marshall's activities as a matter of precaution, but, upon death, the actual facts were interpreted as showing that Marshall's physical exertions had not precipitated death. That physicians would have advised restriction upon exertions could well be considered by the triers of the facts in determining the correctness of the conclusion of certain expert witnesses, but the evidence of the experts which is in accord with the finding that Marshall did not die as the result of an injury or disability incurred in the performance of his duty, which was accepted by the court, is binding on this appeal. In Brant v. Retirement Board of San Francisco, 57 Cal.App.2d 721, at page 734, 135 P.2d 396, at page 403, this court stated: "While it is true that an appellate court has no power to set aside findings of a judicial body vested with fact finding power when such findings are based on conflicting evidence, it is equally well settled that for that rule to apply the conflict must be substantial and real and not fanciful or fictitious."

[4, 5] The burden of showing a causal connection between the death of a person and the work performed by him rests with the person seeking a pension. As stated in Loveland v. City of Oakland, 80 Cal.App.2d 31, at page 34, 180 P.2d 937, at page 939, "The burden was upon appellant to establish the cause of death (Ellenberger v. City of Oakland, 59 Cal.App.2d 337, 139 P.2d 67) and in the face of the adverse finding below she bears the heavy burden before this court of showing, not that the evidence will support a finding that her husband's service-connected injury caused his death, but rather that it will not support the contrary finding actually made."

It is noteworthy that the attending physician stated that Marshall "was cautioned to restrict his activities", but neither in the history of the case nor in the death certificate is there any language which may be reasonably construed as indicating that official activities precipitated or accelerated death.

The judgment entered is affirmed.

PETERS, P. J., and BRAY, J., concur.

EL RIO OILS (CANADA) LIMITED v. CHASE et al.

Civ. 16864.

District Court of Appeal, Second District, Division 2, California.

July 18, 1949.

Rehearing Granted Aug. 15, 1949.*

1. Contracts 🔑318

Generally, fraud, illegality, or any unconscientious conduct of one seeking equitable relief from forfeiture of a contract will prevent court from granting decree in his favor.

2. Mines and minerals 🔑78(7)

In lessors' cross-action seeking forfeiture of oil and gas lease, evidence sustained finding that lessee entered into agreement with third party to accept lower price for oil produced than lessee would otherwise have obtained, for purpose of evading obligation to pay full royalty due lessors.

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* Subsequent opinion 212 P.2d 927.

3. Mines and minerals ⚷78(2)

Where court found that lessee of oil and gas lease entered into agreement with third party to accept lower price for oil produced than lessee would otherwise have obtained to evade obligation to pay full royalty due lessors, lessee was guilty of fraud and unconscientious conduct, and was not entitled to relief from forfeiture of rights and privileges under lease.

4. Contracts ⚷318

Equity will not relieve from a forfeiture caused by a "willful default," and a "voluntary default" is a willful one.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Voluntary Default" and "Willful Default".

5. Mines and minerals ⚷78(2)

Where court found that lessee under oil and gas lease voluntarily failed and refused to pay full amount of royalties due lessors, and failed to pay within 30 days after notice given pursuant to provisions of lease, court could not grant lessee relief from forfeiture.

6. Mines and minerals ⚷78(2)

Rule that forfeitures are not favored in law does not apply to oil and gas leases.

7. Contracts ⚷318

Generally, where time is made the essence of an agreement, a party may not obtain relief from a forfeiture of the agreement because of failure to comply with its provisions.

8. Mines and minerals ⚷78(2)

Where oil and gas lease expressly stated that time was of the essence, and court found that lessee voluntarily failed and refused to pay full amount of royalties due and further refused to pay within 30 days after notice given pursuant to provisions of lease, court could not grant lessee relief from forfeiture.

9. Appeal and error ⚷989

Power of appellate court begins and ends with determination as to whether there is any substantial evidence contradicted or uncontradicted which will support trial court's finding of fact.

10. Declaratory judgment ⚷347

In lessee's action for declaratory relief to determine basis for computing royalties under oil and gas lease, evidence sustained finding that lessee improperly attempted to charge lessors with proportionate share of overhead and expense of injecting distillate into wells for purpose of increasing production.

11. Appeal and error ⚷173(10)

Where party relying on defense of statute of limitations did not plead the statute or assert it in any other way in the trial court, party waived right to rely upon statute on appeal.

◆

Appeal from Superior Court, Ventura County; Ernest D. Wagner, Judge.

Action by El Rio Oils (Canada) Limited, a Delaware corporation, against J. Warren Chase and others, for declaratory relief to determine the basis upon which a royalty should be paid under an oil lease, wherein defendants filed a cross-complaint seeking forfeiture of the lease. From the judgment, plaintiff and defendants appeal.

Judgment modified, and as modified affirmed.

William A. Reppy, Oxnard, and Dolley, Knight, Woods & Hightower, Los Angeles, for El Rio Oils (Canada) Limited.

Durley, Todd & Fox, Oxnard, Churchill, Teague & Romney, Ventura, for J. Warren Chase and others.

McCOMB, Justice.

Plaintiff (hereinafter referred to as lessee) is the assignee of A. A. Weiss, who on January 16, 1937, leased from defendants (hereinafter referred to as lessors) a certain parcel of land for the purpose of exploring and drilling for oil and other petroleum products. The lease contained, among others, these provisions:

"The Lessee shall pay Lessor, as royalty, for oil produced, an equal one-eighth (⅛) part of the value of all oil which may be produced and saved from said leased lands after deducting therefrom all oil used in the operation and development of said property and in pumping products from the said property elsewhere and after making the customary deductions for treatment, temperature, water and b. s., at the posted market price in the district in which the lease premises are located, for oil of like gravity, on the day the oil is run into the pipe line or tank; settlement to be made by Lessee on or before the 20th day of each calendar month for accrued royalty for the preceding month, or at Lessor's option, exercised not oftener than once in any one calendar year, upon six months previous notice, Lessee shall deliver into tanks maintained by Lessee on the leased premises or at the mouth of the well to pipe line designated by Lessor, Lessor's one-eighth part of said oil storage limited to thirty (30) days (this last provision being for the protection of the Lessor to insure him against an imposition of a fictitious price).

"Lessee shall pay Lessor, as royalty on gas, one-eighth (⅛) of the net proceeds derived from the sale of gas from said property while same is being sold or used off the premises; settlement to be made by Lessee on or before the 20th day of each calendar month for gas sold during the preceding month, but nothing herein contained shall require lessee to market gas from said leased lands, unless said lands are being operated as a gas field. Lessee shall have the right, free of cost to him, to use gas required in the operation and development of said property and in the production and lifting of oil from said wells, and in pumping production and lifting of oil from said wells, and in pumping products from said property elsewhere. * * *

"Time is of the essence of this agreement and lease."

Lessee completed two wells on the property described in the lease. The oil obtained from the wells was of a low gravity and high consistency and lessee found few purchasers interested in buying the type of crude oil produced. Lessee, after the first year of production, injected distillate into the well in such a manner that it mixed with and thinned the native crude oil and made it easier to pump. Because of this method of production, a great deal more native crude oil was produced. The mixture resulting from the injection of distillate was slightly more valuable than the native crude but the cost of the distillate injected was greatly in excess of any increase in the value of the oil.

The purpose of lessee in injecting the distillate was not to increase the marketability of the crude but was for the purpose of increasing the production.

After this practice had been commenced, lessee rendered a statement to lessors in which it deducted from lessors' royalty ⅛th of the cost of the distillate injected by lessee into the well, and charged lessors 5 cents for each royalty barrel of oil for what was termed "a heating and treating charge." The oil injected was neither heated nor treated by the lessee. After objection by lessors to the deduction, lessee continued to make the same deduction but termed it "Royalty owner's share of operating overhead."

A dispute ensued over a period of time between lessee and lessors relative to the basis upon which the royalty due lessors should be computed. Lessee being in default under the terms of the lease for nonpayment of royalty in the sum of $5,229.59, notice of default was given by lessors according to the terms of the lease, which notice was ignored by lessee.

Lessee then filed an action for declaratory relief, in which suit lessors filed a cross-complaint seeking forfeiture of the lease. After trial, the court found that:

1. Lessee "voluntarily failed and refused to pay the full amount of said royalties; * * * (and) * * * voluntarily failed and refused to pay" within 30 days after notice thereof, the sum of $5,229.59, which was due as a royalty under the terms of the lease.

2. It was true that lessee entered into an agreement with Douglas Oil Company

and accepted a lower stated price for oil together with the obligation of Douglas Oil Company to deliver distillate as therein provided, for the purpose of evading its obligation to bear the entire production expense of injecting distillate in the wells, and for the purpose of attempting to establish an indirect method of charging lessor with a share of its expense.

Appeals

1. Lessors appeal from the provisions of the judgment granting lessee relief from the forfeiture of the lease.

2. Lessee appeals from the portions of the judgment which hold:

(a) That lessee, in computing cash royalty due lessors, is not entitled under the terms of the lease to make a deduction for a proportionate part of the cost of injecting distillate into the wells;

(b) That lessors are entitled when they elect to take their royalty in kind to take the oil without deducting the distillate injected into it;

(c) That it is proper to include as a part of the basis for computing the cash royalty the theoretical value to the lessee of a covenant in an oil purchase contract to return to lessee distillate equal in amount to that injected into the well;

(d) That the money royalty be predicated upon the contract price or market value of the oil, whichever is higher.

Lessors' Appeal

Question: *Did the trial court erroneously grant lessee relief from the forfeiture of its rights and privileges under the oil and gas lease?*

This question must be answered in the affirmative.

[1] First: It is the general rule that fraud, illegality, or any unconscientious conduct by one seeking equitable relief from a forfeiture will prevent the court from granting a decree in his favor. (DeGarmo v. Goldman, 19 Cal.2d 755, 764 et seq., 123 P.2d 1; Blue Ridge Metal Mfg. Co. v. Proctor, 327 Pa. 424, 194 A. 559, 561.)

[2, 3] The trial court found that lessee had entered into an agreement with the Douglas Oil Company whereby it agreed to accept a lower price for oil produced from its wells than it would otherwise have obtained, plus an obligation of the Douglas Oil Company to deliver distillate to lessee without lessee's paying for it, for the purpose of evading its obligation to pay lessors the full royalty due lessors. This finding was fully sustained by the evidence. It is therefore obvious that lessee perpetrated a fraud upon lessors and that such conduct was unconscientious and therefore deprived it of the right to relief from the forfeiture of its rights and privileges under its lease decreed by the court.

[4] Second: Equity will not relieve from a forfeiture caused by a wilful default, and a voluntary default is a wilful one. (Taylor v. United States Fidelity & Guaranty Co., 86 Cal.App. 382, 390, 260 P. 898; Parsons v. Smilie, 97 Cal. 647, 654 et seq., 32 P. 702.)

[5] The trial court found that lessee voluntarily failed and refused to pay the full amount of the royalties due lessors and voluntarily failed and refused to pay $5,229.59 within 30 days after notice of default given pursuant to provisions of the lease. Therefore, the foregoing rule is applicable and the trial court erred in granting lessee relief from its forfeiture.

[6, 7] Third: The rule that forfeitures are not favored in law does not apply to oil and gas leases. (John v. Elberta Oil Co., 124 Cal.App. 744, 747 et seq., 13 P.2d 538.) Likewise it is the general rule that where time is made the essence of the agreement, a party may not obtain relief from a forfeiture of the agreement because of failure to comply with its provisions. (Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 19, 55 P. 713, 43 L.R.A. 199, 69 Am.St.Rep. 17; Henck v. Lake Hemet Water Co., 9 Cal.2d 136, 143, 69 P.2d 849.)

[8] The lease under consideration expressly stated "Time is of the essence of this agreement and lease." Hence the foregoing rules are applicable and the trial court should not have granted lessee relief from the forfeiture.

Lessee's Appeal

Questions: First: *Did the trial court err in ruling that in determining the amount of* *royalty due lessors pursuant to the terms of the lease they should not be charged with a proportionate share of lessee's overhead or of the expense of injecting distillate into the wells in order to increase production?*

This question must be answered in the negative. The lease provided that lessee should pay lessors a one-eighth royalty on all oil produced "after making the customary deduction for treatment, temperature, water and b. s." The evidence disclosed that there was no treatment of the oil in any sense of the word. The oil was not subjected to any processing. Likewise evidence was introduced to show that it was the custom in the oil industry that the expense of injecting distillate as an aid in pumping and to increase production should be borne exclusively by lessee and that lessee should pay its own "overhead" expense. In the absence of an agreement to the contrary, it was the custom in the oil industry that in computing a royalty, the lessee should not charge any portion of its overhead expense to the lessor.

[9, 10] In view of the rule that the power of an appellate court *begins* and *ends* with a determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the trial court's finding of fact (In re Estate of Isenberg, 63 Cal.App.2d 214, 217, 146 P.2d 424), the foregoing evidence sustains the trial court's finding that lessee improperly attempted to charge lessors with a proportionate share of its overhead and of the expense of injecting distillate into the wells for the purpose of increasing production.

Second: *Was the defense of the statute of limitations available to the lessee?*

[11] This question must be answered in the negative. A party relying on the defense of the statute of limitations must plead it, otherwise the defense is waived. (Union Sugar Company v. Hollister Estate Company, 3 Cal.2d 740, 744, 47 P.2d 273.)

In the present case lessee did not plead the statute of limitations or assert it in any other way in the trial court. Therefore, under the above stated rule, it has waived any right to rely upon the statute of limitations upon appeal.

In view of our conclusions, it is unnecessary to discuss other points argued by counsel for the reason that their decision would not in any way affect the results we have reached.

The conclusions of law are modified by striking therefrom the semicolon after the words "cross-defendant" on line 3, page 94, of the Clerk's Transcript on appeal, and inserting in lieu thereof a period, and by striking the balance of paragraph 6 of said conclusions of law; also by striking paragraphs 7 and 9 of the conclusions of law. Likewise the semicolon after the words "cross-defendant" in paragraph 5 of the judgment appearing on line 8, page 107, of the Clerk's Transcript on appeal, is stricken and a period is inserted in lieu thereof; also, the following words in said paragraph are stricken:

> "provided, however, that the cross-defendant shall be relieved from said forfeiture and reinstated as lessee under said oil and gas lease in the event that it shall, prior to the expiration of fifteen (15) days from the date of entry of this judgment, pay to the clerk of the above entitled court for the benefit of cross-complainants all sums of money for which judgment is given herein, including costs."

Paragraphs 7 and 9 of the judgment, appearing on pages 109 and 110 of the Clerk's Transcript on appeal, are likewise stricken. The document denominated "Final Judgment" appearing on page 112 et seq. of the Clerk's Transcript on appeal is also stricken.

In all other respects, the judgment of the trial court is affirmed.

MOORE, P. J. and WILSON, J., concur.

Rehearing granted; McCOMB, J., dissenting.

92 Cal.App.2d 704

PEOPLE v. COLTON et al.

Cr. 4319.

District Court of Appeal, Second District, Division 2, California.

July 1, 1949.

Hearing Denied by Supreme Court July 28, 1949.

1. Jury 🔑29(7)

When a trial by jury had been voluntarily and regularly waived, the waiver cannot afterward be withdrawn, except in the discretion of the court. Const. art. 1, § 7.

2. Jury 🔑29(7)

Where trial was set for October 25, and court ordered a venire of one hundred jurors to be drawn for trial, but on October 19 defendant with his counsel appeared in court and waived a jury trial and consented that he be tried by the court, and date of trial was then changed by consent from October 25 to November 3, court did not abuse its discretion in denying defendant's motion on November 3 to set aside the waiver of jury trial. Const. art. 1, § 7.

3. Embezzlement 🔑5

Fact that depositor who induced assistant cashier of bank to make defalcations and falsely credit depositor with amounts of defalcations, intended to repay the money to the bank, was not a defense in prosecution of depositor for grand theft.

4. Embezzlement 🔑11(1)

An agent of a corporation cannot take its money which has been entrusted to him or over which he has control as such agent, and use it even temporarily for his own personal benefit and avoid criminal responsibility by calling it a loan.

5. Embezzlement 🔑5

The fact that one who fraudulently appropriates funds of another intends to restore the funds does not avail as a defense, if the funds have not been restored before information laid or indictment found charging embezzlement. Pen.Code, § 512.

6. Embezzlement 🔑24

Depositor who induced assistant cashier of bank to make defalcations and falsely credit depositor with amounts of defalcations, was a principal in the crime of grand theft and was punishable as such. Pen. Code, §§ 31, 512.

7. Criminal law 🔑511(3)

Evidence is sufficient to corroborate the testimony of an accomplice, even though circumstantial and slight, if it tends to connect the defendant with the commission of the thefts.

8. Criminal law 🔑511(1)

Evidence to corroborate the testimony of an accomplice, need not be sufficient to establish by itself, and without the aid of the testimony of the accomplice, that the defendant committed the offense charged.

9. Criminal law 🔑511(2)

Evidence to corroborate the testimony of an accomplice, is sufficient when it tends to connect the defendant with the commission of the crime in such a way as may reasonably satisfy the trier of facts that the accomplice is telling the truth, and it is not necessary that the accomplice be corroborated as to every fact to which he testifies.

10. Criminal law 🔑511(1)

In grand theft prosecution of depositor who allegedly induced assistant cashier of bank to make defalcations and falsely credit depositor with amounts of defalcations, evidence was sufficient to corroborate the testimony of the assistant cashier as accomplice of the depositor.

◆

Appeal from Superior Court, Ventura County; Charles F. Blackstock, Judge.

Ruth Colton and John F. Hall were convicted of grand theft, and John F. Hall appeals.

Judgment affirmed.

Brennan & Cornell, Los Angeles, for appellant.

Fred N. Howser, Attorney General, Henry A. Dietz, Deputy Attorney General, for respondent.

WILSON, Justice.

Defendants were charged in an indictment returned by the grand jury of Ventura County with grand theft in seven counts—the stealing of various sums of money from the Bank of Hueneme. Both defendants pleaded not guilty and waived trial by jury. The court found both guilty under the count charging the theft of $110,000, and the other six counts were dismissed. Mrs. Colton was placed on probation and Hall was sentenced to the state prison. He has appealed from the judgment of conviction.

Defendant Hall assigns as error the denial by the court of his motion to withdraw his waiver of a jury trial. On September 23, 1948, both defendants entered pleas of not guilty. The trial was thereupon set for October 25, and the court ordered a venire of 100 jurors to be drawn for the trial. On October 19 defendants, with their respective counsel, appeared in court, waived a jury trial and consented that they be tried by the court. The district attorney joined in the waiver. The date of trial was then changed by consent of all parties from October 25 to November 3. Each defendant, each of their attorneys and the district attorney was specifically and separately asked by the court whether they respectively waived a jury and consented that the cause be tried by the court. Each answered in the affirmative. Thereupon the court vacated the previous order directing a venire of 100 persons to be summoned as jurors. On November 3, when the case was called for trial, defendant Hall's attorney moved to set aside the waiver and requested that he be tried by a jury. Upon objection by the district attorney the motion was denied and the cause proceeded to trial by the court.

[1, 2] "A trial by jury may be waived in all criminal cases, by the consent of both parties, expressed in open court by the defendant and his counsel, * * *." Const., art. I, sec. 7. When a trial by jury has been voluntarily and regularly waived the waiver cannot afterward be withdrawn except in the discretion of the court. People v. Cowan, 38 Cal.App.2d 144, 149, 100 P.2d 1079; 35 C.J., p. 222, sec. 140; 50 C.J.S., Juries, sec. 111(b), p. 825. Under the circumstances above related the court did not abuse its discretion in denying defendant's motion to withdraw his waiver of a jury trial.

Defendant Hall contends that the evidence is insufficient to sustain the judgment in that it does not establish a felonious intent—a specific intent to steal or permanently to deprive the bank of ownership or possession of the money.

Defendant was the sole owner of John F. Hall Publications, a corporation having its principal place of business in the city of Hueneme, and editor and publisher of three rural newspapers, including the Port Hueneme Herald-Express. He opened his first account with the bank early in 1941. Mrs. Colton was employed by the bank in January, 1943. She had had no previous banking experience and no education along commercial lines. She soon became a teller and in 1945 was made assistant cashier. As such she supervised the bookkeeping department, the tellers, escrow work and the making of loans. Her immediate superior was Mr. Elmer Green, vice president and cashier of the bank. In his absence Mrs. Colton was in charge of the bank. She was authorized to grant loans up to the amount of $500. Some customers, who had a good credit rating, were entitled to susbtantial loans, but when Mrs. Colton made such loans she consulted with Green or with the president or a director of the bank. In September, 1947, the maximum unsecured loan that could legally be made by the bank to one borrower was $11,250. Prior to July, 1947, on a few occasions Hall gave the Bank of Hueneme checks on other banks which were returned marked "not sufficient funds." When a check was so returned he would give the bank another check to cover it. Hall sought bank loans from Green on several occasions and in September, 1947, applied for a loan of $15,000 which Green refused to make, although Hall said he was in desperate need of the money. Hall made no further requests of Green either for loans or overdraft and made no arrangement for credit with the bank.

On August 25, 1948, Green, upon checking the reserve cash in the vault to determine whether they needed to order additional money, discovered a shortage of $22,000 in Mrs. Colton's cash. She was not at the bank and he telephoned her of the shortage and asked her to come to the bank. Before going she telephoned Hall and told him Green knew about the deficit, thinking he knew of the entire shortage, which was then $110,000. When she arrived at the bank she found Green knew only of the $22,000. She told Green she had taken that amount out of cash and turned it over to Hall. She then talked to Hall who told her the money would probably come within a day or two and asked her to postpone telling the whole story because he could not then get the $22,000. Green telephoned to Hall and demanded that he raise the money and pay it to the bank on that day. Hall could not obtain the money and, on Green's demand, he and the secretary of his corporation executed a chattel mortgage to the bank for $22,000 covering some of the equipment belonging to the company. When accused by Green of wrongdoing in thus involving Mrs. Colton Hall made no reply. The chattel mortgage was taken as an emergency measure as evidence of the indebtedness. Green had no knowledge of what assets Hall had. The note and mortgage were not taken as security for a loan.

Mrs. Colton maintained that the shortage was only $22,000. When she was confronted with deposit slips in her handwriting and was asked their meaning she said she might as well tell the whole story and revealed the entire defalcation to be $110,000, and that Hall had received the entire amount.

Mrs. Colton accomplished the shortage by various means—at one time importing shipments of currency for various amounts from Security-First National Bank and crediting the bank with less than the amounts received; she had placed the money in the various accounts of Hall by drawing checks on the bank; many times when there were not sufficient funds in the account to cover his checks she took money and deposited it in his account and charged the checks to the account; on some occasions she intercepted checks and did not charge them to Hall's account; she took to her home the checks that she had intercepted. Hall was having an audit made of his books and upon asking her for the checks she delivered them to him. At the time Mrs. Colton was talking with Green the checks were in Hall's possession but they were later recovered.

Mrs. Colton's accounts were immediately audited and the shortage of $110,000 was ascertained. The evidence shows in detail the several amounts making up the deficit and the manner in which the checks and the money were handled.

Mrs. Colton testified that in July she had Hall's checks in an amount between $15,000 and $19,000 which he said he would make good but he did not do so. She went on her vacation for two weeks and when she returned she found the checks still remaining unpaid. She called Hall by telephone and saw him every day in reference to the checks and went to his home and talked to him and his wife about the matter but without result.

Hall and Mrs. Colton functioned together in such a manner that their operations constituted a conspiracy to defraud the bank. The acts of one were the acts of the other. Her manipulation of Hall's checks, her false entries in the bank's books and in her own cash account, the "kiting" of checks, and other means used by her to conceal the truth of Hall's account with the bank, and his financial condition which was well known to both defendants, establish a felonious and specific intent to deprive the bank permanently of its money. Hall knew Mrs. Colton was paying his checks in excessive amounts over his cash balance; he knew his own financial situation and his lack of funds to repay the amounts he had received through his issuance of such checks. Hall's evidence that he considered the $110,000 as a loan and that he intended to pay it is confuted by the established facts. His spurious contention in that regard is repelled by his knowledge of the limited loaning capacity of the bank, of which he was told when he applied to Green for the loan of $15,000, and by his failure to make any further applications for loans. Moreover, Mrs. Colton's repeated demands that he provide money with which to pay the checks she held for which there were not sufficient funds and the amounts he had received through the devious methods above described, show clearly that he did not consider the amount to be a loan. By imposing upon Mrs. Colton's friendship he was able to induce her to advance small amounts at first but the deficit grew until she was so deep in the mire that the situation was beyond control.

[3-6] Hall knew Mrs. Colton was using the bank's money for his benefit in an illegal manner, and since he was a party to her felonious acts he cannot escape the consequences. His intent is shown by his actions during the months when the defalcation was being built up rather than by the words coming from him while a witness in his own behalf seeking to escape the penalty for his nefarious transactions. Furthermore, his intent to repay the money is not a defense. An agent of a corporation cannot take its money which has been entrusted to him or over which he has control as such agent and use it even temporarily for his own personal benefit and avoid criminal responsibility by calling it a loan, People v. Talbot, 220 Cal. 3, 14, 28 P.2d 1057 and the fact that the person who fraudulently appropriates such funds intends to restore the money does not avail as a defense if it has not been restored before information laid or indictment found charging the embezzlement. (Idem, 220 Cal. at page 15, 28 P.2d at page 1061; Penal Code, sec. 512; People v. Jackson, 138 Cal. 462, 464, 71 P. 566; People v. Harris, 100 Cal.App. 78, 81, 280 P. 178. But Hall maintains that even though Mrs. Colton is criminally liable under the rule above stated his conviction cannot be sustained because he was not in a relation of trust or confidence or connected in any manner as officer, employee or otherwise with the bank. The evidence shows that he conspired with Mrs. Colton in obtaining the money from the bank which she placed in his several accounts and which was drawn therefrom by his checks. He was directly connected with her in the commission of the crime and advised, encouraged and connived in its commission. He is therefore a principle in the crime and punishable as such. Penal Code, sec. 31; People v. Fronk, 82 Cal.App. 465, 468 et seq., 255 P. 777; People v. Zimmer, 23 Cal.App.2d 581, 585, 73 P.2d 923; People v. Kelly, 69 Cal.App. 558, 569, 231 P. 767.

Contrary to Hall's contention, the money received by him through Mrs. Colton's assistance and manipulations was not a loan from the bank and could not have been considered by him as such. He knew for approximately a year he had not had sufficient funds in the bank to meet his checks; he knew a previous application to Green for a loan had been refused and he did not again apply; he knew Mrs. Colton was using funds of the bank without authority and was falsifying its records to conceal her actions from other officers of the bank. It is fallacious to contend that the depositing of a check in a bank operates as an application for a loan in a case where the person issuing the check is a coconspirator with an officer of the bank in the commission of a fraud. People v. Talbot, supra, 220 Cal. at page 14, 28 P.2d at page 1061.

[7–9] Hall contends that since Mrs. Colton was his accomplice it was necessary that her testimony be corroborated and that no corroboration appears in the record. Evidence is sufficient to corroborate that of an accomplice, even though circumstantial and slight, if it tends to connect the defendant with the commission of the offense. Corroborating evidence need not be sufficient to establish by itself, and without the aid of the testimony of the accomplice, that the defendant committed the offense charged. People v. Negra, 208 Cal. 64, 69, 70, 280 P. 354; People v. Trujillo, 32 Cal.2d 105, 111, 194 P.2d 681; People v. Tinnin, 136 Cal.App. 301, 305, 28 P.2d 951. Corroborating evidence is sufficient when it tends to connect a defendant with the commission of the crime in such a way as may reasonably satisfy the trier of facts that the accomplice is telling the truth, and it is not necessary that the accomplice be corroborated as to every fact to which he testifies. People v. Trujillo, supra.

[10] Mrs. Colton's testimony is corroborated by the evidence of these facts: Hall had attempted to obtain a loan from Green which was refused because the amount was more than the loaning capacity of the bank for unsecured loans; he did not apply for a loan after that refusal; his checks remained in Mrs. Colton's possession uncancelled; his checks were "kited," as shown by the examination made by an auditor sent by the Security-First National Bank; for a period of several months he did not have sufficient funds to cover his

checks; Mrs. Colton placed money in his account with his knowledge so that his checks might be paid; the bank's funds were used for his personal benefit; he signed individually or as an officer of his corporation all checks that were paid with the embezzled funds of the bank; he kept no books or records; when he employed an auditor it became necessary to construct a set of books and for the purpose of so doing he obtained from Mrs. Colton the checks which she had taken to her home; he was in arrears with the bank in the sum of $110,000. All the foregoing facts were at all times within Hall's knowledge. Such evidence is more than sufficient to corroborate Mrs. Colton's testimony and to sustain defendant's conviction.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

ERICKSON v. BOOTHE.

Civ. 7486.

District Court of Appeal, Third District, California.

July 27, 1949.

Hearing Granted Sept. 22, 1949. *

1. Appeal and error 🔑1195(1)

Although an unqualified reversal remands a cause for a new trial, and places parties in the trial court in same position as if case had never been tried, opinion of reviewing court must be followed as far as possible.

2. Appeal and error 🔑1203(5)

Where District Court of Appeal reversed without directions a judgment determining that a lessee had not validly exercised an option to release premises, and opinion stated that lessee had fully performed and that executrix was not entitled to a writ of restitution and parties had stipulated as to all of the facts, new trial after reversal was useless, and trial court properly followed appellate opinion and entered judgment in favor of lessee.

3. Appeal and error 🔑1203(5)

Where executrix brought action for declaratory relief under lease and District Court of Appeal reversed judgment for executrix without directions, voluntary dismissal of action by executrix on same date lessee made motion in trial court for judgment in his favor did not deprive trial court of inherent power to enter judgment following appellate opinion.

4. Appeal and error 🔑1208(8)

Lessee's departure from premises after decision of court determining that he had not validly exercised option to release premises was not a "voluntary abandonment", depriving him of right to possession after appellate court determined that option had been properly exercised.

5. Appeal and error 🔑1208(2)

Trial court has inherent power to order restitution of property to party deprived thereof by its erroneous judgment.

6. Declaratory judgment 🔑329

Where lessor's executrix brought action for declaratory relief to determine rights under lease, and only issue raised by pleadings was whether option for renewal had been validly exercised, evidence of alleged non-payment of rent, acts of waste, and abandonment of possession was inadmissible as outside scope of issues.

7. Judgment 🔑251(1)

A judgment can only encompass matters put in issue by the pleadings.

8. Appeal and error 🔑439

District Court of Appeal is not empowered to vacate judgment of a trial court upon motion of one of the litigants, but such power is confined to trial court under certain prescribed conditions, and even that court is deprived of its jurisdiction to do so by an appeal. Code Civ.Proc. §§ 473, 663.

9. Declaratory Judgment 🔑384

Where lessor's executrix brought declaratory action for determination of rights under a lease, and only issue raised by pleadings was whether option for renewal had been validly exercised, lessee, on determination that renewal had been properly exercised, was not entitled to an accounting of rents, issues and profits by executrix while in possession, but such claims were properly subject of a separate action.

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* Subsequent opinion 216 P.2d 454.

◆

Appeal from Superior Court, Merced County; R. R. Sischo, Judge.

Petition for re-hearing.

Former opinion modified, and, as modified, approved and adopted.

For prior opinion, see 203 P.2d 119. See also 207 P.2d 897.

Lafayette J. Smallpage, Stockton, T. B. Scott, Modesto, for appellant.

Edward T. Taylor, Modesto, for respondent.

PEEK, Justice.

This case is before this court for the fourth time—in this instance upon a petition for a re-hearing filed by counsel for Boothe, which petition was granted solely in order to clarify an apparent misunderstanding of counsel relative to the purport of the previous order of this court. Upon rehearing, the opinion of this court filed March 5, 1949, 203 P.2d 119, is modified, and the opinion as so modified is approved and adopted as follows:

This is the second of a series of appeals arising out of a controversy between Mazie Erickson, as executrix of the last will of Timothy H. Carlon, deceased, and respondent Boothe. The original action was for declaratory relief in regard to a lease entered into by the guardian of the estate of Timothy H. Carlon as lessor and by Boothe as lessee, and in particular a clause thereof giving the lessee an option to release the property upon compliance with certain conditions therein prescribed. The sole question presented in said action was whether or not the lessee had validly exercised the option which question was determined adversely to him by the trial court. On appeal the judgment was reversed without directions. See Erickson v. Boothe, 79 Cal. App.2d 266, 179 P.2d 611.

After the remittitur went down from this court a dismissal of the action was filed on July 21, 1947, on behalf of Mazie Erickson, as executrix, and on the same day Boothe filed a motion in the trial court for judgment in accordance with the terms of the opinion of this court on the first appeal. Our opinion which reversed the judgment without directions held that Boothe had validly exercised the option to release the property. After a hearing on Boothe's motion the trial court entered judgment on October 3, 1947 which not only provided that Boothe was entitled to be restored to the possession of the property, as was proper in view of the opinion on the first appeal and the motion for judgment in accordance therewith, but in addition ordered an accounting of the rents, issues, and profits thereof by Mazie Erickson, as executrix, during the period in which she had possession of the premises as a result of the former erroneous judgment. It is from this judgment so entered in favor of Boothe that Mazie Erickson, in her representative capacity, has now appealed.

Appellant first asserts that the reversal without further directions had the effect of remanding the cause for a new trial; but upon a new trial she will amend her complaint to allege nonpayment of rent by respondent, the commission of acts constituting waste to appellant's damage, and the voluntary abandonment of the premises by respondent in accordance with an agreement with appellant that she would waive costs of suit and damages upon the issues above mentioned. Her contention is that a reversal without directions sets the case at large, and in support thereof relies upon cases such as Central Savings Bank of Oakland v. Lake, 201 Cal. 438, 257 P. 521, wherein it is held that an unqualified reversal remands the cause for a new trial and places the parties in the trial court in the same position as if the cause had never been tried.

[1] However, it is also the rule that the opinion of the reviewing court must be followed as far as possible. Estate of Pusey, 177 Cal. 367, 170 P. 846. Turning then to our opinion on the former appeal it is readily apparent therefrom that at the original hearing it was conceded by Erickson that Boothe properly exercised his option to re-

lease the premises; that had Carlon lived Boothe had performed all of the conditions precedent to the exercise of his right to lease the premises, and continued occupancy thereof by Boothe would have been lawful. The opinion concluded with the following language: "* * * it being agreed that appellant [Boothe] has fully performed, the executrix was not entitled to a writ of restitution."

[2] By reason of the issues raised in the declaratory relief action and by virtue of the admissions appearing therein and in particular the stipulation of the parties as to all of the facts (which stipulation appears in said original proceeding), a new trial after the reversal by this court would have been a wholly idle and useless act. Obviously there remained no issue of fact to be reexamined upon a retrial, and hence the only question presented was one of law. Therefore the trial court properly followed the opinion of this court and entered judgment in favor of Boothe.

Furthermore, in considering appellant's contention, it is pertinent to note the record discloses that appellant has neither amended nor moved to amend her complaint, nor has she filed a separate action setting forth the alleged nonpayment of rent, acts of waste and voluntary abandonment of possession by the respondent, nor has she taken any steps to have the cause set down for a new trial. On the contrary, the record shows that appellant filed a dismissal of the original complaint for declaratory relief on the same date that respondent made his motion in the trial court for the judgment appealed from.

[3-5] The voluntary dismissal of her action by appellant did not deprive the trial court of its inherent power to enter the judgment herein attacked. Schubert v. Bates, 30 Cal.2d 785, 185 P.2d 793. While appellant asserts that respondent voluntarily abandoned possession of the premises, the record discloses that he left the premises only after the order of the trial court entering judgment in the original action. Such action on the part of respondent did not constitute a voluntary abandonment so as to deprive him of his right to possession. Erickson v. Boothe, supra; Schubert v. Bates, supra. And while appellant additionally states in her brief that respondent agreed in writing to give up possession of the premises it is sufficient to state that the record fails to disclose any such agreement. In any event it is well established that the trial court has inherent power to order restitution of property to the party deprived thereof by its erroneous judgment. Schubert v. Bates, supra.

[6] Appellant next contends that the trial court abused its discretion in entering the judgment without hearing evidence of the alleged nonpayment of rent, acts of waste, and abandonment of possession, which appellant asserts will be alleged in an amended complaint upon a new trial of the cause as set forth with regard to her first contention. However, as previously stated she has done nothing in this regard, but on the contrary dismissed her action. Moreover, the only issue raised by the pleadings was whether or not the option for renewal had been validly exercised. Therefore, such evidence sought to be introduced by appellant was outside the scope of the issues and was inadmissible. Fuentes v. Tucker, 31 Cal.2d 1, 187 P.2d 752.

[7] The last contention of appellant is that the judgment is erroneous in that it embraces matters not placed in issue by the pleadings. Specifically, appellant contends that there was no issue raised as to any accounting of the rents, issues, and profits as ordered by the judgment. This contention is not without merit since it is the general rule that a judgment can only encompass matters put in issue by the pleadings. Hyde v. Hagen, 70 Cal.App.2d 517, 161 P.2d 242.

[8] The record further discloses that on October 22, 1948, appellant Erickson filed a motion in this court to vacate the last mentioned judgment and to discuss the foregoing appeal in the event that this court should grant the motion. This court is not empowered to vacate the judgment of a trial court upon the motion of one of the litigants, such power being confined to the trial court under certain prescribed conditions, see Code Civ.Proc., secs. 473, 663, and even that court is deprived of its limited jurisdiction to do so by an appeal. (See 14 Cal.Jur. 1017.)

[9] The observation of counsel for appellant, prefacing the concluding statement of her reply brief, cannot be denied—"This case is becoming somewhat confusing." By reason of such confusion we feel impelled to reiterate what was in effect said in our previous opinion and the essence of the views expressed herein; that it is clear that Boothe is entitled to be restored to possession of the premises, and that portion of the judgment so decreeing must be affirmed; that whatever claims either party may have against the other should be the subject of a distinct and separate action, thereby finally terminating this controversy.

For the foregoing reasons that part of the judgment appealed from restoring Boothe to possession of the land is affirmed; that portion ordering Erickson to account to Boothe is reversed, and the motion to vacate the judgment is denied.

ADAMS, P. J., and THOMPSON, J., concur.

93 Cal.App.2d 94

BOOTHE v. SUPERIOR COURT OF CALIFORNIA, IN AND FOR THE COUNTY OF MERCED et al.

Civ. 7714.

District Court of Appeal, Third District, California.

July 27, 1949.

Mandamus 🔑16(1)

Where Court of Appeal had determined in another case that lessee was entitled to unconditional restitution of leased premises, lessee's petition for mandamus to require restitution was moot and the writ was denied.

Mandamus proceeding by Clyde D. Boothe against the Superior Court of the State of California, in and for the County of Merced and Honorable H. S. Shaffer, Judge thereof, and another to require restitution of real property to the petitioner.

Writ denied.

Edward T. Taylor, Modesto, for appellant.

Lafayette J. Smallpage, Stockton, T. B. Scott, Modesto, and V. G. Preston, Stockton, for respondents.

PER CURIAM.

This is a petition for mandamus to require restitution of real property to the lessee thereof, after reversal of an adverse judgment by this court. Erickson v. Boothe, 203 P.2d 119. Upon filing our decision on rehearing in said cited case, 207 P.2d 894, this petition became moot.

The litigation involved in this petition is somewhat complicated. It has been before this court in three separate appeals. Timothy H. Carlon owned the land in Merced County which is involved in this proceeding. It was subject to a six-year lease to petitioner, Boothe, with an option to renew the lease for four additional years. The lessee was in possession of the land. The option to extend the lease was duly exercised. Carlon died testate. Mazie Erickson was appointed executrix of the estate. She filed suit for declaratory relief, asserting that the four year renewal constituted a new lease and not a mere extension of the term of the original lease, and that it was a necessary prerequisite to file with the estate a claim to authorize the restoration. The trial court sustained the contention of the executrix. Pursuant to that judgment the defendant, Boothe, surrendered possession of the property. On appeal, this court determined that the option to renew the lease was duly executed; that the renewal of the lease did not constitute a new lease, but was merely an extension of the original lease, and that the filing of a claim in the estate was not necessary. The judgment was therefore reversed. Erickson v. Boothe, 79 Cal.App.2d 266, 179 P.2d 611. A hearing by the Supreme Court was denied. After the remittitur in that case issued, on motion of the defendant, Boothe, judgment was rendered in his favor, entitling him to be restored to possession, and to an accounting for rents, issues and profits received by the executrix while Boothe was out of possession. The pleadings in that case did not present the issue of damages sustained in the loss of rents, issues or profits. From the last mentioned judgment the executrix appealed. Assuming that the judgment of the trial court restored the defendant Boothe to possession of the land *conditioned* upon the accounting for rents, issues and profits, the defendant was refused possession of the land. On appeal, this court held, Erickson v. Boothe, 203 P.2d 119, that the right of the defendant to restoration of possession was in effect unconditional, and affirmed the order for restitution, but reversed the order for an accounting. Upon application for rehearing that decision was vacated by the granting of the petition therefor. Subsequently, upon reconsideration, the last mentioned decision of this court was approved and adopted by an opinion filed this date. In accordance with the last decision of this court, the defendant is entitled to unconditional restitution of the premises. No other issue in that case remains undetermined. As suggested in our last decision, the defendant has a right to a separate action for rents, issues and profits while he was out of possession through no fault of his own.

This petition for a writ of mandamus is therefore moot.

The writ is denied.

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92 Cal.App.2d 830

ROBART v. BREHMER et al.

Civ. 14007.

District Court of Appeal, First District.
Division 2, California.

July 15, 1949.

Hearing Denied Sept. 12, 1949.

1. Negligence 🔑136(18, 25)

In action for death of one riding in airplane which collided on ground with airplane operated by defendant, plaintiff's evidence was sufficient to take to jury question of defendant's negligence, causing collision, in failing to advance throttle of left motor and retard that of right motor when plane veered to left toward other plane.

2. Witnesses 🔑316

Impeachment of plaintiff's witness did not destroy effect of his testimony on question of defendant's negligence, as credit to be given witness was for court and jury.

3. Negligence 🔑136(27, 28)

Whether airplane operator was negligent in taxiing up airfield runway with knowledge that another plane was taking off thereon in opposite direction and in failing to speed up in attempt to avoid collision with such plane were fact questions for jury in action for death of one riding with such operator as result of collision between planes.

4. Negligence 🔑22, 67

The Civil Aeronautics Board's regulation, requiring airplane pilot to observe other traffic and take precautions to avoid collision with another plane before and while taxiing, taking off and landing on airport, does not require constant observation of other traffic.

5. Negligence 🔑136(28)

Whether airplane operator, taxiing up airport runway with knowledge that another plane was taking off thereon in opposite direction, could have done anything, in exercise of ordinary care, to avoid collision with such plane when it veered to left toward his plane, was fact question for jury in action for death of one riding with him as result of such collision.

◆

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by Barbara Robart, individually and as guardian ad litem of Linden Paul Robart, a minor, against Philip Brehmer and another, for wrongful death caused by a collision between two airplanes on the ground at a privately operated air field. From an order granting plaintiff a new trial after a jury's verdict for defendants, they appeal.

Affirmed.

David Livingston, Louis F. Di Resta, George F. Halcrow, San Francisco, for appellants.

Melvin M. Belli, Jonathan Rowell, Lou Ashe, John Brettman, San Francisco, Darrell B. Edwards, Oakland, for respondent.

DOOLING, Justice.

In an action for wrongful death the jury returned a verdict for defendants. The court granted a new trial on the ground of insufficiency of the evidence and defendants appeal.

The death was caused by a collision of two airplanes on the ground at a privately operated airfield. This field has an easterly and westerly runway about 3,000 feet long and 400 feet wide. The northerly 300 foot strip is used by planes taking off from the field and the southerly 100 feet by planes taxiing up the field to the beginning of the takeoff of the runway.

The decedent Robart was a flying instructor and was in a single motor plane with a pupil, Dr. Long. This plane was equipped with dual controls so that while Dr. Long was actually operating it the decedent could have taken over its operation at any moment. Dr. Long was practicing taking off and landing. On his last landing he decided that it might not be safe to take off immediately so he taxied to the westerly end of the runway, made a U-turn and started to taxi back to the head of the runway on the 100 foot strip set aside for that purpose. As he did so the defendant Brehmer was leaving the easterly end of the runway intending to take to the air. He was operating a two-motor plane. Brehmer proceeded for approximately 570 feet and had attained a speed of at least 40 miles per hour when his plane began to veer toward the left and thereafter proceeded in a parabolic arc about 210 feet leftward until it struck the plane operated by Dr. Long with the resultant death of Robart.

Appellants claim that there is no evidence which would support a finding that defendant Brehmer was negligent and that the evidence establishes the decedent's contributory negligence as a matter of law.

Appellants point out that traveling at 40 miles per hour the plane operated by Brehmer would travel 210 feet in less than 4 seconds. Brehmer testified that as soon as his plane began to veer he tried to turn it back to its course by setting the tail rudder, that when that proved ineffective he eased back his right throttle, depressed his right brake and when none of these measures proved effective he pulled the stick in an attempt to take to the air. It is appellants' position that Brehmer did all that could be expected of a person of ordinary prudence confronted by a sudden emergency with less than 4 seconds in which to act.

[1, 2] There is evidence, however, produced by the plaintiff which is sufficient if believed by the jury to support a finding of Brehmer's negligence. This evidence is to the effect that the most probable cause of Brehmer's two-motored plane veering to the left was a partial or total failure of power in the left motor; that while the plane was on the ground the effect of an attempt to turn it by use of the tail rudder would be negligible; that the use of the right brake would be more effective, but that the most effective method of regaining the proper course would be to equalize the power by throttling down the right and opening up the left motor. The witness Sylvestri, who was riding with Brehmer and is an experienced airplane mechanic, testified that at no time did Brehmer pull back the right throttle or push the left throttle ahead. He then gave the following answer to the following question:

"Q. * * * If from the time you took your swerve, up until the time of the crash, if the right motor had been pulled back on throttle, and the left throttle had been pushed far ahead, what would have happened any time up until the crash? A. Well, it would have corrected the curve, if he closed the right and opened up the left more."

It takes no argument to establish that this evidence presented questions of fact for the jury 1. as to whether Brehmer advanced one throttle and retarded the other; 2. whether a person of ordinary prudence in the emergency presented would have done so; and 3. if he did not do so whether if he had done so the collision would have been avoided. That Sylvestri was impeached did not destroy the effect of this testimony, the credit to be given him being for the court and jury.

There is evidence of admissions of Brehmer and other evidence relied upon by respondents which we need not discuss. Having stated sufficient evidence to support a finding of negligence we need not appraise the effect of any other evidence, and we do not do so.

[3-5] Appellants argue that the decedent was guilty of negligence as a matter of law on 3 grounds. 1. that it was negligence to taxi up the taxi strip knowing that Brehmer's plane was taking off in the opposite direction; 2. that it was negligence for decedent's plane not to speed up in an attempt to avoid the collision; and 3. that decedent violated a rule of the U.S. Civil Aeronautics Board and hence was guilty of negligence per se.

The first two arguments obviously present questions of fact and not of law. The third depends upon the following rule of the Civil Aeronautics Board:

"60.106. Operation on and in the vicinity of airports. Aircraft shall be operated on and in the vicinity of airports in accordance with the following rules:

"(a) Prior to and during taxiing, taking off and landing, a pilot shall:

"(1) Observe other traffic and take precautions to avoid collision * * *."

It is argued that Dr. Long violated this regulation because he testified that after observing Brehmer's plane veering to the left he took his eyes off of it. The regulation requires the operator of a plane to "observe other traffic". Dr. Long did observe other traffic. The rule does not require constant observation. The rule requires the operator to "take precautions to avoid collision". Whether Dr. Long could in the exercise of ordinary care have done anything to avoid the collision was clearly a question of fact.

It is not claimed that this is a res ipsa loquitur case so we do not discuss that question. It is so clearly a fact case, however, that we feel it superfluous to cite or discuss any cases.

Order affirmed.

GOODELL, Justice, concurs.

34 Cal.2d 112

SCHRADER et ux. v. NEVILLE et ux.

L. A. 20932.

Supreme Court of California, in Bank.
July 1, 1949.

1. Pleading 🔑147

Where a defendant files a pleading denominated by him a "cross-complaint", there are for certain purposes two simultaneous actions pending between the same parties wherein each is at the same time both a plaintiff and defendant.

2. Pleading 🔑142

As between a counterclaim and a cross-complaint the nature of the pleading will be determined from its allegations regardless of its designation.

3. Costs 🔑32(5)

Where claim of defendants against plaintiffs for damages in action arising out of collision of automobiles, was one which could have been pleaded by defendants as either a counterclaim or cross-complaint, Supreme Court could, in its discretion, treat claim as either a counterclaim or cross-complaint, for purpose of determining whether plaintiffs were entitled to costs when defendants were unsuccessful on their claim, to the end that substantial justice might be done. Code Civ.Proc. § 1032.

4. Set-off and counterclaim 🔑60

Statute providing that if defendant omits to set up a counterclaim on a claim arising out of the "transaction" set forth in the complaint as the foundation of plaintiff's claim, neither he nor his assignee can afterwards maintain an action against the plaintiff therefor, required that claim by defendants for damages resulting from collision of automobiles be pleaded by them in action by plaintiffs for damages resulting from the same collision, or claim of defendants would have been barred. Code Civ.Proc. § 439.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Transaction".

5. Judgment 🔑622(2)

Only when a claim of a defendant must necessarily be pleaded as a cross-complaint rather than as a counterclaim, is the failure to assert it not a bar to a later action.

6. Costs 🔑32(5)

Where defendants in action for damages arising out of collision between two automobiles, filed a cross-complaint against plaintiffs for damages arising out of same collision, as defendants were compelled to do by statute in order to prevent their claim from being afterwards barred, and plaintiffs were denied recovery on their complaint and defendants were denied recovery on their cross-complaint, defendants were entitled to costs. Code Civ.Proc. §§ 439, 1032.

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Appeal from Superior Court, Los Angeles County; Stanley N. Barnes, Judge.

Action by Delos Wayne Schrader and Helen Lucille Schrader, husband and wife, against John Neville and Marietta Neville, husband and wife, to recover damages assertedly sustained as result of the collision of two automobiles, wherein the defendants filed a cross-complaint for damages, and wherein judgment was entered for defendants on the complaint and for the plaintiffs on the cross-complaint. From an order allowing the plaintiffs costs, the defendants appeal.

Order reversed.

Prior opinion 200 P.2d 557.

Monta W. Shirley, Los Angeles, for appellants.

Parker, Stanbury & Reese and John Henry Peckham, Jr., Los Angeles, for respondents.

EDMONDS, Justice.

Delos W. Schrader and his wife sued to recover damages assertedly sustained as the result of the collision of two automobiles. The defendants, John Neville and his wife, filed a cross complaint for damages claimed by them because of the same accident, and upon a trial neither party recovered against the other. The Nevilles then moved "to tax, disallow and annul the memorandum of costs filed by" the Schraders and the appeal is from an order allowing such costs.

The position of the appellants is that, as the prevailing parties in the action, they are entitled to recover the costs of the litigation. The Schraders argue that, because the cross complaint states an entirely separate cause of action, they must be considered as the prevailing parties, insofar as the issues in that regard are concerned, and the court correctly awarded costs to them.

Section 1032 of the Code of Civil Procedure authorizes the recovery of costs in an action in the superior court "(a) To plaintiff upon a judgment in his favor * * * [and] (b) To the defendant upon a judgment in his favor * * *." In effect, say the appellants, this means "costs shall be awarded to the prevailing party" in the action. However, according to the Nevilles, they defeated the cause of action sued upon by the Schraders and received, to use the words of the statute, "a judgment in their favor in an action for the recovery of damages".

[1] Unlike the statutes in many jurisdictions, our code section is not framed in the express language of the "prevailing party" but it allows the recovery of costs upon that basis by specifying as the condition for an award of them, "a judgment in his favor". The difficulty arises when a defendant files a pleading denominated by him as a "cross-complaint", for it is established that, under such circumstances and for certain purposes, "there are two simultaneous actions pending between the same parties wherein each is at the same time both a plaintiff and a defendant." Pacific Finance Corp. v. Superior Court, 219 Cal. 179, 182, 25 P.2d 983, 984, 90 A.L.R. 384; see also Millar v. Millar, 51 Cal.App. 718, 721, 197 P. 811; Luse v. Peters, 219 Cal. 625, 630, 28 P.2d 357. In that situation it persuasively may be argued that a judgment for the cross defendant entitles him to costs of the cross action insofar, at least, as such cross action was necessarily denominated a "cross-complaint".

[2] However, under our system of procedure, there is a very shadowy line of distinction between a cross complaint and a counterclaim and a considerable area in which they overlap. If, therefore, the claim asserted by the defendant is within this area and it is pleaded as a counterclaim, no question concerning the allowance of costs will arise, because not even in the technical sense does the claim defensively pleaded come within the language of section 1032 of the Code of Civil Procedure. Accordingly, the respondents seek to have the right to costs turn on the name of the pleading chosen by the Nevilles and not by the substance of their claim. But it is well established that as between a counterclaim and a cross complaint the nature of the pleading will be determined from its allegations regardless of its designation. Terry Trading Corp. v. Barsky, 210 Cal. 428, 292 P. 474; Cornblith v. Valentine, 211 Cal. 243, 294 P. 1065; Robertson v. Maroevich, 42 Cal.App.2d 610, 109 P.2d 708.

[3-5] The Nevilles' claim was one which could have been pleaded as either a counterclaim or a cross complaint and this court may, in its discretion, treat it as either to the end that substantial justice may be done. Moreover, section 439 of the Code of Civil Procedure provides: "If the defendant omits to set up a counterclaim upon a cause arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, neither he nor his assignee can afterwards maintain an action against the plaintiff therefor." Under that provision, the claim by the Nevilles must have been pleaded by them in the Schraders' action or it would have been barred, because it is established that all causes of action arising out of an automobile accident are part of one "transaction" within the meaning of the code sections relating to cross complaint and counterclaim. Todhunter v. Smith, 219 Cal. 690, 28 P.2d 916; Engleman v. Superior Court, 105 Cal.App. 754, 288 P. 723. It is only when the defendant's claim must necessarily be pleaded as a cross complaint that "the failure to there assert it does not bar a later action". Sawyer v. Sterling Realty Co., 41 Cal.App.2d 715, 721, 107 P.2d 449, 452.

[6] By filing the complaint the Schraders commenced litigation concerning the liabilities of the respective parties for the injuries sustained as a result of the accident. Although the Nevilles might not have sued to recover damages, when made

defendants in the action, they were compelled to then assert any claim which they might have against the Schraders arising out of the collision. Sec. 439, Code Civ. Proc. Having defeated the claim of the Schraders, as stated in Gerstein v. Smirl, 70 Cal.App.2d 238, 160 P.2d 585, 586, the appellants are entitled to their costs for "a party who defeats an action by a counterclaim is as much entitled to his costs as is a party who defeats it by any other means. In an action such as the instant one for damages, the 'net result' of a judgment requiring defendant to pay nothing to plaintiff is favorable to the former. Although defendant did not recover on her cross-complaint, she was the prevailing party in the court below because plaintiff was denied recovery against her." See also Ballard Transfer & Storage Co. v. St. Paul City Ry. Co., 129 Minn. 494, 152 N.W. 868, 869; Checketts v. Collings, 78 Utah 93, 1 P.2d 950, note 75 A.L.R. 1400. The holding in Borror v. Berry, 51 Cal.App.2d 552, 554, 125 P.2d 537, insofar as it concerns the question of costs, is inconsistent with the rule above stated and is disapproved.

The order is reversed.

GIBSON, C. J., and SHENK, TRAYNOR, CARTER, SCHAUER and SPENCE, JJ., concur.

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93 Cal.App.2d 82

KEANE v. McINDOE.

Civ. 7541.

District Court of Appeal, Third District, California.

July 26, 1949.

Hearing Denied Sept. 19, 1949.

1. Appeal and error 🔑931(1)

Where case was tried before the court sitting without a jury, and defendant appealed from judgment entered in accordance with findings of fact favorable to the plaintiff, evidence would be reviewed in light most favorable to plaintiff.

2. Landlord and tenant 🔑164(1)

Where landlord told new tenant that he could dispose of garbage in a garbage can located in yard adjacent to apartment building and new tenant in passing through gate in order to reach garbage can tripped over a rope and fell to the ground, sustaining serious injuries, status of tenant at time of injury was that of an "invitee", and not a mere licensee. Code Civ.Proc. § 2055.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Invitee".

3. Landlord and tenant 🔑164(1)

Generally, where portion of premises is reserved by landlord for use in common by himself and tenants, or by different tenants, he has duty to use ordinary care to keep those portions of the premises in safe condition and if he is negligent and injury results to tenant by reason thereof, landlord is liable.

4. Landlord and tenant 🔑164(1)

Landlord was not an insurer of the personal safety of tenant on portion of premises reserved for use in common by tenants but landlord did owe him duty to exercise due care to keep the premises in reasonably safe condition.

5. Landlord and tenant 🔑164(1)

Where landlord informed new tenant that he could dispose of garbage in can located in yard adjacent to apartment building, and in passing through gateway to reach garbage can tenant tripped over a rope which obstructed the passageway without sign or other warning to indicate dangerous condition of gateway, landlord was negligent in failing to maintain the gate in safe condition.

6. Landlord and tenant 🔑164(6)

Where landlord informed new tenant that he could dispose of garbage in can located in yard adjacent to apartment building, landlord owed to tenant an affirmative duty to take proper means to discover dangerous condition of gateway through which tenant was required to pass in order to reach the garbage can.

7. Landlord and tenant ⚿169(10)

In action by tenant against landlord for injuries sustained when tenant tripped over a rope on his way to dispose of garbage in can used in common by tenants, evidence that dangerous condition created by rope across gateway had existed for a period of over one month and that landlord had never inspected gate to ascertain its condition sustained finding that such condition was known to landlord or could have been discovered by her in the exercise of reasonable care.

8. Landlord and tenant ⚿164(6)

Landlord was chargeable with constructive notice of the defective condition of a gate which had been in dangerous condition for over one month.

9. Appeal and error ⚿1008(1)

In action by tenant against landlord for injuries sustained by tenant when he tripped over rope across gateway leading to garbage can used in common by tenants, where it was twilight at time of accident and tenant had been such for only one day prior to the accident and was making his first trip to the garbage can, whether tenant was contributorily negligent was for the trial court sitting without a jury and trial court's finding that tenant was free from contributory negligence would not be disturbed.

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Appeal from Superior Court, Del Norte County; Samuel F. Finley, Judge.

Action by Robert E. Keane against Clara McIndoe to recover damages for personal injuries. Judgment for plaintiff, and defendant appeals.

Affirmed.

William W. Speer, George W. Howe, Crescent City, for respondent.

G. H. Van Harvey, San Francisco, C. A. Degnan, Crescent City, for appellant.

PEEK, Justice.

Robert E. Keane brought this action to recover damages for personal injuries allegedly sustained by him on August 20, 1945 when he tripped and fell over a rope attached to a gate upon premises rented by him from the owner, the defendant Clara McIndoe. The allegations contained in the complaint were put in issue by the answer which consisted of a general denial thereof, and the case was tried before the court sitting without a jury. Findings of fact favorable to the plaintiff were adopted by the court, and the defendant has appealed from the judgment which was entered accordingly.

[1] The evidence, reviewed in the light most favorable to respondent, Crawford v. Pacific States Savings & Loan Co., 22 Cal.App.2d 448, 71 P.2d 333; discloses that on or about August 19, 1945, plaintiff and his wife rented an apartment from Mrs. McIndoe. The apartment consisted of a sun room, a "large room", and a kitchenette equipped with a stove and certain cooking utensils, but no garbage can. Appellant, however, stated to respondent's wife that she had a garbage pail for the apartment which she would bring to her, but did not do so. After the garbage from five meals had accumulated the respondent asked appellant where he could dispose of the same. Appellant told him that as yet she did not have a receptacle but that he could dispose of it in a garbage can located in a yard adjacent to the Inn. She further testified that the other tenants made use of the garbage can and that she paid the bill for the removal of the garbage. After procuring the garbage from the apartment respondent proceeded to walk toward the yard where the receptacle was located. The yard was enclosed by a fence necessitating that he pass through a gate in order to reach it. He testified that as he did so he tripped over a rope and fell to the ground, sustaining serious injuries. The rope was fastened to the two gate posts and was not seen by the respondent. Its purpose was to fasten the gate when it was closed but when the gate was open it hung loose. Appellant testified that she knew nothing about the rope although there is evidence that it had been attached to the gate for more than a month. However, she did know that the gate was used by tenants and further testified under section 2055 of the Code of Civil Procedure that the garbage can was for the common use of the tenants.

Appellant contends that respondent was not an invitee but a mere licensee on those parts of the premises where he sustained his injuries; that she was not negligent in failing to maintain the gate or the approaches thereto in a safe condition even if it be conceded that respondent was an invitee; that she had no actual or constructive knowledge of the condition of the gate at the time of the accident, and that respondent's injuries were proximately caused by his own negligence. In contending that respondent was a licensee and not an invitee appellant admits that he occupied the status of an invitee in regard to the apartment he rented but argues that he was a licensee as to the area where the garbage can was located.

[2, 3] We are of the opinion that the evidence amply supports the finding of the trial court. It discloses that appellant undertook to furnish a means and a place to be used by her tenants for the disposal of garbage and invited respondent to use the same in common with the other tenants. The furnishing of the means and the place for disposal of garbage for all practical purposes was a necessary service for the reasonable utilization of the premises for the purposes for which they were rented. In so using such method of disposal furnished by appellant the respondent neither exceeded the scope of his invitation nor lost his status as an invitee. See Oettinger v. Stewart, 24 Cal.2d 133, 148 P.2d 19, 156 A.L.R. 1221. As stated by the court in Bock v. Hamilton Square Baptist Church, 219 Cal. 284, 287, 26 P.2d 7, 8, quoting with approval from Hassell v. Denning, 84 Cal.App. 479, 482, 258 P. 426:

> "The general rule applicable in cases like the present one is that, 'where a portion of the premises is reserved by the landlord, for use in common by himself and tenants, or by different tenants, a duty is imposed upon him to use ordinary care to keep those particular portions of the premises in a safe condition; and if he is negligent in this regard, and a personal injury results to a tenant by reason thereof, he is liable therefor.' "

[4, 5] Appellant's next contention, that she was not negligent in failing to maintain the gate or the approaches thereto in a safe condition, even if it be conceded that respondent was an invitee, likewise is untenable. While appellant was not an insurer of the personal safety of the respondent invitee she did owe him the duty to exercise due care to keep the premises in a reasonably safe condition. Adams v. Dow Hotel, 25 Cal.App.2d 51, 76 P.2d 210. Decisive of this question is the finding of the trial court predicated upon sufficient evidence that the gate "was in a dangerous condition in that a rope or a loop of rope extended across said gateway, thus obstructing the gateway and the passage through said gateway. That there was no sign or other warning to indicate the aforesaid dangerous condition of said gateway. That said dangerous condition was not apparent to anyone passing along said walk and through said gateway."

[6-8] Appellant's further contention that she had no actual or constructive notice of the condition of the gate at the time of the accident is not warranted by the evidence which supports the finding of the trial court that "the aforesaid dangerous condition existed for a period of over one month prior to the 20th day of August, 1945, and was known to the defendant, Clara McIndoe, or could have been discovered by said defendant, by the exercise of reasonable care." The duty owed by appellant to the respondent was an affirmative one requiring her to take proper means to have discovered it. Van Wye v. Robbins, 48 Cal.App.2d 660, 120 P.2d 507. There is evidence that appellant never inspected the gate to ascertain its condition. Furthermore, there is evidence that the gate remained in a defective condition for a month or more which was a sufficient period of time to charge appellant with constructive notice of its condition. See Cressey v. City of Los Angeles, 10 Cal.App.2d 745, 53 P.2d 172.

[9] In support of her last contention that respondent was guilty of contributory negligence, appellant argues that the defect was an obvious one which respondent should have observed in the exercise of ordinary care. In the Cressey case, supra, the court stated, 10 Cal.App.2d at page 748

53 P.2d at page 174, that "In the case before us, an examination of the record discloses that reasonably prudent men could draw different conclusions from the evidence educed before the trial judge. Therefore his finding that respondent was free from contributory negligence will not be disturbed by this court." Such statement is apropos to the finding of the trial court in the present case that respondent was free from contributory negligence. The evidence discloses that it was twilight at the time of the accident and that respondent had been a tenant for only one day prior to the accident and was making his first trip to the garbage can. Under such circumstances we cannot say that he was guilty of contributory negligence as a matter of law. See Dorfer v. Delucchi, 61 Cal.App.2d 63, 141 P.2d 905.

For the foregoing reasons the judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

Hearing denied; SCHAUER, J., dissenting.

92 Cal.App.2d 663

PEOPLE v. RIVAS.

Cr. 4358.

District Court of Appeal, Second District, Division 2, California.

June 29, 1949.

1. Rape 🔑51(4)

Evidence authorized conviction of forcible rape. Pen.Code, § 261, subd. 3.

2. Criminal law 🔑742(1)

Truthfulness of testimony is for triers of fact.

3. Criminal law 🔑554

Defendant's retraction of statement to undersheriff concerning his participation in a rape did not oblige jury or court to believe retraction. Pen.Code, § 261, subd. 3.

4. Rape 🔑51(4)

In prosecution for forcible rape, on the issue of force, the bruised condition of prosecutrix' body, her bloody clothing, testimony of prosecutrix as to violence used upon her, corroborated by witness to her beating and abduction, satisfied statutory requirement. Pen.Code, § 261, subd. 3.

5. Criminal law 🔑1144(13)

On appeal, it is assumed that trial court and jury believed evidence and drew inferences favorable to judgment.

6. Rape 🔑14

Where prosecutrix had been beaten and terrorized before being taken into defendant's presence, her continued resistance was not essential to proof of forcible rape, since she was not required to risk death or further mutilation of her body to prevent violation of her virtue. Pen.Code, § 261, subd. 3.

7. Criminal law 🔑553

In prosecution for forcible rape, the fact that prosecutrix made some inconsistent statements as to details while undergoing an extended cross-examination did not require rejection of her testimony on basic issue of whether she was raped by defendant.

8. Criminal law 🔑741(1)

Jury must determine ultimate fact of guilt of accused out of the harmony or confusion of utterances of witnesses.

9. Criminal law 🔑1159(4)

A reviewing court may not reject testimony believed by jury unless occurrences related by witnesses are physically impossible or their falsity is apparent without resorting to inferences.

10. Criminal law 🔑553

Testimony of a witness cannot be rejected by a reviewing court on the ground of inherent improbability merely because phenomena reported were unusual or because witness may have been inconsistent, and if an incident related could have occurred, it is not inherently improbable.

11. Criminal law 🔑338(4)

In prosecution for rape allegedly committed by defendant after prosecutrix had been brought to defendant's house by two other persons, evidence concerning the kidnaping and rape of prosecutrix by such persons before they turned her over to defendant and of her rape by one of such persons after leaving defendant's house was admissible as disclosing one indivisible transaction, the rape by defendant being a detail or part of the entire criminal scheme. Pen. Code, § 261, subd. 3.

12. Criminal law ⚷338(4)

Where crimes of several persons are so connected, blended and confused with acts of defendant that they all compose one transaction, so that the proof of any one of them cannot be made without establishing the others, evidence against any or all of such persons is admissible against defendant on trial for an offense which is itself a detail or part of entire criminal scheme.

13. Criminal law ⚷369(2)

Evidence of other crimes will not be excluded when it logically tends to establish any facts pertinent to proof of crime on trial.

14. Criminal law ⚷427(5)

Where prosecutrix was violently brought into defendant's house in his presence and was raped by two men, aside from defendant's own rape of prosecutrix, his conduct made him a part of conspiracy with the other men and his silence thereafter made him their accomplice, so that testimony concerning their acts was admissible against defendant. Pen.Code, § 261, subd. 3.

15. Criminal law ⚷427(1)

Evidence of conspiracy among persons charged with crime is proper, though no conspiracy is charged in indictment or information.

16. Conspiracy ⚷47

A conspiracy may be proved by circumstantial evidence.

17. Criminal law ⚷422(1)

Where a conspiracy among defendant and two other men to rape prosecutrix was established, exhibits as evidence of the crimes against prosecutrix by defendant's confederates outside presence of defendant were admissible against him.

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Appeal from Superior Court, Ventura County; Louis C. Drapeau, Judge.

Manuel G. Rivas was convicted of rape and he appeals.

Affirmed.

Charles F. Kromm, Oxnard, for appellant.

Fred N. Howser, Attorney General; Kent C. Rogers, Deputy Attorney General, for respondent.

MOORE, Presiding Justice.

From a conviction of rape by force and violence defendant appeals, asserting the insufficiency of evidence, and errors in the admission thereof.

The prosecutrix having finished her day's work in a cafe at Port Hueneme entered her automobile nearby about 12 o'clock midnight, December 18, rested her head on the steering wheel to await the arrival of her husband and fell asleep. She was suddenly awakened by a blow to the mouth followed by a jerk of the hair and her fall to the sidewalk. One tooth was knocked out and she was bleeding and suffering pain. Two boys whom she recognized as Joe Cortez and George Padilla, both 20 years of age, forcibly placed her in the rear seat of a black sedan. As it sped away to an orchard one of her captors held and choked her. Padilla and a man named Nunez occupied the seat with her and the latter raped her. They drove then to the house of appellant in Oxnard. Padilla and Cortez forced her into the house and told her to keep her mouth shut or receive a blow like the first. They opened the door and there stood Rivas. She pleaded with appellant to make the men desist. He washed her face with alcohol but offered no interference with George and Joe as they jerked off her uniform and threw her on the bed. Still disregarding her requests, appellant remained in the room while Joe and George successively raped her. Thereupon Joe held her while appellant had intercourse with her as she pleaded that the others had done enough to her. After Rivas had accomplished his purpose, she begged him to make the boys take her home. With an oath, Padilla ordered her to "get dressed quick." She complied and was returned by the three men to the sedan. She paid Joe one dollar to transport her to Hueneme. He took her money but threw her onto the back seat, told her to do as he said or he would hit her, and then raped her again as she pleaded for her freedom. As he returned to the front seat the prosecutrix escaped.

The victim's testimony was corroborated by Mr. Gliss who heard two screams near the cafe and saw two men forcing a woman into a car. She knocked at the door of the witness Lockett about 6 o'clock the following morning. She was nervous, held her throat and could not talk. Blood was found by a deputy sheriff on the car in which she slept at the time she was struck. Dr. Crites on the same day found blood on her clothing, her nose and lip swollen and bluish, an upper tooth recently removed, bruises on her neck and left shin and lacerations on her genitalia. The witness Bryden called by the defense saw the prosecutrix with blood on her face placed on the back seat of the sedan with Nunez and Cortez. The witness Stewart, also called by the defense, lived fifteen feet from appellant's room. He heard talking there between 3:00 and 4:00 o'clock a. m. December 19.

Appellant denied having had intercourse with the prosecutrix but admitted that when Cortez and Padilla entered his room they held her and there had sexual relations with her against her will. He did not notify the police until after he had received notice they wished to see him. He told the undersheriff that he had accompanied the prosecutrix, Joe and George to the sedan at the time of their departure from his premises.

[1-5] There is no element of the crime charged absent from the evidence adopted by the jury and approved as sufficient by the trial court. It is a familiar rule that the triers of fact shall determine on which side the truth lies. The proof of forcible rape by appellant is conclusively established. He admitted it to the undersheriff. The fact that he retracted his statement did not oblige the jury or the court to believe his retraction. The bruised condition of the woman's body and bloody clothing, her being beaten and abducted by her captors and her own testimony of the violence used upon her answer all requirements of the law. Penal Code, sec. 261, subd. 3; People v. Trawick, 78 Cal.App.2d 604, 607, 178 P.2d 45; People v. Wade, 71 Cal.App.2d 646, 650, 163 P.2d 59. It is assumed on appeal that the court and jury believed the evidence and drew the inferences favorable to the judgment. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778; People v. Perkins, 8 Cal.2d 502, 510, 66 P.2d 631; People v. Harshaw, 71 Cal.App.2d 146, 147, 161 P.2d 978.

[6] Resistance by the prosecutrix was clearly established. She was beaten and terrorized before being ushered into appellant's presence. Her continued resistance was not, under such conditions, essential to proof of forcible rape. She should not have risked the crushing of her cranium or the further mutilation of her body in her battle to prevent the violation of her virtue. People v. Cassandras, 83 Cal.App.2d 272, 278, 188 P.2d 546; People v. Ford, 81 Cal.App.2d 580, 582, 184 P.2d 524.

[7-10] Appellant emphasizes certain asserted contradictions and inconsistencies in the testimony of the unfortunate woman. When it is realized how inaccurate and self-contradictory an intelligent and phlegmatic person may sometimes appear it is no wonder that, in an extended cross-examination of a woman concerning the details of a tragic event in which her honor and her life were in peril, she should have been guilty of some inconsistent statements of details. The jury had to determine only whether she was raped by appellant. Whether his act was in light or in darkness is not important. Unusual circumstances do not necessarily rob a witness of his veracity. Out of the harmony or confusion of the utterances of one or many witnesses it is still incumbent upon the jury to determine the ultimate fact of the guilt of the accused: People v. Jackson, 63 Cal.App.2d 586, 590, 147 P.2d 94. Like-

wise, the contention that the events recited in the testimony of the prosecutrix are unusual and inherently improbable has no legal support. People v. Holquin, 48 Cal. App.2d 551, 554, 120 P.2d 71. An appellate court must not reject testimony believed by the jury unless the occurrences related by the witness are physically impossible "or their falsity must be apparent without resorting to inferences." People v. Huston, 21 Cal.2d 690, 693, 134 P.2d 758, 759; People v. Klinkenberg, 90 Cal. App.2d 608, 204 P.2d 47, 58. If it could have occurred, it was not inherently improbable. The improbability of testimony must be apparent. That the phenomena reported are unusual or that the witness may have been inconsistent is not decisive of its improbability. People v. Headlee, 18 Cal.2d 266, 267, 115 P.2d 427.

It is urged that the proof failed for the reason that resistance on the part of the prosecutrix was not shown. But the evidence is abundant that her resistance was overcome by force and violence. When she arrived at appellant's home she was benumbed by the blow that knocked out her tooth, dazed by the punishment administered on the way from Port Hueneme and frightened by the threats of the men who jerked her into appellant's abode. The terrors suffered and fears for her life made her conscious of the hopelessness of defeating the demands of the three men.

[11–13] It is asserted with perfervid zeal that grievous error was committed in admitting evidence of the kidnapping and rape of the prosecutrix by her captors and of her rape by Cortez after leaving appellant's home. The evidence of which complaint is made is not of the erroneous variety by which a person accused of crime X is confronted with proof of crimes Y and Z committed by strangers in precincts remote from the locale of the crime X. The crimes of Cortez, Nunez and Padilla were so connected, blended and confused with the acts of appellant that they all compose one indivisible transaction. Proof of any one of them cannot be made without establishing the others. Therefore evidence against any or all of them is admissible against the one on trial for an offense which is itself a detail or part of the entire criminal scheme. In response to an assignment similarly made in People v. Wade, 71 Cal.App.2d 646, 657, 163 P.2d 59, 66, in referring to the rule excluding prior offenses, the court held that such rule does not forbid the state to adduce proof of everything that occurred during the perpetration of the crime charged "including the acts of a defendant that might constitute distinct offenses." Evidence of other crimes will not be excluded when it logically tends to establish any facts pertinent to the proof of the crime on trial. People v. Wade, 71 Cal.App.2d 646, 657, 163 P.2d 59; People v. Dabb, 32 Cal.2d 491, 499, 197 P.2d 1; People v. Peete, 28 Cal.2d 306, 315, 169 P.2d 924.

[14–16] The proof that appellant conspired to commit a forcible rape is complete. Prosecutrix had been beaten, bruised, raped and over her protest transported to appellant's house. There, she was violently jerked into his presence and raped by the two men as he looked on. His behavior at once made him a part of the conspiracy and his silence made him an accomplice of both Cortez and Padilla. If another act was essential to show his complicity, he performed it by raping the woman. He then attended his confederates as they led her from his house and placed her in the same sedan that had brought her, to be driven by the same Cortez who had raped her and who appellant might have known would repeat his villainy. A conspiracy was proved and appellant did his part. An allegation thereof was not necessary. People v. Duran, 57 Cal.App.2d 363, 371, 134 P.2d 305. The circumstances were sufficient to prove the conspiracy without direct evidence. People v. Ragone, 84 Cal.App.2d 476, 480, 191 P.2d 126. Circumstances as proof of a criminal conspiracy are sufficient if they are competent evidence and convince the jury. People v. Yant, 26 Cal. App.2d 725, 737, 80 P.2d 506. Direct proof of such a crime is seldom available and the punishment for many gross offenses would be avoided if the courts were forbidden to determine guilt from circumstances created or participated in by the accused. The moment appellant willingly sheltered and assented to the crimes of Cortez and Padilla he became their confederate and liable for each of their acts done pursuant to their agreement to rape the defenseless woman. People v. Harper, 25 Cal.2d 862, 871, 156 P.2d 249; People v. Henderson, 79 Cal.App.2d 94, 119, 179 P.2d 406.

[17] By reason of the criminal conspiracy of appellant with Cortez and Padilla there was no error in the court's admitting over objections the several exhibits as evidence of the crimes against the prosecutrix by the confederates outside the presence of appellant. People v. Ciulla, 44 Cal.App. 719, 722, 187 P. 46.

The judgment is affirmed.

McCOMB and WILSON, JJ., concur.

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93 Cal.App.2d 7

In re LE VAN.

Cr. 4354.

District Court of Appeal, Second District,
Division 2, California.
July 18, 1949.

Rehearing Denied July 28, 1949.
Hearing Denied Aug. 11, 1949.

1. Appeal and error 🔑544(3), 907(3)

Where appeal is upon the judgment roll alone, reviewing court assumes that proceedings taken in lower court were regular in all respects and is confined to an examination of clerk's transcript on appeal to determine whether there is any reversible error.

2. Infants 🔑16.14

Where mother's appeal from order of Juvenile Court releasing custody of a minor to probation officer for placement in home of minor's father was on judgment roll alone and appellant failed either by argument or citation of authority to direct attention of reviewing court to any error in proceedings, order would be affirmed.

◆

Appeal from Superior Court, Los Angeles County, sitting in separate session as a Juvenile Court; A. A. Scott, Judge.

Proceeding in the matter of George Francis Le Van, a person under the age of twenty-one years. From an order releasing the custody of such person to the probation officer for placement in the home of minor's father, Mary Le Van, mother of the minor, appeals.

Affirmed.

Mary Le Van, in pro. per.

McCOMB, Acting Presiding Justice.

Appellant, who is the mother of George Francis Le Van, Jr., a minor *, appeals on the judgment roll alone from an order of the Juvenile Court of Los Angeles County made January 3, 1949, releasing the custody of the minor to the probation officer for placement in the home of the minor's father.

[1] Appellant asks that this court reverse the judgment of the Juvenile Court. However, since the appeal is upon the judgment roll alone, we must assume that the proceedings taken in the lower court were regular in all respects (In re Pierce, 127 Cal.App. 773, 775, 16 P.2d 765), and we are confined to an examination of the clerk's transcript on appeal to determine whether there is any reversible error.

[2] An examination of such record fails to disclose any error, but on the contrary, shows that each document and order was duly and regularly made and entered. Appellant has failed either by argument or citation of authority to direct the attention of this court to any error in the proceedings leading to or in the order of placement from which the appeal is taken.

The order is affirmed.

WILSON, J., concurs.

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* It is to be noted that the mother had the right to appeal as an interested party. (Welfare and Institutions Code (1944) sec. 580; In re Matter of Hill, 78 Cal.App. 23, 26, 247 P. 591.)

92 Cal.App.2d 654

LONDON v. ZACHARY et al.

Civ. 16872.

District Court of Appeal, Second District,
Division 2, California.
June 29, 1949.

1. Judgment ⚿586(2)

Judgment determining invalidity of award of arbitrator that contract for sale of business was void was res judicata in subsequent action between same parties for breach of same contract, and objection to introduction of evidence on ground that award was still in force was properly overruled.

2. Arbitration and award ⚿48

Where parties intended to enter into a statutory arbitration agreement after repeal of statute, award rendered under such agreement was invalid.

3. Husband and wife ⚿146

In action for breach of contract for sale of business, finding that wife was owner of business and that husband was manager and agent of wife in all matters pertaining to management and operation of busienss, could not be relied on by husband to escape liability under contract where he signed contract in individual capacity.

4. Principal and agent ⚿136(3)

If an agent who signs an agreement in his own name would avoid personal liability, he must, on writing itself, indicate his intention to bind the principal only.

5. Appeal and error ⚿1011(1)

A finding based upon disputed evidence will not be disturbed on appeal if there is substantial evidence to support it.

6. Sales ⚿29

Where purchaser completed two of four copies of contract for sale of business by filling in their blank spaces, signed one of them and one blank copy, delivered two signed copies to vendor who signed incompleted copy, and returned it in same condition to purchaser and told him to fill in blanks himself, contract for purchase of business was executed, and action for breach thereof could be maintained.

7. Appeal and error ⚿173(6)

Where issues of fraud or mistake were not pleaded as defense to action for breach of contract for sale of business, such issues would not be considered on appeal.

8. Appeal and error ⚿931(8)

In absence of pleas of fraud or mistake in answer to action for breach of contract for sale of business, findings would be construed on appeal to support judgment.

9. Appeal and error ⚿910

Neither fraud nor mistake will be presumed by District Court of Appeal.

10. Damages ⚿140

$10,000 for breach of contract to sell wholesale wine distributing business was not speculative where it was found in year following vendor's refusal to consummate sale business netted between $13,000 and $47,000.

◆

Appeal from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

Action by Samuel London against Irving Zachary and Roberta Zachary, individually and as copartners doing business under the firm name and style of American-Swiss Wine Company for breach of contract for sale of wholesale wine distributing business. From a judgment for the plaintiff, defendant Irving Zachary appeals.

Affirmed.

Goodwin J. Knight, Maurice Saeta and Frank Kashare, Los Angeles, for appellants.

Ralph B. Herzog and Jerome D. Rosenfield, Los Angeles (Benjamin D. Mathon, Los Angeles, of counsel), for respondent.

MOORE, Presiding Justice.

Defendant Irving Zachary appeals from a judgment for damages resulting from the breach of a contract for the sale of a wholesale wine distributing business.

In January, 1946, appellant caused to be prepared a contract in quadruplicate for the sale of such business to respondent for $3,000. Spaces were left in the instrument for the date, price and terms of payment.

After the omitted data had been orally agreed upon, respondent inserted them in two of the copies which he signed. One of the copies bearing respondent's signature together with a second copy "not filled in" he gave to appellant with the request that the latter fill the blank spaces of the incomplete copy. After the lapse of a week appellant returned the incomplete copy with the signatures of both defendants and respondent to the latter and instructed him to "fill it in." This was done by using the memorandum of the terms prepared by appellant's attorney which had been inserted in the copy then held by appellant fully executed. Thereafter, appellant refused to consummate the sale.

After many discussions, appellant and respondent executed a contract whereby they agreed to submit all disputes to the final determination of a designated arbiter. Pursuant to such contract the parties submitted their controversy to the named arbiter who after a hearing decided that the contract of sale dated January 15, 1946, was null and void and that respondent was not entitled to recover anything from appellant. Thereupon, appellant moved the superior court to confirm, while respondent moved it to vacate, the award. After hearing, the court denied both motions. Respondent thereupon commenced the instant action for breach of contract and the court upon findings duly made entered judgment in the sum of $10,000 in favor of respondent.

[1] Appellant first contends that the trial court erred in not sustaining an objection to the introduction of evidence on the grounds that the parties had executed a common law arbitration agreement; that the award of the arbitrator is still in force and effect, and as such, is a good defense to respondent's action. There are two answers to such contention. The validity of the award under the statutory provisions relating to arbitration was the issue presented to the superior court which for good reasons was denied. The judgment became final five months prior to the commencement of the instant action. It is therefore res judicata and its validity cannot be effectively asserted herein.

But the contention that the decision of the arbiter is a valid common law award has been definitely settled in the instant action. The court below found contrary to appellant's thesis as follows: "That it is not true that * * * plaintiff and said defendant entered into a common law or other agreement of arbitration * * * the fact being that both of said parties believed and intended said arbitration proceeding to be a statutory arbitration under and in accordance with the provisions of section 1280 et seq. of the Civil Code." (sic.)

[2] That such a finding is supported by the evidence is apparent from the arbitration agreement itself which provides: "It is further agreed that a judgment of any court of record competent to have jurisdiction of the subject matter of said controversy may be rendered upon the award made pursuant to the submission in pursuance of the statute in such case made and provided." An award made pursuant to an agreement for a common law arbitration is not thus enforcible. A common law arbitration not having been contemplated the award of the arbiter may not now be raised as a defense. Williams v. Walton, 9 Cal. 142, 146.

Appellant asserts that the court erred in rendering judgment against appellant because he was at the time merely an agent acting for his wife. Such declaration is based upon the court's finding that "Roberta Zachary at all times mentioned in plaintiff's amended complaint was the owner of the wholesale wine business * * * and defendant Irving Zachary was the manager and duly authorized agent of said Roberta Zachary in all matters pertaining to the management and operation of said American Swiss Wine Company."

[3, 4] This finding in no respect implies that appellant was his wife's agent for the purposes of selling the business, but is limited in its application to the operation and management thereof. Also, this isolated part of a single finding may not be tortured into a finding of an all-encompassing agency on the part of appellant. Throughout all the findings the defendants are referred to in the plural. This is in ac-

cordance with the agreement itself which refers to Irving and Roberta Zachary as sellers and is signed by both in their individual capacities. Appellant is in no better position than an accommodation surety on a promissory note. Having by his signature placed himself in a position to enjoy the advantages of a sale he must bear the obligations of the contract. Assuming that appellant did act as an agent he is liable unless it is made to appear on the face of the instrument that the parties intended to bind only the principal and not the agent. Patterson v. John P. Mills Organization, 203 Cal. 419, 421, 264 P. 759; Otis Elevator Co. v. Berry, 28 Cal.App.2d 430, 432, 82 P.2d 704. If an agent who signs an agreement in his own name would avoid personal liability he must on the writing itself indicate his intention to bind the principal only. (Ibid.)

[5] Appellant says that the court erred in finding the contract of sale to be valid, and points to much evidence which would support a contrary finding. It has become elemental, the authorities are legion and citation is unnecessary to the effect that a finding based upon disputed evidence will not be disturbed on appeal if there is substantial evidence to support it.

[6] Respondent testified that he received four copies of the agreement of sale containing certain blank spaces. He completed two copies by filling in their blank spaces, signed one of them and one blank copy. He delivered the two signed copies to appellant who signed the incompleted copy, had his wife sign it, returned it in the same condition to respondent and later told the latter to fill in the blanks himself. From such testimony and the fact that respondent had been negotiating with appellant and his attorney for over a month for the purchase of the business, it cannot be said that the trial court erred in concluding that the final instrument, signed by both parties, represented their mutual agreement. When appellant signed the blank copy which he returned to respondent he had in his possession the original signed by respondent with the blank spaces properly filled.

[7-9] Appellant belatedly announces that there can be no contract unless the minds of the parties have met and mutually agreed; that consent must be unclouded by fraud, duress or mistake. In the first place, no issue of fraud or mistake was pleaded. By reason of its absence from the answer it will not be considered on appeal. Frank Meline Co. v. Kleinberger, 108 Cal.App. 60, 64, 290 P. 1042; Brandt v. Brandt, 32 Cal.App.2d 99, 102, 89 P.2d 171. In addition to the absence of such plea from the answer, the findings will be construed on appeal to support the judgment. Neither fraud nor mistake will be presumed. Brandt v. Brandt, supra; Harding v. Robinson, 175 Cal. 534, 542, 166 P. 808. When appellant signed the completed contract bearing the signature of respondent he thereby established the meeting of his mind with that of respondent.

[10] Appellant's final contention is that the court erred in finding respondent to have been damaged in the sum of $10,000. It is argued that the amount is speculative. Not so. The court found that in the year following appellant's refusal to consummate the sale, the business netted between $13,000 and $47,000. Appellant himself testified that the business made $13,000 in 1946 and $40,000 in 1945, the year of the agreement. These figures and others for previous years were before the court and presented a satisfactory basis upon which to calculate the damage.

The judgment is affirmed.

McCOMB and WILSON, JJ., concur.

92 Cal.App.2d 813

BRODERICK v. KOEHLER et al.

Civ. 16990.

District Court of Appeal, Second District, Division 1, California.

July 12, 1949.

1. Evidence ⚷594

Court may not arbitrarily disregard testimony of unimpeached witness, but testimony may be nullified by witness's manner, motives, content of utterances, or by such behavior as may reasonably be deemed inconsistent with the truth.

2. Gifts ⚷82(1)

Gifts causa mortis are not favored, and they should be established by clear and convincing proof, and evidence supporting such a claim should be viewed with caution.

3. Appeal and error ⚷989

When a finding is challenged on ground of insufficiency of evidence to support it, power of appellate court begins and ends with determination that there is or is not substantial evidence to support such a finding, and when opposing inferences are reasonably deducible from the facts, appellate court may not substitute its deductions for those of the trial court.

4. Gifts ⚷82(2)

Evidence supported findings that decedent possessed ability to endorse cashier's checks and that hence no gift causa mortis or any gift of unendorsed checks payable to decedent was made to decedent's friend.

◆

Appeal from Superior Court, Los Angeles County; Everett L. Ball, Judge pro tem.

Action by Ethel Broderick against Grace Koehler, Grace Koehler, administratrix of the estate of John Koehler, deceased, and Bank of America National Trust & Savings Association, a banking corporation, to quiet title to two checks. From an adverse judgment plaintiff appeals, and Grace Koehler and Grace Koehler, administratrix, appear as respondents.

Judgment affirmed.

Geo. W. Rochester, Los Angeles, for appellant.

J. Howard Corvin, Los Angeles, for respondents.

WHITE, Presiding Justice.

At the time of the death of John Koehler on October 10, 1946, plaintiff and appellant, Ethel Broderick, was in possession of two cashier's checks issued by the Bank of America, dated August 5, 1946, and August 30, 1946, for the sums of $600.00 and $500.00 respectively, payable to the order of John Koehler, and not indorsed. Plaintiff brought an action to quiet title to the checks, basing her claim upon an asserted gift causa mortis. Trial before the court without a jury resulted in a judgment that plaintiff take nothing by her complaint; that the checks constituted property of the estate of John Koehler, deceased; and that plaintiff deliver the checks to the administratrix of said estate. From the judgment plaintiff has appealed.

It is urged that the evidence does not support the judgment and that the judgment is against the law. Both contentions are founded upon the premise that the trial court was bound to accept the assertedly uncontradicted and unimpeached testimony of plaintiff and her daughter whereby a prima facie case including every element of a gift causa mortis was allegedly established.

The plaintiff testified: "I had known John Koehler for about eight years before he died; he lived in an apartment house I managed. Mr. Koehler went to the hospital October 3, 1946, and my daughter and I went to visit him every two or three days. He was operated on October 7 and died October 10. On the Sunday before the operation, my daughter and I went to see him at the hospital. He said he was not feeling good, in fact feeling worse. He asked me to get his trousers out of the closet and to hand him his wallet. He told me to take the checks out of the wallet and said, 'Those are yours, Mrs. Broderick, I want you to take and keep them, and in case anything happens to me, they are yours. * * * They are not indorsed but I am too weak to indorse them. The bank knows all about it.'"

Plaintiff's daughter testified to substantially the same effect.

An assistant cashier of the Bank of America testified that he had known John Koehler some five years prior to his death. He issued both the cashier's checks in question and had a conversation with Mr. Koehler in August about the checks. Mr. Koehler said he was having marital difficulties and did not want to keep money in his account. He said if anything happened to him he would like the money to go to Mrs. Broderick. The witness told him he couldn't do that with the cashier's checks, but should make a will. The witness knew Mrs. Broderick as a customer of the bank, and told her, after Mr. Koehler died, that he had said he wanted the money to go to her.

Grace Koehler, widow of decedent, testified that she obtained an interlocutory decree of divorce from Mr. Koehler in April, 1946, and had not seen him for a month to six weeks before his death and did not know he was in a hospital. Two days after the death Mrs. Koehler saw Mrs. Broderick in the apartment of a Mr. Lane. Mr. Lane gave Mrs. Koehler some of the papers of decedent. Thereafter Mrs. Koehler and Mrs. Broderick drove in Mrs. Koehler's automobile to a mortuary to arrange the funeral. On the way Mrs. Broderick gave Mrs. Koehler her husband's billfold. There was a small amount of money in it, and Mrs. Broderick said she had used some to pay a special nurse. "Mrs. Broderick offered me the two checks, but as I was driving, I told her to take care of them until we got to the undertakers. After we got to the undertakers I didn't think of the checks and they were never mentioned any more that day. She didn't tell me about their having been a gift to her at that time. After we left the undertakers, we went to my apartment. There were friends of mine there so we had a coke and all talked. Then on the day Mr. Koehler was buried, I talked with Mrs. Broderick over the phone and we made arrangements to meet at the bank the next day and for Mrs. Broderick to introduce J. Howard Corvin (respondent's present attorney) to me. We met in Mr. Corvin's office and Mrs. Broderick introduced him to me. I don't remember too much, but I think she mentioned the checks. I don't remember exactly what was said. After Mrs. Broderick told me about the checks, I don't remember just when I thought of them again. I don't think I thought of them driving from the mortuary with Mrs. Broderick, and while we sat around having a Coca-Cola. We never talked about the checks during our telephone conversation."

In rebuttal, Mrs. Broderick denied that the two checks were ever mentioned until the time she introduced Mrs. Koehler to Attorney Corvin, at which time she told Mrs. Koehler, "I have the checks that Mr. Koehler gave me." She further testified that on another occasion she said to Mrs. Koehler, "You know good and well Jack (Mr. Koehler) didn't want you to have them," to which Mrs. Koehler replied, "I know he didn't."

The trial court found that the cashier's checks were not "purchased as a gift causa mortis" to the plaintiff; that at all times the decedent "possessed the ability to indorse said checks had he desired to do so"; and further found that no gift causa mortis or any gift whatsoever was made.

At the conclusion of the trial, in rendering his decision, the trial judge said, in part:

"I am not at all satisfied that the decedent didn't have the ability to sign those checks. There was a witness to the conversation, who could have been obtained, who would have been an impartial witness to the conversation at that time. (This witness was a young man who shared decedent's room at the hospital.) There is no really competent testimony as to the condition of the decedent on the day that these checks were given. There is the testimony of the plaintiff that he was ill, but that is not the kind of testimony that proves the condition of a person. Now, there was a doctor here in this case, and he should have been able to testify as to the condition of the decedent, and I am not satisfied that the decedent intended to make a gift. I feel he could have signed those checks, and he certainly knew the checks had to be signed; * * * There is not a proper showing that this decedent was not able to sign those checks, and I think he was able to do that, and the proper way to pass the title to the property was by his executing the endorsement on those checks, and I feel there isn't sufficient evidence here of his inability to do so."

[1] It is argued that nothing introduced by respondents tended in the slightest degree to rebut the evidence of appellant or even decrease its weight, and that such evidence established a prima facie case; that the court was in error in basing his decision on the theory that the gift should have been witnessed by an unknown third party, that the showing as to the donor's illness was insufficient, and that the donor should have indorsed the checks. In effect, appellant's argument is that the evidence permitted of only one finding, that a gift was made. In this argument appellant relies upon the statement in Hynes v. White, 47 Cal.App. 549, 190 P. 836, 838, to the effect that "A court may not arbitrarily disregard the unimpeached evidence of a single witness." This contention finds an answer in the case of Barham v. Khoury, 78 Cal.App.2d 204, 177 P.2d 579, likewise involving an asserted gift causa mortis, where the court said, 78 Cal.App.2d at page 215, 177 P.2d at page 585:

> "* * * While the court may not arbitrarily disregard the testimony of an unimpeached witness, Hynes v. White, 47 Cal. App. 549, 190 P. 836, yet his testimony may be nullified by his manner, by his motives, by the content of his utterances, or by such behavior as may reasonably be deemed inconsistent with the truth. * * * The most positive testimony may be contradicted by inherent improbabilities or by circumstances that are inconsistent with its truth, and the manner of one's testifying may influence the court to disregard his positive testimony concerning a particular fact. * * *"

[2] The circumstances surrounding the claim of a gift in the instant cause provided ample justification for the trial court's rejection thereof. Gifts causa mortis are not favored in law, and they should in all cases be established by clear and convincing proof of the requisites of such a gift. Barham v. Khoury, supra, 78 Cal.App.2d at page 211, 177 P.2d at page 583; Knight v. Tripp, 121 Cal. 674, 678, 54 P. 267. Evidence supporting such a claimed gift should be viewed with caution. Hart v. Olson, 68 Cal.App.2d 657, 157 P.2d 385. The only testimony as to the actual delivery of the checks, the physical condition of decedent at the time of such delivery and the conversation had at that time was that of two interested witnesses, the plaintiff and her daughter. It appears from the record that the identity of the man occupying the other bed in the same hospital room with decedent could have been readily ascertained.

Obviously, mere delivery of cashier's checks without indorsement by the payee could not operate to pass title to the funds represented thereby, nor place it within the power of the donee to obtain possession of such funds. The plaintiff had nothing but the bare possession of two checks payable to the decedent or his order. She attempted to explain his failure to indorse the checks by testimony that he said he was too weak to do so, but the doctor who was treating the decedent was not called as a witness. No explanation was offered for the failure to call either the doctor or the young man who shared decedent's hospital room. In connection with the asserted weakness of decedent, it might be noted that on direct examination the plaintiff testified that she handed him his trousers, that the decedent himself removed his wallet from the trousers, took out the checks and handed them to her. The daughter likewise testified that the decedent handed her mother the checks. On cross-examination plaintiff testified she was mistaken—that she herself, at decedent's direction, took the wallet from the trousers and removed the checks therefrom. In addition, there was conflicting testimony as to whether plaintiff on the day of the funeral had offered the checks to decedent's widow without asserting any claim to them.

[3] When a finding is challenged upon the ground of insufficiency of the evidence to support it, the power of the appellate court begins and ends with a determination that there is or is not substantial evidence to support such finding. Estate of Bris-

tol, 23 Cal.2d 221, 223, 143 P.2d 689. When opposing inferences are reasonably deducible from the facts, the appellate court may not substitute its deductions for those of the trial court.

[4] From the foregoing recital of the evidence, it is apparent that the trial court did not arbitrarily disregard the testimony of an unimpeached witness, but weighed the testimony in the light of the circumstances and evidence which were inconsistent with the claim that a gift was made or intended. These circumstances and evidence, considered with the unexplained failure to produce other evidence apparently within the power of the plaintiff to produce, were amply sufficient to support the findings.

The judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

92 Cal.App.2d 846

MILLER v. KEEGAN et al.

Civ. 16699.

District Court of Appeal, Second District, Division 3, California.

July 15, 1949.

1. Fraudulent conveyances 🔑310

In action against husband and wife to set aside an allegedly fraudulent conveyance from husband to wife finding that indebtedness involved was an obligation personal to the husband and not a community debt for which the wife also would be liable was supported by the evidence, and judgment for wife was proper so far as it determined that the wife's separate property was not liable for the satisfaction of plaintiff's claim. Civ.Code, § 171.

2. Fraudulent conveyances 🔑272

In action to set aside fraudulent conveyance burden was on plaintiff to prove insolvency either at time of the transfer or as a result thereof, particularly when such issue was directly tended by the plaintiff. Civ.Code, §§ 3439.01–3439.13.

3. Appeal and error 🔑1071(6)

In action against husband and wife to set aside allegedly fraudulent conveyance trial court's failure to make a finding as to the solvency of the husband at time of or as a result of transfer involved was not prejudicial to plaintiff where such a finding would not have been supported by the evidence and the judgment would be affirmed for want of proof of an element essential to recovery by plaintiff. Civ. Code, § 3439.01–3439.13.

4. Fraudulent conveyances 🔑297

Mere proof that husband transferring property to wife was indebted and that he failed to keep up installment payments, particularly on secured obligations, and that he was unable to provide current family living expenses was insufficient to warrant a conclusion of insolvency. Civ.Code, §§ 3439.01–3439.13.

5. Evidence 🔑56, 89

As a general rule solvency, and not insolvency, is presumed and to overcome such presumption there must be some basis in the evidence for determining that amount of the debtor's obligations exceeded then present fair saleable value of his non-exempt assets. Civ.Code, §§ 3439.01–3439.13.

6. Evidence 🔑601(1)

The return of execution unsatisfied on August 2, 1946 had no legitimate tendency to prove insolvency of judgment debtor on November 22, 1944.

7. Pleading 🔑36(6)

In action against divorced husband and wife to set aside allegedly fraudulent conveyance the admissions of the husband of the material allegations of plaintiff's complaint could not rectify an otherwise fatal hiatus in the proof of plaintiff's complaint against defendant wife.

8. Judgment 🔑112

Admissions implied from the default of one defendant are not ordinarily binding upon co-defendant who by answering expressly denies and places in issue the truth of the allegations thus admitted by the absent party.

Appeal from Superior Court, Los Angeles County; J. T. B. Warne, Judge Assigned.

Action by John E. Miller against Joseph M. Keegan and others to set aside an allegedly fraudulent conveyance. From that part of the judgment in favor of the defendant, Iva Lee Keegan, the plaintiff appeals.

Judgment affirmed.

Geo. W. Rochester, Los Angeles, for appellant.

Edwin F. Franke, Edward J. Owen, Bernard Rose, Los Angeles, for respondents.

SHINN, Presiding Justice.

Plaintiff's predecessor in interest was adjudged bankrupt in October, 1942, and an indebtedness of defendant Joseph M. Keegan was found to be an asset of the bankrupt. On September 22, 1943, the sum of $741.93 was found by the bankruptcy court to be due and owing from said defendant. Plaintiff acquired this obligation for value in February, 1946, and obtained judgment thereon in the Municipal Court of Los Angeles on July 26, 1946. Thereafter execution was returned wholly unsatisfied, and after examination in supplementary proceedings the judgment debtor, Joseph M. Keegan, was discharged by the court, no property being found. Plaintiff, acting as his own attorney, thereupon commenced the present action against Joseph M. Keegan and Iva Lee Keegan for the purpose of setting aside an alleged fraudulent conveyance of real property from the former to the latter. Defendant Joseph M. Keegan having failed to answer, his default was duly entered and the trial proceeded as to respondent, Iva Lee Keegan, alone. Judgment was rendered against defendant, Joseph M. Keegan, in the sum of $899.04 and in favor of respondent, Iva Lee Keegan, declaring the real property in controversy to be her sole and separate property free and clear from any claims of plaintiff. The present appeal is taken from the portion of the judgment in favor of Iva Lee Keegan and presents chiefly the question whether the findings of the trial court, upon which the judgment rests, are supported by the evidence.

Evidence of the following facts was presented at the trial. Prior to November 22, 1944, the two defendants and their children had resided in their home, acquired subsequent to their marriage, on North Electric Street in Alhambra. Marital discord had developed due principally to Mr. Keegan's failure to provide sufficiently for the family, and his habit of intemperance. They agreed that respondent was to seek a divorce, and that she was to have custody of the children, the household furnishings, and the house subject to the encumbrance of a mortgage which was about to be foreclosed. Mr. Keegan, in turn, was to have his automobile and "whatever else we had." Respondent testified on direct examination that since it was agreed that she was to receive the house she was "not going to make any demand" upon her husband for herself in the divorce proceedings. On cross examination she testified that she "didn't make any special agreement not to ask for" alimony or child support; that she "didn't ask for any alimony or any support because at the time he had nothing and couldn't support me if I had"; and that she didn't give Mr. Keegan anything for the transfer to her of his interest in the Electric Street property. This testimony was reaffirmed on redirect examination. Although her complaint for divorce did contain a prayer for child support she testified that her attorney inserted it without her knowledge. She was awarded neither alimony nor support by the decree as rendered. On November 22, 1944, Mr. Keegan "signed the [Electric Street] property over" to respondent by a written instrument which was not introduced in evidence, was evidently never recorded, and which respondent kept in her safe deposit box. Subsequently, on the same day, Mr. and Mrs. Keegan together executed a deed conveying the Electric Street property to Harry W. Benstead, a real estate agent, and his wife, for a net consideration of about $1,700. This sum was applied, as part of the same transaction, to the simultaneous purchase from the Bensteads of the Larch Street house in Alhambra where respondent now resides and which is the subject of this action. Although Joseph M. Keegan joined with the Bensteads as grantor in the latter conveyance, which was to respondent as sole grantee, the only evidence in the record is that he had no previously existing interest in the Larch Street property. Respondent testified that at the time of the foregoing transactions she knew of the indebtedness of her husband to plaintiff's predecessor, but did not know any of the details thereof.

The trial court made findings to the effect that the indebtedness of Joseph M. Keegan to plaintiff's predecessor was a personal and not a "community debt"; the Electric Street property had been jointly owned by Mr. and Mrs. Keegan; Joseph M. Keegan, "in consideration of defendant, Iva Lee Keegan, receiving no alimony in the aforementioned divorce, did give up all of his right, title and interest in said [Electric Street] lot to said defendant, Iva Lee Keegan"; Joseph M. Keegan had no right, title or interest in the Larch Street property; and Iva Lee Keegan acquired title to the Larch Street property as her sole and separate property and paid a good and valuable consideration therefor.

[1] The findings that the indebtedness was an obligation personal to Mr. Keegan and not a "community debt," for which the wife also would be liable, are supported by the evidence. Respondent testified that she did not participate in the loan; she never received any of the proceeds thereof; Mr. Keegan had borrowed it himself; and the money he received "mostly went for his drinking." During 1943 Mr. Keegan gave her just enough money to buy food and keep the house running but never any large sums. He was at that time operating a barber shop. The family was supported in part by respondent from her earnings caring for neighbors' children and from assistance given by her relatives. It could have been inferred from the evidence that Mr. Keegan borrowed the money from plaintiff's predecessor for his personal use and benefit and that it was not a debt incurred for necessaries or for the benefit of respondent or the community. Accordingly the judgment rendered was proper insofar as it may have determined that respondent's separate property was in no way liable for the satisfaction of plaintiff's claim. Civ. Code, sec. 171; 3 Cal.Jur. Ten-Yr. Supp., sec. 142, p. 659.

Plaintiff strenuously urges that there is no support in the evidence for the finding that Mr. Keegan conveyed his interest in the Electric Street lot in consideration of respondent receiving no alimony, nor for the ultimate findings, derived therefrom, that Mr. Keegan had no interest in the Larch Street property and that respondent acquired those premises for a valuable consideration and as her separate property. Although a reading of the record reveals but little to support these findings, we need not decide the question, for we think the judgment must be affirmed in any event.

[2, 3] The record is devoid of any evidence of actual intent to defraud creditors by means of the transactions between Mr. and Mrs. Keegan. We do not understand plaintiff to contend to the contrary. Although his complaint tendered the issue of actual fraud plaintiff expressly abandoned that theory of his case during the course of the trial. Of necessity plaintiff must and does rely upon the provisions of the Uniform Fraudulent Conveyance Act, Civ. Code, secs. 3439.01 to 3439.13 inclusive, and, in particular, upon section 3439.04 thereof which reads: "Every conveyance made and every obligation incurred by a person *who is or will be thereby rendered insolvent* is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration." (Emphasis added.) It is clear, and plaintiff, by directly tendering the issue in his complaint must be deemed to have conceded, that proof of insolvency either at the time of the transfer or resulting therefrom is a prerequisite to relief under the quoted section. Cain v. Richmond, 126 Cal.App. 254, 260, 14 P.2d 546; Kirkpatrick v. Towers, 60 Cal.App.2d 251, 140 P.2d 681. The burden of such proof rests upon the party attacking the conveyance. Parker v. Riddell, 41 Cal.App.2d 908, 913, 108 P.2d 88; Parkinson Bros. Co. v. Feigel,

24 Cal.App. 701, 711, 142 P. 135; Morgentham v. Harris, 12 Cal. 245, 247. Although, as we have indicated, the issue of insolvency was raised in the complaint and denied by the answer, the court made no finding thereon. We are of the opinion, however, for reasons hereinafter set forth, that a finding that Joseph M. Keegan was insolvent at the time of, or was rendered insolvent by, the transactions whereby respondent acquired the Larch Street property, would not have been supported by the evidence. Accordingly the failure of the court to make a finding thereon was not prejudicial to plaintiff, and the judgment for respondent may be affirmed for want of proof of an element essential to recovery by plaintiff. See McLane v. Storr, 75 Cal.App.2d 459, 464, 171 P.2d 534; Fay Securities Co. v. Mortgage G. Co., 37 Cal.App.2d 637, 641, 100 P.2d 344; Hoover v. Wasson, 11 Cal. App. 589, 596, 105 P. 945; People v. Center, 66 Cal. 551, 564, 5 P. 263, 6 P. 481.

[4-8] The record contains no evidence whatsoever tending to prove Mr. Keegan's insolvency in the statutory sense, that is, that the fair saleable value of his assets on November 22, 1944, or within a reasonable time thereafter, was insufficient to pay his then existing debts as they matured. Civ. Code, sec. 3439.02. The only testimony relating to his financial affairs consists of respondent's statements that "he was deeply in debt, and was drinking, and mismanaging his money. * * * He wasn't keeping up the payments on the home or his barber shop or paying anybody at all," and that she didn't seek alimony because "he had nothing and couldn't support me if I had." Mere statements of indebtedness are not enough to prove insolvency. See Shasta Lumber Co. v. McCoy, 85 Cal.App. 468, 473, 259 P. 965. Likewise neither a failure to keep up installment payments, particularly on secured obligations, nor an inability to provide current family living expenses, is sufficient standing alone to warrant a conclusion of insolvency. Neither circumstance is inconsistent with a status of solvency within the meaning of the statute. As a general rule "solvency and not insolvency is presumed." Hasenjeager v. Voth, 91 Cal.App. 394, 397, 267 P. 146. To overcome this presumption a fair interpretation of the statute requires some basis in evidence for determining that the amount of the debtor's obligations exceeded the then present fair saleable value of his nonexempt assets. Such a basis is entirely wanting here. The extent of Mr. Keegan's debts is not shown, except for the $741.93 owed to plaintiff's predecessor. In respect to his assets, the record reveals that prior to the transfer to respondent, an equity of some $1,700 remained in the Electric Street property; and subsequent thereto, Mr. Keegan was still possessed of an automobile, the value of which is not shown, and evidently of other assets as well. Although a mortgage or lien on his barber shop had been foreclosed, it would be permissible to infer from respondent's testimony that he retained some equity therein which could have been salvaged. Furthermore, Mr. Keegan was working, part time at least, in 1944 and there is some evidence that he was also receiving a veteran's pension. There is nothing in the record from which it could logically be inferred that his assets did not exceed his liabilities. The value of the automobile alone might have been enough to satisfy plaintiff's claim had a timely attempt been made to enforce it. The return of execution unsatisfied on August 2, 1946, of course, has no legitimate tendency to prove insolvency on November 22, 1944, nearly two years before. Cf. Windhaus v. Bootz, 92 Cal. 617, 28 P. 557. Nor may plaintiff rely upon the admissions of the material allegations of plaintiff's complaint implied from Mr. Keegan's default, to rectify an otherwise fatal hiatus in the proof of his case against Iva Lee Keegan. It is an established principle of law that admissions implied from the default of one defendant ordinarily are not binding upon a co-defendant who, by answering, expressly denies and places in issue the truth of the allegations thus admitted by the absent party. The Mary, 9 Cranch 126 [3 L.Ed. 678, 684]; Chamblin v. Chamblin, 362 Ill. 588 [1 N.E.2d 73, 75, 104 A.L.R. 1183]; Fawkes v. National Refining Co., 341 Mo. 630 [108 S.W.2d 7, 10]; Glos v. Swanson, 227 Ill. 179 [81 N.E. 386, 387].

Plaintiff also claims that the court erred in denying his motion to strike certain paragraphs from respondent's answer and in permitting respondent to orally amend the said paragraphs at the commencement of the trial. The contention is without merit. The objections to the answer as pleaded were technical and formal only, and the record does not disclose any abuse of discretion by the trial court in the matter. In view of the conclusions we have reached, certain other questions discussed in the briefs require no decision.

The judgment is affirmed.

WOOD and VALLÉE, JJ., concur.

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92 Cal.App.2d 712

In re FERRALL'S ESTATE.

HAMILTON v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al.

Civ. 16447.

District Court of Appeal, Second District, Division 3, California.

July 1, 1949.

1. Trusts 🔑276

Provision of testamentary trust conferring sole discretion upon trustees to pay to testator's daughter, as beneficiary of income, such amount from corpus of trust sufficient to meet her needs, if income from corpus was insufficient, did not deprive court of power to determine whether income from corpus was insufficient to meet needs of testator's daughter, but did preclude court from determining amount to be paid from corpus should income be insufficient to meet needs of testator's daughter, unless trustees in exercise of their discretion in determining amount to be paid from corpus should act in bad faith or fraudulently. Civ.Code, § 2269.

2. Trusts 🔑271½

An absolute discretion exercised in good faith by a trustee cannot be controlled by a court on considerations going to soundness of exercised discretion, but trustee's exercise of a sole or absolute discretion is subject to review and control by court if trustee acts in bad faith or fraudulently. Civ.Code, § 2269.

3. Trusts 🔑276

Where testamentary trust of income gave trustees absolute discretion as to amount payable to beneficiary from corpus of trust estate should income be insufficient to provide for needs of beneficiary, beneficiary, on petition for order directing trustees to pay specific monthly amount from trust corpus for needs of beneficiary, had burden of proof as to bad faith, fraud and abuse of discretion of trustees in failing to make any payment out of corpus, proof of which would permit control of amount payable by court, and trustees were entitled to benefit of presumption that they acted in good faith. Civ.Code, § 2269.

4. Trusts 🔑276

Where testamentary trust of income gave trustees absolute discretion as to amount payable to beneficiary from corpus of trust estate should income be insufficient for needs of beneficiary, court improperly ordered payment of specified monthly amount to beneficiary from corpus without first finding that trustees acted in bad faith or fraudulently in failing to make any payment from corpus, or thereby abused their discretion. Civ.Code, § 2269.

◆

Appeal from Superior Court, Los Angeles County; Raymond McIntosh, Judge.

Proceeding in the matter of the estate of John C. Ferrall, also known as John Charters Ferrall, deceased, wherein the Bank of America National Trust & Savings Association and George D. Ferrall, cotrustees, contested petition of Faye F. Hamilton for an order directing cotrustees to pay specific monthly amounts to petitioner from corpus of trust. From an adverse judgment, contestants appeal.

Judgment reversed.

See, also, 200 P.2d 1.

Earle M. Daniels, Burdette J. Daniels, Hallam Mathews, Los Angeles, for appellants.

Potter, Potter & Rouse, Los Angeles, for respondent.

WOOD, Justice.

Appeal by trustees from a judgment directing them to pay to a beneficiary $400 per month from the corpus of a testamentary trust.

The testator, John C. Ferrall, who died October 9, 1940, left surviving him a son, George D. Ferrall, and a daughter, Faye F. Hamilton. Under the provisions of his will, which was made April 15, 1938, he gave $2,000 to each of George D. Ferrall's three sons, and gave ½ of the remainder (after paying said $6,000, his debts and expenses of administration) to George D. Ferrall, and gave the other ½ of the remainder to the Bank of America and George D. Ferrall as joint trustees and in trust for the following uses and purposes:

"(d) After payment of any expenses of management of the trust estate and administering this trust, including the compensation for the services of the trustees, all income from the trust which is available for distribution shall be distributed monthly to and for the use and benefit of my daughter, Faye F. Hamilton during her lifetime, or unless sooner terminated in accordance herewith. That if at any time the income from the corpus of the trust herein created is insufficient to meet the needs of my daughter, Faye F. Hamilton, then and in that event, in the sole discretion of the trustees herein, the trustees may pay to my said daughter, Faye F. Hamilton, such amounts from the principal or corpus of the trust sufficient to meet her needs, care and comforts.

"(e) * * *

"(f) Anything herein contained to the contrary notwithstanding, this trust shall cease and terminate upon the following conditions:

"(1-a) Provided my daughter, Faye F. Hamilton, be living, this trust shall terminate upon the death of Alex C. Hamilton, or his divorce from my said daughter, Faye F. Hamilton, in which event all the property held by the trustees herein shall be distributed to my daughter, Faye F. Hamilton, or

"(1-b) Upon the death of my daughter, Faye F. Hamilton, this trust shall cease and terminate and all the property held by the trustees under the terms hereof shall be distributed one-half to my son, George D. Ferrall, and one-half to my three grandchildren, George D. Ferrall, Jr., John Charters Ferrall and Frank M. Ferrall, share and share alike."

The decree of distribution, entered February 16, 1943, distributed to said trustees ½ of said remainder in trust for the said uses and purposes stated in the will. The provisions of the decree so distributing said part of the estate to the trustees included verbatim the said above-quoted provisions of the will regarding the uses and purposes for which the trust was created.

On June 10, 1947, Mrs. Hamilton petitioned the court for an order directing the trustees to pay to her from the corpus of the trust estate for her needs, care and comfort $450 per month until the further order of the court, and also to pay to her from said source $10,231.46 in repayment of that amount expended by her for her needs, care and comfort.

The court found that at the time of execution of the will Mrs. Hamilton was afflicted with multiple sclerosis and that fact was known to the testator; that by reason of such disease it became necessary, about January 1, 1942, to remove her from her home to a sanitarium, where she has remained since that time; that since she went to the sanitarium she has been bedridden, unable to care for herself or her property, and has required the attention of nurses and physicians; that she received as income from the trust estate, from January 1, 1942, to May 1, 1947, the sum of $5,550.10; that she paid for her care, during said period of time, from her own funds the sum of $10,231.46 in addition to the said amount she received as income from the trust estate; that she "sold whatever property she had in order to maintain herself"; that in addition to the amount expended by Mrs. Hamilton, during said period, her husband paid $3,000 for her care; that she had received about $50 per month from income from the trust estate; that the expense of caring for her during several months last past has amounted to $400 per month; that the present value of the trust estate is in excess of $27,000, about all of which consists of negotiable assets; that in creating said trust it was the intent of the deceased to provide for the care, needs, comfort and maintenance of Mrs. Hamilton from the trust estate and the corpus thereof in the event the income was insufficient for said purposes; that the income is insufficient for said purposes; that $400 per month is a reasonable sum to be paid from the date of filing the petition herein, June 10, 1947; that the income of her husband for 1946 was in excess of $15,000, and as of August 29, 1947 (the date of the hearing herein) his income was in excess of $10,000; and that their income tax returns for the past four years show that the income of Mr. Hamilton was community property.

The judgment was that it was the intent of the testator to provide for the care, needs, comfort and maintenance of Mrs. Hamilton from the trust estate and corpus thereof in the event the income should be insufficient for said purposes; that the income is insufficient for said purposes; that $400 per month is a reasonable sum "to be paid out of income and the corpus" for the care, needs, comfort and maintenance of Mrs. Hamilton; that $400 be paid to her "from income and corpus" on the 10th day of each month, beginning June 10, 1947, until the further order of court.

[1-4] Appellants contend that the trustees had absolute discretion "as to the circumstances which would entitle them to invade the corpus of the trust"; and also that they had absolute discretion as to the amounts to be paid from the corpus if payments should be made therefrom; and that since there was no allegation, proof, or finding of fraud, or of a demand or refusal to exercise discretion by the trustees, or of an abuse of discretion by them, the court erred in assuming control of the trustees' discretion. As above shown, the decree creating the trust provided that "if at any time the income from the corpus * * * is insufficient to meet the needs of my daughter, Faye F. Hamilton, then and in that event, in the sole discretion of the trustees herein, the trustees may pay to my said daughter, Faye F. Hamilton, such amounts from the principal or corpus of the trust sufficient to meet her needs, care and comforts." Under that provision a court is not deprived of power to determine the fact as to whether the income from the corpus is insufficient to meet the needs of Mrs. Hamilton. By that provision, however, the matter of determining the amounts to be paid from the corpus, in the event that the income is insufficient to meet her needs, is left to the sole discretion of the trustees. Section 2269 of the Civil Code provides: "A discretionary power conferred upon a trustee is presumed not to be left to his arbitrary discretion, but may be controlled by the proper court if not reasonably exercised, unless an absolute discretion is clearly conferred by the declaration of trust." An absolute discretion, as to the amounts to be paid from the corpus, was conferred by the trust provisions herein. An absolute discretion, exercised in good faith by a trustee, cannot be controlled by a court on considerations going to the soundness of the discretion so exercised. Neel v. Barnard, 24 Cal.2d 406, 417, 150 P.2d 177. If a trustee in the exercise of a sole or absolute discretion acts in bad faith or fraudulently, his exercise of such discretion is subject to review and control by a court. Ibid. There was no allegation or finding that the trustees, or either of them acted in bad faith or fraudulently, or that they abused their discretion. Respondent argues that it was not necessary to make such allegations for the reason that the hearing was had upon the theory that bad faith, fraud and abuse of discretion were in issue. Even if it be assumed that those matters were in issue, the fact remains that there was no finding as to those issues. Findings on those issues were necessary, as above indicated in order that it might be determined therefrom whether the acts of the trustees were subject to review and control by the court. As above stated, there were two trustees herein—George D. Ferrall and the Bank of America. The burden of proof as to bad faith, fraud and abuse of discretion, was on petitioner, and the trustees were entitled to the benefit of the presumption that they acted in good faith. In re Estate of Canfield, 80 Cal.App.2d 443, 451, 181 P.2d 732. The court erred in not making findings

regarding those matters. In Re Estate of Smith, 23 Cal.App.2d 383, 73 P.2d 239, 240, the testamentary trust provided that the trustees should apply the income "so far as in their judgment they deem it necessary" to the support, maintenance and education of the issue of Sidney V. Smith, Jr. The petitioner therein alleged that she was a daughter of said Smith; that the trustees acted in arbitrary abuse of their discretion; and that they refused to apply any part of the income for the support and education of petitioner. The petitioner therein asked that the court determine the amount necessary for her support and education. The court therein said, in referring to the above-quoted provision of the trust, 23 Cal.App.2d at page 387, 73 P.2d at page 240: "The trustees were therefore given the power to determine the necessity for applying any part of the income of the trust to the support, maintenance and education of said issue, and we are of the opinion that there should be no interference by the courts with the exercise of that power except upon the showing of an abuse of discretion by the trustees. The trial court concluded that no abuse of discretion had been shown in the present case, and entered its findings and judgment accordingly." In Re Estate of Marré, 18 Cal.2d 184, 114 P.2d 586, 588, the testamentary trust provided that the trustees should pay out of the net income "such part thereof as said trustees shall in their sole judgment deem advisable" for the proper support and education of trustor's grandson "so long as, in their sole judgment, his education is incomplete." The grandson, who was petitioner therein, asked that the court instruct the trustees to reimburse him for expenses incurred for his support and education during a period prior to the entry of the decree of distribution. The trial court therein ordered the trustees to reimburse the petitioner for certain expenses during that period, and the trustees appealed from the order. The court therein said, 18 Cal.2d at page 190, 114 P.2d at page 590: "The amount to be paid for the beneficiary's support, however, was to be determined in the sole judgment of the trustees. The order of the superior court sought to specify the exact amount of the payments to be made to the beneficiary. It is well settled that the courts will not attempt to exercise discretion which has been confided to a trustee unless it is clear that the trustee has abused his discretion in some manner. [Citations.] In the present case the refusal of the trustees to make payment for the period between the death of the testatrix and the date of distribution of the trust estate to them was based upon the belief that any such payment would be improper. There was no attempt on the part of the trustees to fix the amount and, hence, there could be no abuse of discretion in this regard. The amounts to be paid should therefore be determined in the discretion of the trustees." The Supreme Court modified the order therein by directing that the trustees determine, in their discretion, the amounts necessary for the grandson's maintenance during said period.

There was no evidence that the trustees had been requested to make payments from the corpus, and there was no evidence as to what, if anything, the trustee Ferrall or the trustee Bank of America said relative to making payments from the corpus.

It does not appear that if findings, regarding abuse of discretion, had been made they would necessarily under the evidence have been adverse to appellants. It was essential, as above stated, that the court find whether the trustees abused their discretion.

The judgment is reversed.

SHINN, P. J., and VALLEE, J., concur.

92 Cal.App.2d 659

DICKEY et al. v. PATTISON et al.

Civ. 16985.

District Court of Appeal, Second District,
Division 2, California.
June 29, 1949.

1. Specific performance 🔑30

A purported contract for sale of lot stipulating no sum as purchase price and permitting unnamed balance to be paid in future at times and in installments satisfactory to purchaser was so uncertain as not to be specifically enforceable. Civ. Code, § 3390, subd. 6.

2. Vendor and purchaser 🔑21

Terms of purported contract for sale of land cannot be enforced if terms cannot be ascertained from agreement relied upon. Civ.Code, § 3390, subd. 6.

3. Specific performance 🔑31

A purported contract leaving certain terms to be agreed upon and contemplating execution of provisions ultimately adopted is not specifically enforceable. Civ.Code, § 3390, subd. 6.

4. Specific performance 🔑28(1)

A purported agreement which is too indefinite to ascertain the intention of parties cannot be enforced, not for want of equitable remedy but because of absence of clear, unmistakeable proof of all essential terms of contract. Civ.Code, § 3390, subd. 6.

5. Specific performance 🔑28(1)

Definiteness of agreement is sine qua non of enforcibility of agreement and while agreement may be uncertain in some particulars and nonperformance by obligor may provide basis of recovery of damages for breach, uncertainty must be removed to justify judgment of specific performance and statement of purpose of contract must in all particulars be clear, definite and precise. Civ.Code, § 3390, subd. 6.

6. Appeal and error 🔑931(1), 1010(1)

Findings supported by substantial evidence will not be upset on appeal but must be given benefit of every reasonable inference to be drawn from evidence favorable to judgment.

Appeal from Superior Court, Los Angeles County; Luray J. Mouser, Judge.

Action for specific performance of alleged contract for sale of realty by Claude Dickey and Edna Dickey against Richard Pattison and Amelia Pattison. From the judgment, the plaintiffs appeal.

Affirmed.

A. L. Abrahams and H. B. Cornell, Los Angeles, for appellants.

Krag & Sweet, Alhambra, David T. Sweet, Alhambra, for respondents.

MOORE, Presiding Justice.

The question for decision is whether there is sufficient evidence to support the finding that no enforceable contract was made by the parties.

Appellant Claude Dickey is the son-in-law of respondent Amelia Pattison while his wife Edna and respondent Richard Pattison are her children. Amelia was the owner of lot C in Santa Monica. It stood of record in the name of Richard. In August, 1944, a number of conversations were had among the parties concerning the purchase of lot C by appellants. No written terms were ever agreed upon. However, it appears to be established that a title search was ordered by Richard, and Claude paid him $1,000 on account of the purchase and thereafter contended that the price of $2,000 had been agreed upon. After appellants' demands for a conveyance of the lot had been rejected, they commenced this action. Following a trial the court determined that no contract had been made for the sale of lot C to appellants.

Basing its findings upon the issues presented by the pleadings and upon the evidence adduced, the trial court found that (1) the sum of $2,000 was not a fair and adequate price for lot C; (2) Richard did not agree to convey the lot for that sum; (3) possession of the lot was not delivered to plaintiffs nor did they take possession thereof or begin to make improvements thereon; (4) plaintiffs have not fully performed, nor are they willing to complete the terms of, their alleged contract; (5) Richard has no interest in lot C but Amelia is the sole owner thereof; (6) Amelia never consented to Richard's contracting with Claude for the sale of the lot to plaintiffs for $2,000 or for a sale upon plaintiff's down payment of $1,000; (7) she never represented to plaintiffs that Richard was the sole owner; (8) she did not permit plaintiffs to take possession or to make improvements thereon; (9) plaintiffs did not rely upon statements of Richard that he owned lot C nor were they misled by his statement of his ownership; (10) Amelia is not estopped by reason of any statement of Richard from asserting that the latter was not the true owner of the lot with the power to dispose of it; (11) also, she has not confirmed any representation of Richard that he was acting for her and she has not ratified the alleged agreement for the sale of the lot to plaintiffs.

In addition to the foregoing findings which resulted from the evidence and the allegations of the complaint, the court found the affirmative defense of Amelia to be true; that she was owner of lot C while the title stood in the name of Richard Pattison; that on August 29, 1944, Edna and Amelia attempted to make an agreement whereby Edna as the daughter of Amelia could acquire lot C for the immediate construction of a residence thereon; that they did not fix the total purchase price but solely by reason of parent and child relationship agreed that upon the consummation of the sale they would determine the purchase price to be paid; that the transaction was not to be considered as an investment by Edna and neither plaintiff could dispose of the lot without Amelia's consent.

The transcript discloses the numerous conversations of the parties. For this court to attempt to reconcile the testimony would be to usurp the function of the trial court. It is not clear that there was ever a definite meeting of the minds of the parties for the purchase and sale. But it is clear that their conversations left the attempted agreement in a tenuous state. The testimony of Amelia lends substantial support to the court's findings. She testified in substance as follows: I purchased lot C to serve as a convenience to my home. The title thereto was vested in Richard with my knowledge, which fact I imparted to Claude. Richard manages all my properties. The lot was not for sale in August, 1944, but because of Edna's long illness I discussed with her the idea of her buying it and took her and showed her the view down the coast. She felt that she would feel better at the ocean than at San Gabriel. I required no deposit but Claude simply made out a check, payable to Richard as I suggested. I did not see the check until that evening after I had shown Edna a lot "a little further down" for sale at $4,000. Nothing was said about where Claude would get the money. My concern was about Edna's health. I never discussed the sale of it with Claude prior to his writing the check. He agreed to purchase the lot and gave me the $1,000. He then became displeased with it and said it was too little and he was going to buy another. But he cleared off the grass and weeds and had it surveyed. When I saw he was not pleased, I offered to return the check.

Richard Pattison testified that $1,000 was not the balance due from the Dickeys; that he did not know what the balance was; that his mother had never set any figures; that when the $1,000 check was given he did not discuss with Mr. Dickey the amount of the balance; that Claude spoke of some other payment coming along but he did not say the amount; no dates were set for other payments; they were to be made at times when it would be convenient for the Dickeys.

From the testimony of the witness Brown it was a fair inference that lot C was reasonably worth $5,000.

[1-3] From the findings and the adopted evidence it is seen that the purported agreement is shrouded in uncertainty. No sum was stipulated as the purchase price although the unnamed balance would be paid in the future at times and in installments satisfactory to appellants. Such indefiniteness is a complete barrier to specific performance. Its terms cannot be

enforced if they can not be ascertained from the agreement relied upon. Civil Code, sec. 3390, subd. 6; Harris v. Larter, 36 Cal.App.2d 587, 591, 97 P.2d 1035. When a purported contract leaves certain terms to be agreed upon and contemplates the execution of the provisions ultimately adopted, it is not specifically enforceable. Patch v. Anderson, 66 Cal.App.2d 63, 66, 151 P.2d 644.

[4, 5] If a purported agreement is too indefinite to ascertain the intention of the parties, it cannot be enforced; not for want of an equitable remedy but because of the absence of clear, unmistakable proof of all the essential terms of a contract. Buckmaster v. Bertram, 186 Cal. 673, 676, 200 P. 610; Martin v. Bank of San Jose, 98 Cal.App. 390, 398, 277 P. 197; Harris v. Tarter, 36 Cal.App.2d 587, 593, 97 P.2d 1035; Rest., Contracts, sec. 370. Definiteness of an agreement is the sine qua non of its enforcibility. While it may be uncertain in some particulars and its nonperformance by the obligor may provide the basis of a recovery of damages for its breach, yet in order to justify a judgment of specific performance, its uncertainty must have been removed. The statement of its purposes in all particulars must be clear, definite and precise. Civil Code, sec. 3390, subd. 6; Pascoe v. Morrison, 219 Cal. 54, 57, 25 P.2d 9; Klein v. Markarian, 175 Cal. 37, 40 165 P. 3; Chandler v. Hollingsworth, 96 Cal.App. 472, 475, 274 P. 581; Durst v. Jolly, 35 Cal.App. 184, 190, 169 P. 449.

[6] Inasmuch as the findings are supported by substantial evidence they will not be upset on appeal. In fact, they must be given the benefit of every reasonable inference to be drawn from the evidence favorable to the judgment. California Employment Commission v. Betthesda Foundation, 54 Cal.App.2d 348, 351, 128 P.2d 874; Herbert's Laurel-Ventura, Inc., v. Laurel Ventura Holding Corp., 58 Cal.App.2d 684, 690, 1138 P.2d 43. In view of the foregoing, it is unnecessary to consider other points raised by appellants.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.

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92 Cal.App.2d 752

PEOPLE v. O'BRAND et al.

Cr. 4295.

District Court of Appeal, Second District,
Division 2, California.
July 8, 1949.

Hearing Denied Aug. 4, 1949.

1. Criminal law 🔑342

Where object of attempted burglary was a drug store in which there was a stock of narcotics consisting chiefly of opium derivatives and in room of one of defendants an eye dropper and other articles commonly possessed by users of narcotics were found, proof of defendant's desire for narcotics was competent to establish motive for attempting to burglarize the drug store.

2. Criminal law 🔑369(1, 2)

Generally, evidence of other crimes and degrading practices unrelated to any issue on trial is inadmissible, but where such proof is relevant to an issue, it is admissible though it tends to show immoral conduct or other crimes.

3. Criminal law 🔑369(2)

Justice may not be defeated by rejecting evidence simply because it involves other crimes or gross immorality.

4. Criminal law 🔑342

Proof of motive will not be excluded merely because it may be prejudicial to the accused, if it is relevant and material.

5. Criminal law 🔑728(2, 5)

Objection to argument of prosecutor was waived by failure to object at time of argument or to move to strike or to request that jury be directed to disregard the argument.

6. Criminal law 🔑1171(3)

In prosecution for attempted burglary of drug store, argument in which prosecutor did not refer to defendants as drug addicts or in any other derogatory sense but merely stated evidence from which an inference might reasonably have been drawn that defendants attempted to burglarize the drug store to obtain narcotics was not prejudicial.

7. Witnesses 🔑337(5)

Where alleged felon testifies in his own defense, prosecution may for purpose of impeachment elicit from him the fact that he has previously been convicted of a felony and the nature of his crime.

8. Witnesses 🔑350

In prosecution for attempted burglary, where defendant testifying in his own defense had denied a prior conviction for a felony, asking him whether he had been convicted of automobile theft in 1925 was not error. St.1923, p. 564, § 146; Pen. Code, § 1203, as amended by St.1927, p. 1493; § 1203.4.

9. Criminal law 🔑27

A crime which is in fact a felony remains a felony until its status is changed by judgment imposing punishment other than confinement in state prison.

10. Witnesses 🔑337(5)

Conviction of crime designated as a felony can be shown to impeach accused without proving that he has been sentenced to the state prison.

11. Criminal law 🔑1035(3), 1044

Objection to remarks of trial judge respecting written instructions was waived by failure to object to the remarks at the time or to move to strike or to request that jury be admonished to disregard them.

12. Criminal law 🔑823(5)

Instruction that the word "wilfully" implied simply a purpose or willingness to commit act or make omission and did not include any intent to violate law or to injure another or to acquire any advantage, was not prejudicial as permitting a finding of guilt though defendants had no intent to violate the law, in view of other instructions that specific intent was an essential element of offense involved. Pen. Code, § 7, subd. 1.

13. Constitutional law 🔑266

In prosecution for attempted burglary, accused were not deprived of fair and impartial trial in violation of due process clause, though evidence regarding narcotics was considered by jury on question of motive, and though defendants contended their proof of alibi was conclusive. U.S.C.A. Const. Amend. 14.

14. Criminal law 🔑1172(3)

In prosecution for attempted burglary, where the only purpose in proving admissions of one of defendants was to establish motive and there was other evidence of his participation in the crime and it was improbable that jury would have reached a different verdict even if a cautionary instruction that all admissions of the defendants should be viewed with caution had been given, failure to so instruct was not prejudicial.

15. Criminal law 🔑739(2)

Whether alibi had been established was solely for jury.

16. Constitutional law 🔑257

Jury's rejection of evidence of alibi offered by defendants did not deny them due process or any other right. U.S.C.A.Const. Amend. 14.

Appeal from Superior Court, San Luis Obispo County; Ernest Wagner, Judge.

Morris Samuel O'Brand and Harry Beck, also known as Harry Beckinstein and Harry Miller, were convicted of attempted burglary in the second degree and they appeal.

Affirmed.

Morris Samuel O'Brand, in pro. per. and Harry Beck, in pro. per. for appellants.

Fred N. Howser, Attorney General, Dan Kaufman, Deputy Attorney General, for respondent.

MOORE, Presiding Justice.

Having been convicted of attempted burglary in the second degree defendants have assigned five errors as grounds for reversal of the judgment.

[1-4] They contend that their cause was prejudiced by the court's allowing "evidence of narcotics to be introduced." The fact that such proof might have been prejudicial is not a ground for exclusion. The objection to it was made in the course of the testimony of a police officer who was

detailing the conversation had between the narcotic inspector and appellant Beck. After the latter had answered that he was not using narcotics, in response to other questions, he stated that O'Brand had sent him money to buy some opium from a Mexican; that he had received the money and attempted to make the purchase. There was no error in the court's ruling. The object of the attempted burglary was a drug store in which there was a stock of narcotics consisting chiefly of opium derivatives. Also, in the room of O'Brand there was found a bottle of theominal, an eye dropper and other articles commonly possessed by the users of narcotics. Therefore, proof of O'Brand's desire for narcotics was competent to establish motive for attempting to burglarize the drug store. While the general rule forbids the admission of evidence of other crimes and degrading practices unrelated to any issue on trial, it is the settled law that where such proof is relevant to an issue in the case on trial, it is admissible notwithstanding it tends to show immoral conduct or other crimes. The law will not permit justice to be defeated by rejecting evidence simply because it involves other crimes or gross immorality. People v. Zatzke, 33 Cal.2d 480, 202 P.8d 1009; People v. Peete, 28 Cal. 2d 306, 315, 169 P.2d 924. Proof of motive will not be excluded merely because it may be prejudicial to the accused if it is relevant and material. People v. Weatherford, 78 Cal.App.2d 669, 687, 178 P.2d 816; People v. Hall, 27 Cal.App.2d 440, 444, 81 P.2d 248.

[5, 6] Appellants assign as prejudicial the argument made by the prosecutor to the jury in reciting that the narcotic inspector had found discarded substances in the room of appellant O'Brand and that since Beck had brought a narcotic from Los Angeles, the logical place for them to attempt to get other narcotics was in the drug store which they attempted to burglarize. In the first place, no objection was interposed at the time of the argument; neither motion to strike the statement nor request for the jury to be directed to disregard it was made. Under such circumstances any objection appellants had must be deemed to have been waived. People v. Ash, 88 Cal.App.2d 819, 199 P.2d 711; People v. Goldstein, 84 Cal.App.2d 581, 588, 191 P.2d 102. Moreover, the language of the prosecutor was not such as was calculated to incite prejudice in the hearts of the jury. They were not referred to as addicts or in any other derogatory sense. The prosecutor merely stated evidence from which an inference might reasonably have been drawn that appellants attempted to burglarize the drug store to obtain narcotics. People v. Montgomery, 47 Cal.App. 2d 1, 20, 117 P.2d 437; People v. Ash, supra.

[7, 8] Appellants deem themselves to be aggrieved by the court's admitting evidence of Beck's prior conviction for violating section 146 of the Motor Vehicle Act. See Stats.1923, p. 564. Aside from the fact that the information did not accuse him of a prior conviction, the only other basis asserted for such contention is that since a conviction for this crime could have been punished by imprisonment either in the county jail or in the state prison it was incumbent upon the prosecution to follow up the proof of conviction with evidence that Beck had served a term in the state prison in expiation of his crime. The answer to such argument is that when a person who is on trial for having committed a felony testifies in his own defense the prosecution may for the purpose of impeachment elicit from him the fact that he has been previously convicted of a felony and the nature of his crime. People v. Romer, 218 Cal. 449, 452, 23 P.2d 749; People v. Keosababian, 73 Cal.App.2d 476, 479, 166 P.2d 619; People v. Dutton, 41 Cal.App.2d 866, 871, 107 P.2d 937. After Beck had denied a prior conviction for a felony his attention was directed to a particular conviction in 1925 and his counsel was directed to section 1203.4 of the Penal Code which permits a probationer to be released from all penalties and disabilities resulting from his crime. While appellants make no point out of the provision of the last cited section, they contend that instead of inquiring of Beck whether he had been convicted of a felony he was improperly asked whether he had been convicted of violating section 146:

stealing an automobile without the owner's consent, and that as a result of his affirmative answer both suffered prejudice before the jury. There was no error in the court's ruling. The accused may be impeached by showing his conviction of a felony even though thereafter he obtains a dismissal of the action under section 1203.4. All penalties and disabilities flowing from a conviction of a felony and which had been abrogated by the statute of 1923, supra, were reinstated by the amendment of 1927. Stats.1927, chap. 770, pp. 1493–1496; People v. James, 40 Cal.App.2d 740, 747, 105 P.2d 947.

[9, 10] The contention that Beck's conviction in 1925 might have been a misdemeanor is answered by section 153, Motor Vehicle Act, Stats.1923, page 565, which provides that a person convicted of violating section 146 shall be deemed guilty of a misdemeanor "unless his conviction is for an offense which this act or other law of this state declares to be a felony." Where a person is shown to have been convicted of a crime which was in fact a felony, it remains a felony until its status is changed by a judgment imposing punishment other than confinement in a state prison. Therefore, his conviction of a crime designated as a felony can be shown to impeach the accused without proving that he has been sentenced to the state prison. People v. Williams, 27 Cal.2d 220, 228, 163 P.2d 692; In re Miller, 218 Cal. 698, 701, 24 P.2d 766; People v. Ford, 81 Cal.App.2d 580, 583, 184 P.2d 524.

[11] Appellants contend that the court misdirected the jury and deprecated the value of written instructions ordered by the appellate courts. The language of the court referred to will be found on the margin hereof[1] and should not have been employed. No objection was made to the remarks; neither was there a motion to strike nor request made for an admonition to the jury to disregard them. Such failure constituted a waiver of objections by appellants and they may not now be heard to complain. People v. Jefferson, 84 Cal.App.2d 709, 714, 191 P.2d 487; People v. Horowitz, 70 Cal.App.2d 675, 695, 161 P.2d 833. The remarks of the court although erroneous could have had no effect other than to incite more careful attention by the jury to the written instructions which were to follow.

[12] Appellants contend that they were prejudiced by the following instruction: "The word 'wilfully' when applied to the intent with which an act is done or omitted and as used in my instructions, implies simply a purpose or willingness to commit the act or to make the omission in question. The word does not require in its meaning any intent to violate law, or, to injure another, or to acquire any advantage." They argue that it nullified all other instructions pertaining to "*wilfull* conduct and that it told the jury they could find defendants guilty even though the defendants had no intent to violate the law." Such argument ignores the three instructions which contain the following: "The essence of burglary is entering a shop, store or other building with such specific intent * * * the act must be accompanied by a specific or particular intent without which such crime may not be committed * * * in the crime of attempted burglary the necessary element is the existence in the mind of the perpetrator of the specific intent."

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[1] "May I say this parenthetically: That I personally somewhat disagree with the theory of instructing the jury from written instructions; it is difficult enough for a person who is trained in the law or with the law to understand instructions, at the same time we expect a jury of 12 lay persons who have no law training and most of you without any previous experience, to understand these instructions that are read to you with varying tones and varying emphasis. For that reason I am merely saying this: that if any instruction that I read to you is not intelligible or you do not understand it, you raise your hand and I will read it again; though it would be much better if you—my own personal feeling is that it would be much more understandable if the instructions were given orally, but the Appellate Court of this state frown upon that. Let me repeat: If any instruction I read to you is not intelligible you may interrupt me and I will read it again."

In no case has it been held that defining "wilfully" in the language of the Penal Code is prejudicial error. Penal Code, sec. 7, subd. 1; People v. Kearney, 20 Cal.2d 435, 439, 126 P.2d 612; People v. Flores, 62 Cal.App.2d 700, 705, 145 P.2d 318; People v. Saunders, 61 Cal.App. 341, 344, 215 P. 120. The authorities cited by appellants, People v. Mize, 80 Cal. 41, 22 P. 80 and People v. Snyder, 15 Cal.2d 706, 104 P.2d 639, are not in point. Both involved an instruction in a case of attempted murder. In attempting to commit that crime a person is presumed to intend to do that which he voluntarily and wilfully does. He is presumed to intend the natural consequences of his acts. After a killing has been proved, the burden shifts to the defendant to justify, excuse or mitigate it. In the Mize and Snyder cases there was no argument that defendant did not strike the victim. In the case at bar the sole undisputed issue was whether appellants did attempt to burglarize the drug store named in the information.

[13–16] Appellants in effect assert that their conviction resulted from their being deprived of a fair and impartial trial in violation of the due process clause of the Fourteenth Amendment, since they presented proof of a conclusive alibi. The connection of the alibi with the violation of the 14th amendment is not clearly stated. They do, however, recite that after two hours and thirteen minutes had elapsed after the jury had retired to deliberate, they returned and asked the court whether they "should consider any testimony regarding narcotics" and the court had replied that they might "consider the testimony regarding narcotics, but only for the purpose of motive in connection with the attempted burglary." They returned within about thirty minutes with a verdict of guilty. Such a speedy decision by the jury, assert appellants, is the result of "the atomic prejudicial effect of the improper introduction of the question of narcotics." They conclude their argument on their fifth point by the declaration that when a defendant has "presented a conclusive alibi and the prosecution depended upon prejudicial matters to secure the conviction, the judgment will be reversed on appeal." But the jury determined that the alibi was not conclusive.

Finally, appellants assign as prejudicial error the court's failure to instruct the jury that the oral admissions of defendant Beck should be viewed with caution, citing People v. Bemis, 33 Cal.2d 395, 202 P.2d 82. In the case of Bemis, his admissions were the only evidence of his guilt, whereas in the instant case the only purpose in proving Beck's admissions was to establish motive. There was other evidence of his participation in the crime. Even though a cautionary instruction had been given, it is improbable that the jury would have reached a different verdict. People v. Koenig, 29 Cal.2d 87, 94, 173 P.2d 1. The instruction on narcotics requires no additional discussion. The question whether an alibi was established is, like any other factual issue, solely for the jury's determination. People v. Ash, 88 Cal.App.2d 819, 199 P.2d 711; People v. D'Elia, 73 Cal.App.2d 764, 767, 167 P.2d 253. There was no denial of due process of law or of any other right by the jury's rejection of the evidence of an alibi offered by appellants.

The judgment and the order denying the motion for a new trial are affirmed.

McCOMB and WILSON, JJ., concur.

92 Cal.App.2d 648

SAMPSELL v. SECURITY-FIRST NAT. BANK OF LOS ANGELES et al.

Civ. 16938.

District Court of Appeal, Second District, Division 1, California.

June 29, 1949.

Hearing Denied Aug. 25, 1949.

1. Statutes ⚷158, 167(1)

The repeal of statute by implication is not favored, but when it becomes apparent that later law is a revision of entire subject-matter embodied in respective legislative acts, later law is deemed to supercede or repeal earlier one. Gen.Laws, Act 9059.

2. Statutes ⚷167(1)

Uniform Warehouse Receipts Act revised the entire subject-matter relating to general business of conducting a public warehouse, and, therefore, repealed inconsistent provisions of civil code penalizing failure to state in receipts the rate of storage in so far as it affected such receipts. Civ.Code, §§ 1858b, 1858f; Gen.Laws, Act 9059.

3. Statutes ⚷181(1)

Primary task in statutory construction is to determine intent of legislature.

4. Warehousemen ⚷12

Non-negotiable warehouse receipts which did not state storage charges and which were held by bank as security for indebtedness of pledgor substantially complied with Uniform Warehouse Receipts Law and bank had valid pledge of material. Civ.Code §§ 1858b, 1858f; Gen.Laws, Act 9059.

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Action by Paul W. Sampsell, as trustee in Bankruptcy for estate of Hamill-Jones Corporation, against Security-First National Bank of Los Angeles, and Lawrence Warehouse Company. A demurrer to complainant was sustained, and plaintiff appeals.

Judgment affirmed.

McLaughlin, McGinley & Hanson, Craig, Weller & Laugharn, Los Angeles, for appellant.

Roane Thorpe, Los Angeles, for respondent Security-First Nat'l Bank.

Williamson & Wallace, San Francisco, for respondent Lawrence Warehouse Co.

DORAN, Justice.

The instant controversy involves no disputed questions of fact. The appeal is concerned with the effect, if any, of Sections 1858b and f of the Civil Code upon certain warehouse receipts, and raises the question whether that code section was repealed by the Uniform Warehouse Receipts Act, adopted in 1909, Gen.Laws, Act 9059.

According to appellant's brief, the complaint sought recovery from respondents "for the value of building materials warehoused by a bankrupt corporation known as Hamill-Jones Corporation with the respondent, Lawrence Warehouse Company. This respondent, in turn, issued its (non-negotiable) warehouse receipts for such building materials to respondent bank, the pledgee, as security for an indebtedness from the bankrupt to such bank in the sum of $171,851.00 * * * All of these warehouse receipts were identical in form except that they covered different items * * *".

The warehouse company retained possession of the materials until a date between July 1, 1947 and September 10, 1947 after the bankrupt had become involved in the present proceedings, when it delivered possession to the respondent bank. On September 30, 1947, pursuant to stipulation and for the purpose of taking advantage of an advantageous market, the bank sold the building materials for the sum of $87,500.00, which amount the appellant trustee seeks to recover in this action. The complaint alleged insolvency of the bankrupt and that "both respondents had reasonable cause to believe that the bankrupt was insolvent" at the time the warehouse company delivered the materials to the bank.

Appellant's complaint was predicated upon the theory that the warehouse receipts were invalid for the reason, as stated in appellant's brief, "that the warehouse company had failed to have the warehouse receipts show on their faces the rate of storage charges per month or per season, as required by Section 1858b of the Civil Code of California. Section 1858f of the Civil Code makes it a felony to violate any of the provisions of Section 1858b". A demurrer to the complaint was sustained, appellant chose not to amend, and this appeal followed.

It is appellant's claim that since the warehouse receipts were void, "the pledge of the warehouse receipts was, likewise void and that the bank acquired no lien on any of the building materials"; that the purpose of the suit "is to prevent such lender (the bank) from enjoying the preferential treatment as a valid lien claimant when its lien was void".

The questions presented by this appeal involve the following points:

(1), Are the provisions of Section 1858 of the Civil Code inconsistent with or repugnant to those of the Warehouse Receipts Act, so that the latter Act has repealed the code sections?

(2), "If no such repeal were effected, then were not the warehouse receipts void as being issued in violation of a criminal statute (Section 1858)? If they were void, was not the pledge which depended upon them also void or unperfected * * *?"

(3), "Did the provisions in the warehouse receipts substantially comply with the Civil Code sections?"

Section 1858b of the Civil Code, enacted in 1905, requires that "all warehouse receipts must distinctly state *on their face* for what they are issued and its brands and distinguishing marks *and the rate* of *storage per month or season*". (Italics added.) Section 1858f fixes punishment for violation of such requirement, which act is designated a felony; it also makes the warehouseman liable in damages to any person aggrieved by such violation.

The Uniform Warehouse Receipts Act of 1909, Section 2, differs from the quoted Civil Code provision in merely requiring that "Warehouse receipts * * * must embody within (their) written or printed terms. * * * The rate of storage charges", and makes the warehouseman liable for "all damage caused by the omission from a negotiable receipt of any of the terms herein required". Sections 57 and 60 of the Uniform Act further provides that "This Act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it", and specifies that "All acts or parts of acts inconsistent with this act are hereby repealed."

The warehouse receipts here in question are non-negotiable in character, and the printed form, on its face, specifies that the stored building materials are "subject to lien for storage, handling, insurance and other charges as per contract and lease with the industry served". It is respondents' contention that the warehouse receipts are valid; that the Civil Code sections in question were repealed by the Warehouse Receipts Act; that in any event the bank held a valid pledge of the goods in question, and that the subject of the pledge was not the warehouse receipts but the property covered thereby.

[1, 2] Appellant's contentions cannot be sustained. The relation of the Uniform Warehouse Receipts Act to the previously enacted sections of the Civil Code involved herein is not a new question. This matter, presented in one phase or another, has been before the courts on several different occasions, and the decisions in reference thereto have been unusually consistent. The rule applicable herein, is stated in Jewett v. City Transfer & Storage Co., 128 Cal.App. 556, 561, 18 P.2d 351, 353, as follows: "Although in law the repeal of a statute by implication is not favored, when on comparison of the later law with the earlier statute it becomes apparent that the later law is a revision of the entire subject-matter embodied in the respective legislative acts, * * * the later law is deemed to supercede or repeal the earlier one. * * * Considering the provisions of the statute known as the Warehouse Receipts Act, it is apparent that its purpose was to revise the entire subject-matter relating to

the general business of conducting a public warehouse." These statements are not, as characterized by appellant, mere "careless dicta", but constitute an enunciation of obvious truth.

The case of Sampsell v. Lawrence Warehouse Co., 9 Cir., 167 F.2d 885, 887, upholding the validity of identical warehouse receipts issued by the defendant in the instant case, has received detailed attention from all parties hereto, and is set forth in full in appellant's brief. There as here, the appellant bankruptcy trustee contended that the receipts conferred no rights on a pledgee bank for the reason that the rate of storage was not stated "on their face" as required by Sections 1858b and f of the California Civil Code. Although this decision constitutes no controlling authority in the state courts, the reasoning therein in reference to facts identical with those here presented is persuasive. Citing Jewett v. City Transfer & Storage Co., 128 Cal.App. 556, 18 P.2d 351, hereinbefore mentioned, and other cases, the court in the Sampsell case said: "It is apparent that the intent of the California legislature in providing that the (Uniform Warehouse Receipts Act) act is to be interpreted to make uniform the law of the states which enacted it, is defeated if in California this warehouse receipt be held invalid. * * * We hold that the Act of 1905, section 1858 of the California Civil Code, penalizing the failure to state in the receipt the rate of storage is inconsistent with the Uniform Act and was thereby repealed in so far as affecting such warehouse receipts. It is a rational interpretation of the receipt, a contract embodying the law, which makes it lawful and carries into effect the intention of the parties".

[3] As said in one of respondents' briefs, "there are no iron-clad rules of statutory construction. The primary task in each case is to determine the intent of the legislature passing the statute". In the present controversy the legislative purpose is obvious and has received recognition in the cases cited. Such purpose, again quoting from respondents' brief, "can hardly be realized if warehouse receipts, valid in all other jurisdictions, are invalid in California because of a statute which far antedates the Uniform Act."

[4] It cannot have been the intention of the legislature to penalize the holder of warehouse receipts on the technical grounds urged by the appellant. Viewed in the least favorable light the receipts here under consideration evidence a substantial compliance with the law; nor is it claimed that any prejudicial effect resulted to any person by reason of failure of the receipts to state "on their face" the full and complete details relating to storage charges.

In Boas v. DePue Warehouse Co., 69 Cal. App. 246, 250, 230 P. 980, 981, the Court said: "A warehouseman issuing a nonnegotiable receipt which contains, as here, a recital that the goods stored are subject to a lien for charges, is entitled to a lien to the extent of such charges, even though the amount is not stated in the receipt". Although not dealing with the precise issue here presented, the opinion refers to the Uniform Warehouse Receipts Act involved herein, and bears out respondents' argument that a liberal and reasonable interpretation of the law is called for.

An examination of the cases cited by appellant reveals that such decisions are inapplicable to the present situation by reason of dissimilarity of the statutes and facts involved. Such is the case with Carter v. Seaboard Finance Co., Cal.App., 193 P.2d 985, where the court held a conditional sales contract void because it did not comply with certain statutory requirements. Other cited cases present only general rules and precepts about which there can be no controversy. In none of these opinions is there anything to sustain appellant's position, or which detracts from the principles and reasoning contained in the decisions hereinbefore mentioned.

The Uniform Warehouse Receipts Act must be held to govern in the instant case; the receipts in question are not invalid and the pledge evidenced thereby must be sustained.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

93 Cal.App.2d 193

PEOPLE v. DARGO.

Cr. 4313.

District Court of Appeal, Second District,
Division 3, California.
July 29, 1949.
Hearing Denied Aug. 25, 1949.

1. Burglary 🔑41(1)
Larceny 🔑65

Evidence sustained convictions of grand theft and of second-degree burglary.

2. Criminal law 🔑1037(1, 2)

In prosecution for grand theft and second-degree burglary, statements of prosecutor that jury was not concerned with reason why defendant who was under 21 was on trial in the Superior Court, thereby allegedly indicating that defendant was a dangerous character, did not require a reversal where no objection was made, argument was not assigned as misconduct, court was not requested to instruct jury to disregard argument, and evidence of guilt was conclusive.

3. Criminal law 🔑785(1)

A proceeding against a juvenile which resulted in his detention was not a prosecution for the commission of a crime, as respects the necessity of the court to instruct that a witness may be impeached by proof of his conviction of a felony.

4. Criminal law 🔑814(17)

In prosecution for grand theft and second-degree burglary, where circumstantial evidence was merely incidental to direct evidence of defendant's guilt, requested instructions on circumstantial evidence were properly refused.

◆

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Fridolin J. Dargo was convicted of grand theft and of second-degree burglary, and he appeals from judgments and from an order denying his motion for a new trial.

Affirmed.

Elizabeth Cassidy, San Francisco, for appellant.

Fred N. Howser, Attorney General, Elizabeth Miller, Deputy Attorney General, for respondent.

SHINN, Presiding Justice.

Fridolin J. Dargo was convicted in a jury trial of the offense of grand theft and of second degree burglary. His application for probation was denied, he was sentenced to the State prison, sentences to run concurrently, execution of the sentence was suspended and he was referred to the California Youth Authority, the Youth Authority refused to accept him, and the sentences theretofore imposed were ordered carried into execution. He appeals from the judgments and from an order denying his motion for new trial.

Defendant has been before this court on other occasions. In re Dargo, 81 Cal.App.2d 205, 183 P.2d 282; In re Dargo, 86 Cal.App.2d 114, 194 P.2d 34. In his extensive briefs he urges 12 grounds for reversal of the judgments. The first to be considered is the claim of insufficiency of the evidence.

On the night of August 4, 1948, some time after 10:30 o'clock, a 1947 Chevrolet Convertible automobile was stolen from Joe Dooley's automobile sales lot at 330 South Vermont Avenue, in Los Angeles. The keys of the automobile, with other keys, were in the drawer of a desk in an office building which had been locked up. Entrance to the office had been made through a rear window, the glass of which was broken and the desks and cabinets had been broken into. Some cigarette lighters and also automobile keys, including the Chevrolet key, had been taken and the Chevrolet had been driven from the lot. Two days later it was found in the custody of the West Covina Police Department. Donald Gannon, 16 years of age, testified for the People in substance as follows: He knew defendant by sight and met him at Olympic and Bixel about midnight August 4th; defendant was endeavoring to start automobiles on Olympic Boulevard by making connection between ignition wires with a penny; Jack Rector was with Gannon; defendant was alone; defendant asked Gannon if he wished to assist in the theft of a car and Gannon agreed; defendant broke in the rear window of the Dooley office and the two went inside, ransacked the desks and took the automobile keys and lighters. Gannon identified the lighters shown to him as those that had been stolen. He and defendant took the Chevrolet and started for Riverside, where defendant said they could hide out. On the way they stopped briefly at the home of a girl friend of defendant; at West Covina they ran out of gas and left the car on the street; they left the ignition keys in the car but threw away the other keys and two cigarette lighters and hitchhiked back to Los Angeles. Defendant at that time gave Gannon one cigarette lighter. Gannon, at the time of trial, was in a Forestry Camp at Calabasas where he had been sent for a period of six or nine months as a ward of the Juvenile Court after he had admitted participation in the thefts. Another witness for the State was Jackie Rector, aged fifteen. He was acquainted with defendant. He was present at the meeting of Gannon and defendant, the night of August 4th, and heard defendant ask Gannon to go with him to "hot wire" a car; Gannon agreed and the two left. Jack Fornte, aged fourteen, testified that he was acquainted with defendant, Gannon and Rector; on the afternoon of August 5 he talked with defendant, asked him if it was true he had stolen a car and defendant said that he had, a 1947 Chevrolet; that they had broken in and had taken the keys and cigarette lighters and had driven the car until it ran out of gas. M. S. Hansen, police officer of West Covina, met defendant and Gannon about 6:00 A.M. on August 5th in West Covina at a point about a mile and a half from where the Chevrolet had been abandoned. He stopped them, defendant identified himself, said they had been visiting his aunt in Pomona, and they were allowed to go on. Another officer testified to having found the cigarette lighters in a field about 25 feet from the car, and at the same place some scattered keys. The car was returned to the owner on August 6th. R. P. Doran, a Los Angeles Police Officer, talked to defendant on the 16th, when defendant denied all knowledge of the theft. Gannon was brought into their presence and related the story of the theft in the presence of defendant, and when asked if the account were true defendant stated that he knew nothing about it. The keys and cigarette lighters were those that had been stolen; the automobile was proven to be worth not less than $400. Defendant on the stand denied the testimony of Gannon, saying that he had been at home on the night of the theft, that he had had a slight argument with his mother, left home about 11:00 o'clock to go to the home of his aunt in Imperial Valley, caught a ride on a truck to a point near Riverside, met a friend named Charlie, whose last name he could not remember, and started to hitchhike back to Los Angeles; he got a ride as far as West Covina where they were let out, were questioned by a police officer and returned to Los Angeles. He admitted having given Gannon a cigarette lighter but claimed he had purchased it. He testified that he had been to the Dooley secondhand lot looking at cars, expecting his stepfather to buy one for him. He was questioned by Officer Doran as to how his finger print could have been impressed upon the window sill of Mr. Dooley's private office. He accompanied the officers to the Dooley office and stated that he had been in the office, talking to a man he believed to be Dooley and may have placed his hand upon the window sill. The finger print was not clear and was not offered in evidence. Mr. Dooley denied having seen defendant prior to his arrest. Defendant's stepfather testified that defendant was at home until about 11:00 o'clock P.M. on the night of August 4th; that defendant then said he was going to Riverside and was given $2 by his stepfather. He testified to having made a persistent effort to locate the truck driver with whom defendant claimed to have ridden, but that he had been unable to locate him.

[1] The foregoing is the substance of the evidence, and it is clearly sufficient to support the verdicts of guilty.

Defendant's briefs consist of 200 pages, considerably in excess of the entire transcript of the evidence. The arguments as to the sufficiency of the evidence dwell upon inconsequential imperfections such as are usually found in the narration of events by lay witnesses. The testimony of each witness for the people is dissected and criticized for the discovery of trivial inaccuracies of speech or recollection. All this is wasted effort. It is an attack upon the credibility of the witnesses which can avail defendant nothing on appeal. That the jurisdiction of this court does not extend to a review of questions of fact is entirely overlooked.

[2] Several statements of the prosecutor made during argument are quoted in support of the claim that he was guilty of misconduct. In considering these charges, we have examined carefully both the opening and closing arguments of the prosecutor, which appear in the reporter's transcript. With one exception, we think the challenged statements constituted a fair and dispassionate discussion of the evidence, accompanied by appropriate and proper comments thereon. The following argument of the District Attorney, however, was in our opinion inappropriate and improper: "There is one other thing that I would like to invite your attention to, although the Court will instruct you, I believe that you are not allowed to speculate on matters. Yet there must have occurred to you the idea as to why the defendant, a boy of less than majority, under 21, is on trial before you here in the Superior Court. The only answer that I can give you, ladies and gentlemen, and I am going to have to make it blunt, is that it doesn't concern you. Regular and due processes have been gone through to bring the defendant for trial here before you in the Superior Court the same as any other defendant, regardless of age, charged with felony offenses and you cannot permit yourselves to be concerned with those other matters, no more than you can permit yourselves to be guided by a sympathy because of his youth. Those matters again, to put them bluntly, are none of your business. I don't mean to be crude or anything, but sometimes the vernacular drives the point home better than trying to be kind and sweet and smooth it over. You just have to consider the facts and the law in this case and that alone." The basis of defendant's complaint is that the statements indicated as a fact that he was a dangerous character who should be prosecuted for a felony, even though his accomplice, Gannon, also a minor, was treated as a juvenile offender. No objection was made to the argument. It was not assigned as misconduct. The court was not requested to instruct the jury to disregard it. The evidence of guilt is conclusive. Under these circumstances the impropriety of the argument will not warrant a reversal.

[3, 4] Defendant complains of the failure of the court to instruct that a witness may be impeached by proof of his conviction of a felony and also complains of a ruling of the court to the effect that the incarceration of the minor witness, Gannon, did not amount to his conviction of a felony. The point is not well taken. The proceeding against the juvenile which resulted in his detention was not a prosecution for the commission of a crime. In re Dargo, supra, 81 Cal.App.2d 205, 183 P.2d 282; 86 Cal.App.2d 114, 194 P.2d 34. The jury was instructed as to the necessity of corroboration of the testimony of an accomplice and the instructions as a whole were comprehensive and correct. There was no occasion to give defendant's requested instructions on circumstantial evidence. The circumstantial evidence was merely incidental to the direct evidence of defendant's guilt.

The defendant has been fairly tried, the record discloses no error, and the evidence was such as to satisfactorily establish guilt.

The judgments and order denying motion for new trial are affirmed.

WOOD and VALLÉE, JJ., concur.

CALIFORNIA REPORTER

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SECOND SERIES

GOLDING et al. v. R.K.O. PICTURES, Inc. et al.

L. A. 20699.

Supreme Court of California, in Bank.
July 1, 1949.

Rehearing Granted July 28, 1949.*

1. Literary property 🔑9

In action for infringement of common law copyright of literary property, plaintiff must establish ownership of a protectible property interest, unauthorized copying by the defendant and damage resulting therefrom.

2. Literary property 🔑1

Literary property in the fruits of a writer's creative endeavor extends to the full scope of the writer's inventiveness but only the produce of the writer's creative mind is protectible.

3. Literary property 🔑9

An inference of copying may arise when there is proof of access coupled with a showing of similarity to plaintiff's protectible property and when there is strong evidence of access, less proof of similarity may suffice, but if the evidence of access is uncertain, strong proof of similarity to plaintiff's protectible property must be shown before the inference of copying may be indulged.

4. Literary property 🔑8

The fact that a plan or theme of the plaintiffs' story is similar to the plots of prior stories does not defeat the claim of originality for common law copyright purposes, and where there was strong evidence from which jury had reasonably concluded that scenario of moving picture was copied from the plaintiffs' play, the fact that the defendants could have obtained the story from another source was of no consequence.

5. Literary property 🔑9

In action by writers of a play for infringement of common law copyright finding that defendants had opportunity and inclination to pirate plaintiffs' literary property was clearly supported by the evidence.

6. Literary property 🔑9

Proof of access establishes no more than opportunity to copy and not actual copying of literary property.

7. Literary property 🔑9

In action for infringement of common law copyright of literary property, liability for damages must rest upon substantial evidence of similarity between plaintiffs' literary property and the moving picture produced by the defendants.

8. Appeal and error 🔑1001(2)

No finding of fact is binding upon an Appellate Court if it is not supported by substantial evidence.

9. Appeal and error 🔑989

The function of the Supreme Court, when the contention of insufficiency of the evidence is made, is to examine the record to ascertain whether there is evidence to support the verdict of the jury.

10. Appeal and error 🔑989

Where writers of play asserted that the defendants' moving picture infringed common law copyright of the writers, it was necessary to read or view the play and the moving picture involved to determine whether they presented any substantial similarity so far as the property of the writers of the play was concerned, but the appellate court would not substitute itself for the jury to decide what it thought of the issue of similarity but would determine only whether there was any substantial evidence of similarity to support the jury's finding for such writers.

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* Subsequent opinion 221 P.2d 95.

11. Literary property 🔑9

In action by writers of play called "The Man and His Shadow" for infringement of common law copyright by producers of motion picture called the "Ghost Ship" evidence sustained finding that there was substantial similiarity to plaintiffs' protectible property in such play.

12. Literary property 🔑8

In determining whether writers of play have a protectible common law property right therein, the play must be subjected to expert analysis and if such right is found to exist, the question of similarity of motion picture to the original and protectible part of the play must be determined on the basis of an average observer.

13. Evidence 🔑474(16)

The owner of property is competent to testify to its worth.

14. Literary property 🔑9

Evidence sustained finding that owners of play had been damaged in the sum of $25,000 by infringement of owners' common law copyright by producers of motion picture.

SCHAUER, J., dissenting.

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Action by Samuel R. Golding and Norbert Faulkner against R.K.O. Pictures, Inc., and Val Lewton for infringement of literary property. From a judgment for plaintiffs for $25,000 and from an order denying motion for judgment notwithstanding the verdict, the defendants appeal.

Affirmed.

Prior opinion, 193 P.2d 153.

Mitchell, Silberberg & Knupp and Guy Knupp, Los Angeles, for appellants.

Harold A. Fendler, Beverly Hills, for respondents.

EDMONDS, Justice.

In an action for the infringement of literary property, the producers of a motion picture appeal from a judgment awarding the authors of the assertedly plagiarized stage play damages in the sum of $25,000. The sufficiency of the evidence to support the judgment is the principal question presented for decision.

Samuel R. Golding and Norbert Faulkner, both well-established writers, collaborated in writing a play entitled, "The Man and His Shadow". They neither published nor dedicated it to the public and it was not copyrighted. The Pasadena Playhouse produced the play in December, 1942. After the authors made some revisions, they submitted it to R.K.O. Radio Pictures, Inc. and Val Lewton, a producer. Lewton retained the manuscript for about six weeks. At that time, according to the evidence, Lewton was looking for a story with the action on board a ship in order to utilize an old set which was available. The appellants admit access to the play in that a copy of it was in the custody of Lewton for some time.

In August, 1943, the appellants released the motion picture entitled "The Ghost Ship" and this action followed. Upon the trial, the play was read to the jurors and the motion picture was shown to them. After they returned a verdict for damages in the amount of $25,000, a motion for judgment notwithstanding the verdict was denied. The appeal is from the judgment and from the order denying the motion.

The central dramatic situation or core in which the plaintiffs claim property is as follows: The action takes place on board a ship. Only one person aboard, a passenger, suspects the captain of being a murderer. He accuses the captain who neither admits nor denies the accusation, in fact, to his crew and passengers the captain clearly infers that his accuser is either guilty of hallucinations or himself desires to kill him. The accuser knows that he is subject to the captain's whims and is in a position where he can be killed or imprisoned. The captain, sure of his authority, informs the accuser that he is free to try to convince any one on board ship of the truth of his suspicions. The passenger tells his story to the first mate and to others on the ship but they refuse to believe him and instead suspect the passenger of hallucinations or malice. Finally, however, the captain becomes aware that he is suspected by at least one other person and he threatens to kill, or does kill that person as an intermeddler. Knowledge that his murders are about to be uncovered causes him to lose his mind and brings about his own undoing and death.

In the plaintiffs' play this basic dramatic core was filled out by placing the passengers and crew upon a pleasure cruise and making the captain an imposter who has come to show his superiority to the man in whose shadow he has worked for years; this man is the person throughout who knows the captain's true identity. There are various other sub-characters who give body and filling to the central plot, but as testified to by both Golding and Faulkner, this matter was all superficial and could be changed in innumerable ways without affecting the literary property and its value.

The moving picture "Ghost Ship" has its captain as the dominant figure of the story. The locale of the drama is on a freighter with members of the crew having the subordinate roles. The ship carries no passengers and, to that extent, the minor characters are quite different from those in the play. However, the captain and his obsession with authority and the fact that no one aboard can successfully challenge his position is found in the picture, as is the dramatic struggle between the captain and his adversary, the one person who knows his true nature. Basically, the psychological situation is that described by the plaintiffs as the dramatic core of their work.

The producers contend that the evidence does not support the finding of plagiarism. The correct standard for making a comparison between the play and the picture, they assert, is that of an ordinary observer; if dissection, rather than observation, is necessary to determine the question of similarity, a finding of infringement is unwarranted. They also claim that the evidence is insufficient to support the award of damages. In answer, the respondents argue that "whether or not similarities are apparent to an 'ordinary observer' and support a finding of copying is a question of fact upon which the jury's unanimous determination is conclusive."

[1] The rights asserted in this case are not based upon statutory copyright but stem from the so-called common-law copyright. Civ.Code § 980. Upon such a cause of action, to recover for infringement, or piracy, of literary property, three elements must be established: (1) ownership by the plaintiff of a protectible property interest; (2) unauthorized copying of the material by the defendant; and (3) damage resulting from the copying. See Caruthers v. R.K.O. Radio Pictures, Inc., D.C., 20 F. Supp. 906, 907.

[2] Literary property in the fruits of a writer's creative endeavor extends to the full scope of his inventiveness. This may well include, in the case of a stage play or moving picture scenario, the entire plot, the unique dialogue, the fundamental emotional appeal or theme of the story, or merely certain novel sequences or combinations of otherwise hackneyed elements. It is, however, only the product of the writer's creative mind which is protectible. If only a portion of the play or story is original and the remainder is but an orthodox collection of filler comprising matters in the public domain, the property right must be fully analyzed and closely defined, because in the subsequent determination of the issue of copying, it is necessary to make a comparison of the two works, and such comparison is of value only if it is based upon a correct determination of the issue as to the extent and nature of the plaintiff's protectible interest.

[3] After a plaintiff has established a protectible property right, the further issue, common to all copyright cases, statutory or common law, is: Was the plaintiff's material copied by the defendant? There will seldom be direct evidence of plagiarism, and necessarily the trier of fact must rely upon circumstantial evidence and the reasonable inferences which may be drawn from it to determine the issue. An inference of copying may arise when there is proof of access coupled with a showing of similarity. Shipman v. R.K.O. Radio Pictures, Inc., 2 Cir., 100 F.2d 533, 538; O'Rourke v. R.K.O. Radio Pictures, Inc., D.C., 44 F.Supp. 480, 482. Where there is

strong evidence of access, less proof of similarity may suffice. Conversely, if the evidence of access is uncertain, strong proof of similarity should be shown before the inference of copying may be indulged.

It is particularly important to keep clearly in mind, insofar as the question of similarity is concerned, that it is only similarity as to the plaintiff's protectible property which is relevant. Thus, if the property interest entitled to protection extends only to certain sequences or characters, similarity of the plaintiff's and the defendant's works as to other phases of the play or scenario is wholly irrelevant.

If it is established that the plaintiff has a protective property in his literary work, and there was copying, the elements of liability for infringement or piracy are established and all that remains is the determination of damages. On this latter issue, the rules are the same with regard to literary property as apply to any other form of personal property. Barsha v. Metro-Goldwyn-Mayer, 32 Cal.App.2d 556, 90 P.2d 371; Universal Pictures Co. v. Harold Lloyd Corp., 9 Cir., 162 F.2d 354.

The plaintiffs do not claim that their entire play, or any particular sequence or dialogue, was directly or totally pirated. Their insistence throughout has been that the thing of value in their play is the central dramatic situation and the interplay of the dominant and secondary characters upon each other. All other characterizations and dialogue are admittedly nothing more than hackneyed filler which could be added or subtracted without affecting the value or substance of the plaintiffs' literary property.

Golding testified that when Lewton became reluctant to purchase the play, he told the producer that a moving picture of "The Man and His Shadow" could be based upon very simple lines, and the action need not necessarily take place on a pleasure yacht. The story might well be played in all its dramatic aspects on a freighter, having an ordinary captain and an ordinary crew. There is one important dramatic figure in this play and only one, he said; that is the captain, with his insane lust for power, driving to carry out his sadistic objectives. And as the production on the Pasadena stage was summarized by the witness, "the sub-story of the other characters seemed very much warped and almost trivial as compared to the figure of the captain who dominated the scene when he appeared."

The first question presented for decision is whether this basic dramatic situation constitutes protectible literary property. On the subject of the use of such plots Faulkner, who formerly had been a story editor at a studio, testified that "the basic duty of [the story editor] is to read a book or * * * play * * * and condense the story theme into two or three pages. This material is then used for conferences with producers and executives of the studio so they don't have to read the whole book or play * * * You have in studios a great problem of budget * * * That means the studio gives a producer an assignment and says, 'Here is a story, but * * * we don't want you to spend more than this amount of money for the production.' * * Now in such cases, the story editor goes in and talks over the story with the producer, he says, 'You can do this story * * *, for the lower budget cost because you can eliminate certain incidents, certain persons, certain settings, so that you can create the same basic theme and powerful story * * *.' "

According to this evidence, the real value of a story or play may have little to do with specific dialogues or sequence of scenes or locale and there is ample evidence tending to prove that the basic dramatic core of the plaintiffs' play constitutes the truly original and valuable feature of it. Further, there was testimony to the effect that this particular physchological drama, with its emphasis upon the captain's controlling monomania for authority and power, was particularly well timed with the early days of the war and, therefore, of unusual value at that time. Nor was it a mere abstract idea. It had been reduced to the form of a full stage play. Its creators had embellished it with much of the trappings that give form, if not substance, to such literary work.

[4] The fact that a plan or theme of the plaintiffs' story is similar to the plots of prior stories does not defeat the claim of originality within the meaning of that word for copyright purposes. "It is not essential

that any production, to be original or new within the meaning of the law of copyright, shall be different from another * * * the true test of originality is whether the production is the result of independent labor or of copying." Drone, Copyrights, cited with approval in Fred Fisher, Inc. v. Dillingham, D.C., 298 F. 145, 151; to same effect, Amdur on Copyrights, sec. 3, pp. 69, 70. It is of no consequence that R.K.O. could have obtained the story from another source, when there is strong evidence from which the jury has reasonably concluded that the scenario of "Ghost Ship" was copied from the plaintiffs' play. "Any subsequent person is, of course, free to use all works in the public domain as sources for his compositions. No later work, though original, can take that from him. But there is no reason in justice or law why he should not be compelled to resort to the earlier works themselves, or why he should be free to use the composition of another, who himself has not borrowed. If he claims the rights of the public, let him use them; he picks the brains of the copyright owner as much, whether his original composition be old or new. The defendant's concern lest the public should be shut off from the use of works in the public domain is therefore illusory; no one suggests it." Fred Fisher, Inc. v. Dillingham, supra, 298 F. at page 150. Or, as stated by Justice Holmes: "Others are free to copy the original. They are not free to copy the copy." Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 249, 23 S.Ct. 298, 299, 47 L.Ed. 460.

Concerning the issue of copying, and its subsidiary determinations of access and similarity, the evidence as to access is strong. The producers of the motion picture have conceded access, but because the inference of copying must rest upon both access and similarity, it is necessary to examine, to a certain extent, the nature of the evidence of access.

[5] It appears without conflict that the plaintiffs' play was submitted to Lewton to read and consider. Both Golding and Faulkner testified to conversations with Lewton regarding the acceptability of the story for moving picture purposes. In one of the discussions of it, according to Golding, Lewton stated: "Well, Golding, I don't have to buy my stories. I don't have to lay out money for originals; I get my idea and I call in a couple of writers in the lot and I make my stories that way." It was a few days later that the manuscript was returned to plaintiffs. The evidence of opportunity and, indeed, inclination to pirate plaintiffs' literary property is therefore clearly supported by the evidence.

[6, 7] Proof of access, however, establishes no more than the opportunity to copy and not actual copying. Kustoff v. Chaplin, 9 Cir., 120 F.2d 551, 560; Cain v. Universal Pictures Co., D.C., 47 F.Supp. 1013, 1015. And liability for damages must rest upon substantial evidence of similarity between plaintiffs' literary property and the moving picture produced by the defendants. The play was read to the jury and the picture was viewed by them. There was no other evidence of similarity offered or received, and whether such evidence is sufficient to sustain the jury's implied finding of similarity is a question which can only be determined upon appeal by reading the play and seeing the moving picture, which have been done by this court.

[8, 9] The parties are directly at variance as to whether this issue of similarity presents a question of law or of fact. The only direct statements in the cases appear to confirm the playwrights' position that it is a question of fact for the jury. Universal Pictures Co. v. Harold Lloyd Corp., 9 Cir., 162 F.2d 354, 360; Dam v. Kirke La Shelle Co., C.C., 166 F. 589. However, they extend this point too far when they contend that the determination by the jury of this issue "is conclusive" upon appeal. No finding of fact is binding upon an appellate court if it is not supported by substantial evidence. The function of this court, when the contention of insufficiency is made, is to examine the record to ascertain whether there is evidence to support the verdict of the jury.

[10] The situation presented by the issue of similarity is a peculiar one. There is always some evidence in the record. That is to say, if plagiarism is claimed there will always be a play by the plaintiff and one assertedly copied from it by the defend-

ant. Yet the mere existence of two dramatic works in evidence does not, per se, constitute sufficient evidence of similarity. It is necessary to read or view the two works to see if they present any substantial similarity insofar as the plaintiff's property in his work is concerned. This is not to say that the appellate court will substitute itself for the jury to decide what it thinks of the issue of similarity, it is merely a question of determining if there is any substantial evidence of similarity to support the jury's finding.

[11] In the present case, the movie "Ghost Ship" contains all the elements of the plaintiffs' basic dramatic situation. It is true that the story is placed on a freighter instead of a luxury cruise; that it showed no passengers but only the crew aboard; and that there are many differences in the minor characters. "Evidence of these differences is relevant upon the question of [similarity], but if such differences are shown to exist, the question remains for the trier of fact to decide the issue." Universal Pictures Co. v. Harold Lloyd Corp., supra [162 F.2d 361]; Maurel v. Smith, D. C., 220 F. 195, 199; Sheldon v. Metro-Goldwyn Pictures Corp., 2 Cir., 81 F.2d 49, 56. The basic factors of the play and the moving picture show strong similarity in their respective plots although superficially there is considerable difference. But such differences go to the quality of the plagiarism, and not to its existence or nonexistence.

The appellants' main contention, however, is that in making a comparison of the two works, "the standard of the ordinary observer should be applied—that is, the comparison should be made without dissection of the works under observation and without expert or elaborate analysis." Harold Lloyd Corp. v. Witwer, 9 Cir., 65 F.2d 1, 18; Frankel v. Irwin, D.C., 34 F.2d 142, 144; Dymow v. Bolton, 2 Cir., 11 F.2d 690, 692. It is, therefore, argued that the court must look at the two plays as a whole to determine if they would impress the average observer as similar. The argument suffers from oversimplification. The rule of law stated is correct insofar as the issue of similarity is concerned, but it has no application to the preliminary issue of originality or a plaintiff's protectible property interest.

[12] It is essential from the nature of the inquiry as to originality to first dissect the play to determine wherein, if at all, plaintiffs have any protectible property right. Assuming this is established, then comparison may be made between the two works as to the original and protectible portion only. If, as may often be the case, plaintiffs' property extends to the entire play, then the trier of fact will compare the one with the other. But where, as here, the plaintiffs' property extends only to a portion of the play, to its dramatic core, then the comparison of the two works must be on the basis of an average observer looking at that portion. Otherwise stated, dissection may be necessary to define the existence and extent of a plaintiff's property interest, and on the issue of similarity the test is always that of the average observer comparing such property interest with the alleged copy made by the defendant.

[13, 14] In support of the appellants' contention that there is no sufficient evidence of the value of the damages sustained by the authors of the play, it is argued that all of the evidence concerning the value of the motion picture rights is found in the testimony of the respondents, and that no person with experience in the determination of the value of such property was called to testify on their behalf. But the testimony of Faulkner, who stated his opinion in regard to the value of the play was not necessary as an expert for both he and his co-author testified as owners of the property. Each of them told the jury that the value of the play before the infringement was between $25,000 and $50,000 and that it had no value after the production and distribution of the picture. It is a well recognized rule that the owner of property is competent to testify as to its worth. 10 Cal.Jur. 1023. "Literary property is not distinguished from other personal property and is subject to the same rules and is likewise protected. Palmer v. De Witt, 47 N.Y. 532, 538, 7 Am.Rep. 480. California has held that plaintiffs may testify to the value of an unpublished manuscript prior to misappropriation in Barsha v. Metro-

Goldwyn-Mayer, 32 Cal.App.2d 556, 90 P.2d 371. See Yadkoe v. Fields, 66 Cal.App.2d 150, 151 P.2d 906; Nathan v. King Features Syndicate, Sup., 32 N.Y.S.2d 519." Universal Pictures Co. v. Harold Lloyd Corp., supra. The testimony of the appellants' experts that the play contained no material of value for motion picture purposes merely created a conflict in the evidence.

The judgment and the order denying the motion for judgment notwithstanding the verdict are affirmed.

GIBSON, C. J., and SHENK, TRAYNOR and SPENCE, JJ., concur.

CARTER, Justice.

I concur in the judgment of affirmance.

I am not, however, disposed to agree with the statement made in the majority opinion that, in a case of this sort, the preliminary issue is that of originality. It is my understanding that where there are two works, whether literary, dramatic, musical, or of art, and one is claimed to be a piracy or infringement of the other, that the first issue which must be determined is that of similarity between the two. For if there is no substantial evidence to show similarity between them, then no matter how original either of the two is, the plaintiff is not entitled to judgment.

In Dymow v. Bolton, 2 Cir., 11 F.2d 690, 692, it was said: "But an examination of that and other cases will show that the inquiry actually made was always to ascertain what had been appropriated, if anything, and then decide whether the appropriation was (1) of copyrightable matter, and (2) was substantial." Rush v. Oursler, D.C.N.Y., 39 F.2d 468, 472; Lowenfels v. Nathan et al., D.C.N.Y., 2 F.Supp. 73, 79; Dam v. Kirke La Shelle Co., C.C. N.Y., 166 F. 589, 591. This procedure was followed in Harold Lloyd Corporation v. Witwer, 9 Cir., 65 F.2d 1; Nichols v. Universal Pictures Corporation, D.C.N.Y., 34 F.2d 145; Stodart v. Mutual Film Corp., D.C.N.Y., 249 F. 507; Sheldon v. Metro-Goldwyn Pictures Corporation, 2 Cir., 81 F.2d 49; Universal Pictures Co. v. Harold Lloyd Corporation, 9 Cir., 162 F.2d 354; Barsha v. Metro-Goldwyn-Mayer, 32 Cal.App.2d 556, 90 P.2d 371. By "copyrightable material" is meant material which is new, novel, original, and outside the public domain.

SCHAUER, Justice.

I dissent.

It is urged in the majority opinion that the judgment can be sustained on the theory that defendants pirated "The Ghost Ship" from plaintiffs' story "The Man and His Shadow," although obviously, insofar as plot is concerned, both plaintiffs' story and defendants picture are taken from the public realm of long recognized and often used plots. Reliance is placed on the language of Justice Holmes: "Others are free to copy the original. They are not free to copy the copy." (Bleistein v. Donaldson Lithographing Co. (1902), 188 U.S. 239, 249, 23 S.Ct. 298, 299, 47 L.Ed. 460.) The majority say, "It is of no consequence that R. K. O. *could have* obtained the story from another source, when there is strong evidence from which the jury has reasonably concluded that the scenario of 'Ghost Ship' was copied from the plaintiffs' play." As an abstract proposition of law the quoted sentence is sound enough but in its assumption of facts and as applied to this record it hops, skips and jumps the major weakness in the plaintiffs' case.

Viewing the picture and reading the play seem to me to approach demonstration that the picture was not copied from the play. I find utterly no similarity between the picture and play except in respect to a hackneyed plot which has been in the public domain so long and so often that it seems beyond even judicial credulity to accept as tenable the theory that defendants copied it from plaintiffs.

Certainly there was no necessity for the defendants to read plaintiffs' "The Man and His Shadow" in order to obtain the "basic plot," or its subordinates, as depicted in "The Ghost Ship"; they needed only to turn to "The Universal Plot Catalog" (Henry Albert Phillips) or to "Story Plotting Simplified" (Eric Heath). In the last named work (which admittedly only suggests further sub-classifications or applications of the fundamental law[1] proclaimed by Georges Polti)[2] we find in chapter XIX (sub-situation 15 of the sixteenth situation) the following listing:

"Madman	Victim	The Cause"
"A sea-captain	His crew	Insanity"

And in chapter XXVII we find:

"Superior Rival	Inferior Rival	The Object"
"A sea-captain	His first mate	A native girl"

These situations, it seems to me, are too well and widely known and have been too often written about, to admit of present proprietorship in them merely as such. *They might be used in something original but they are not original.* Yet it is only in relationship to these situations that any similarity between play and picture can be found. They fit the "The Ghost Ship" almost precisely; indubitably they constitute the so-called "basic plot" or "central core" of the pictured story; they fit it far more closely than does any situation portrayed in plaintiffs' sketch; and they were free to defendants' use.

Plaintiffs' sketch, likewise, uses formulae plot and subordinates. It avails of a mad sea-captain, a passenger instead of a crewman, and, as the cause, descends to jealousy—mad jealousy. Jealousy, in the Thirty-Second Situation of Polti, is labeled "Mistaken Jealousy." "The reason," says Heath, "is that jealousy in itself is not dramatic." Even "Mistaken Jealousy" has poor emotional value and "the usual solution [which plaintiffs have adopted] * * *—a murder, *suicide*, divorce, or separation—is extremely hackneyed and undramatic." (Italics added.) Plaintiffs' use of the equally hackneyed "pursuit-escape" technique and "A hurricane A vessel Seamanship" may be found clearly depicted and specifically listed in Heath's exposition of Polti's law. (Fifth Situation, chap. VIII.)

So far as I know, no copyrights or other forms of literary protection have heretofore been granted as to the literary use of madmen, sea-captains or murders, as such. I find nothing of literary novelty in the portrayal, by either plaintiffs or defendants, of dominant and secondary characters; nor in the concept that a ship's captain has supreme authority over his command on the high seas and may demonstrate a mad lust for or brutal exercise of power; nor in the proposition that a paranoiac may captain a ship or be a killer; nor in the manner in which the above elements, or any of them, have been put together by either plaintiffs or defendants.

As I view the film, if it possesses any element at all which may be said to give it character, originality or any literary protectibility, that element would seem to be a certain quality of detail in production, an imprint of the artistries of director and actor. But, insofar as plot or, as the majority denominate it, "central core," is concerned, I am satisfied that neither the story told by plaintiffs nor that pictured in the film, can be said to possess *in this decade* sufficient originality to be the subject of exclusive literary property rights and protectibility; in some aspects each is at least as old as Shakespeare[3] and, since Polti the whole substance of each has been but a published formula. And if either work does possess originality in substance, structure or form sufficient to make it protectible as literary property, then, measured by an equal standard, it surely follows that the film is so different from plaintiffs' story as to preclude plaintiffs' recovery for plagiarism. The only part of the play which may be original is that wherein it differs from the "The Ghost Ship" and the only part of the picture which may be original is likewise different from the play.

The Ghost Ship sailed but I think neither it nor its author was engaged in piracy; and I think upholding the judgment in this case supports a result which approaches closer to piracy than did any act of the defendants. Certainly the individual writer should have ample protection for his literary enterprise but zeal to protect him should not lead to strait-jacketing producers against what appears here to have been but legitimate exercise of their own freedom of enterprise in an open field.

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[1] "There are only thirty-six fundamental dramatic situations, various facets of which form the basis of all human drama." ("The Thirty-Six Dramatic Situations," by Georges Polti, 1916.)

[2] Recognition of the "law" antedates Polti; Goethe relates that "Gozzi maintained that there can be but thirty-six tragic [dramatic] situations. Schiller took great pains to find more, but he was unable to find even so many as Gozzi."

[3] See MacBeth, Hamlet, Othello, King Lear; see also the works listed by Polti under examples of the Twenty-Fourth Situation, sub-classification A(9).

For the reasons stated I would reverse both the judgment and the order denying the motion for judgment notwithstanding the verdict.

STANLEY v. COLUMBIA BROADCASTING SYSTEM, Inc., et al.

L. A. 20686.

Supreme Court of California, in Bank.
July 1, 1949.

Rehearing Granted July 28, 1949.*

1. Literary property 🔑7

The originator of a novel idea reduced to concrete form and disclosed to wrongful appropriator under circumstances indicating that compensation was expected if the idea should be used, may recover from such appropriator upon an implied contract.

2. Literary property 🔑7

The general rule that the problem of similarity between the two compositions, whether literary, musical or dramatic, is a question of fact to be determined ultimately by comparison of the two works upon the basis of the opinion of the average individual possessing a practical understanding of the subject, applied to radio programs involved in action to recover on an implied agreement of defendant to pay plaintiff for a radio program which the plaintiff claimed to have originated. Civ. Code, §§ 980, 983.

3. Literary property 🔑9

In action on implied contract of defendant to pay plaintiff for a radio program which the plaintiff claimed to have originated, finding of jury as to the similarity of the defendant's program to plaintiff's was sustained by the evidence.

4. Appeal and error 🔑1001(1)

Jury's finding that the defendant's radio program was similar to plaintiff's would not be disturbed on appeal where there was sufficient evidence to sustain it.

5. Literary property 🔑9

In action on implied contract to pay plaintiff for a radio program which plaintiff claimed to have originated, evidence sustained finding that the defendant had access to plaintiff's program idea.

6. Literary property 🔑9

In action on implied contract to pay plaintiff for a radio program which plaintiff claimed to have originated, evidence sustained finding that plaintiff's radio program was new and novel and was originated by plaintiff.

7. Literary property 🔑2

An author who takes existing materials from sources common to all writers, arranges and combines them in a new form giving them an application unknown before is entitled to a copyright notwithstanding that he may have borrowed much of his materials and ideas from others, provided they are assembled in a different manner and combined for a different purpose and his play and arrangement are a real improvement upon existing modes; since the labor of making such selection, arrangements and combinations has entailed the exercise of skill, discretion and creative effort. Civ.Code, §§ 980, 983.

8. Appeal and error 🔑842(7)

In action on implied contract to pay plaintiff for a radio program which plaintiff claimed to have originated, the question of originality of plaintiff's program was not one of law to be determined by the court but was one of fact for the jury's determination.

9. Literary property 🔑5

Where originator of radio program made his audition recording before an audience in defendant's broadcasting studio, he was not making his idea "public prop-

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* Subsequent opinion 221 P.2d 73.

erty" within the meaning of the law. Civ. Code, §§ 980, 983.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Public Property".

10. Literary property ⚷5

Prior to publication an author may make copies of his production and enjoy the benefit of limited or restricted publication without forfeiture of the right of a general publication. Civ.Code, §§ 980, 983.

11. Literary property ⚷9

In action on implied contract to pay plaintiff for a radio program which plaintiff claimed to have originated by plaintiff, verdict for plaintiff for $35,000 was sustained by the evidence.

12. Appeal and error ⚷981
New trial ⚷99

A motion for a new trial on the ground of newly discovered evidence is to a large extent addressed to the discretion of the trial judge and an appellate court will not disturb his ruling unless a gross or unmistakable abuse of discretion appears.

13. New trial ⚷99

In action on implied contract to pay plaintiff for a radio program which plaintiff claimed to have originated denial of the defendant's motion for a new trial on ground of newly discovered evidence was not an abuse of discretion.

TRAYNOR and EDMONDS, JJ., dissenting.

Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Action by Jack Stanley against Columbia Broadcasting System, Inc., and others to recover on an implied agreement of defendant to pay plaintiff for a radio program which plaintiff claimed to have originated. From a judgment for plaintiff for $35,000, the named defendant appeals.

Judgment affirmed.

Prior opinion, 192 P.2d 495.

O'Melveny & Myers, Homer I. Mitchell, W. B. Carman, Jr., and Deane F. Johnson, Los Angeles, for appellant.

Harold A. Fendler, Beverly Hills, and John W. Preston, Los Angeles, for respondent.

CARTER, Justice.

Defendant Columbia Broadcasting System, Incorporated, has appealed from a judgment entered on a verdict for $35,000 given by a jury in favor of the plaintiff. The action was brought to recover on an alleged implied agreement of defendant to pay plaintiff for a radio program which plaintiff claims to have originated.

In his complaint, plaintiff alleged that during the year 1941 he originated and caused to be prepared, composed and written an original script for a radio program entitled Walter Wanger Presents" and a radio program format entitled "Preview Parade" or "Hollywood Preview" and that about September 1st of that year he had this script recorded for the purpose of submitting it to prospective sponsors, advertising agencies and broadcasting companies. He alleged that he, at all times, retained full ownership of the radio program and that he at no time licensed or authorized the use of it in any manner. Plaintiff further alleged that during the years 1942, 1943 and 1944 he submitted to the defendant, Columbia Broadcasting System, Incorporated, the radio program, script, format and records for the purpose of having the defendant determine whether or not it desired to purchase it or license the right to use it under an implied agreement that if the defendant did use the radio program it would pay plaintiff its reasonable value. But that on or about the first of May, 1945, the defendant produced and presented a radio program entitled "Hollywood Preview" which substantially copied and embodied plaintiff's radio program and, as a result, became indebted to the plaintiff for the use thereof.

On this appeal, defendant contends that the court should have found, as a matter of law, that there was no similarity between the two programs; that the evidence was insufficient to show that defendant had access to plaintiff's program idea; that there can be no implied agreement to pay for an abstract idea which is not new or novel; that the jury arbitrarily ignored the uncontradicted, unimpeached testimony of defendant's witness, Hudson; that when an idea is made public there can be no liability for its use; that its motion for a new trial on the grounds that (1) the jury's verdict for damages was so excessive that it appeared to have been given under the influence of prejudice and passion, (2) newly discovered evidence, and (3) that the evidence was insufficient to support the verdict should have been granted.

[1] As a general observation from the cases, it may be stated that the right of the originator of an idea to recover from one who uses or infringes it seems to depend upon whether or not the idea was novel and reduced to concrete form prior to its appropriation by the defendant, and, where the idea was disclosed by the originator to the appropriator, whether such disclosure took place under circumstances indicating that compensation was expected if the idea was used.

Where these prerequisites exist, recovery may be had upon a theory of contract implied in fact or in law. Plus Promotions v. R.C.A. Mfg. Co., D.C.N.Y., 49 F.Supp. 116; Alberts v. Remington Rand, 175 Misc. 486, 23 N.Y.S.2d 892; Healey v. R. H. Macy & Co., 251 App.Div. 440, 297 N.Y.S. 165, affirmed 277 N.Y. 681, 14 N.E.2d 388.

Plaintiff's complete program is as follows:

"Announcer: 'Ladies and gentlemen, Walter Wanger Presents Hollywood Preview! Hollywood Preview! Hollywood Preview!

" 'And here is Hollywood's distinguished producer, Walter Wanger.'

"Wanger: 'How do you do, ladies and gentlemen. Welcome to our Hollywood Preview Parade, a radio show designed for your pleasure and to give you a voice in what pictures Hollywood shall produce in the months to come. Hollywood is very interested in giving you motion pictures you want to see. Unfortunately producers do not and cannot always know just what you do want. This is the reason for this "Preview Parade." Each week we plan to present a radio story we think will make a good film. We ask you to send us your opinion and suggest players for the leading roles. Our sponsor will give worthwhile cash prizes for the best letters, but more about that later.

" 'Now allow me to introduce Mr. True Boardman.'

"Boardman: 'This is the sixth program of the new series, "Walter Wanger Presents." Your host is one of Hollywood's most progressive film leaders, the President of the Academy of Motion Picture Arts and Sciences, and producer of such outstanding films as Foreign Correspondent, Blockade, Long Voyage Home, Stagecoach, Algiers, and currently Sundown.

" 'Each week Mr. Wanger selects a story which he feels should be made into a picture. You are asked to write to Mr. Wanger and give him your opinion. The sponsors pay $500 for the best letter written by one of our listeners and if enough of you vote for it our play will be produced as a motion picture.

" 'And now, once again, Walter Wanger.'

"Wanger: 'Thank you, Mr. Boardman. Tonight our play is entitled "So Gallantly Gleaming." It has been written by Harvey Thew, Peter Ordway, and Sonya Levien. The radio adaptation is by Hector Chevigny.

" ' "So Gallantly Gleaming" tells a thrilling and romantic story of a great explorer, his beautiful wife, and the acquisition of California. Listen closely. Do you think it should be made into a motion picture? Your votes will decide.

" 'Our guests who will later give their opinion are Miss Joan Bennett, Hector Chevigny and Henry Hathaway. Music is by Robert Armbruster.' "

(Drama)

"Boardman: 'Thank you, ladies and gentlemen. Did you like "So Gallantly Gleaming?" Would you like to see it as a motion picture? The story of John Charles Fremont, I think, is one that deserves retelling. In a moment we will hear the opinion of our three Hollywood guests, Joan Bennett, Hector Chevigny, and Henry Hathaway, and then have an opportunity to compare their opinions with yours.

" 'Now again a word as to the real idea behind this program. Each week Walter Wanger Presents brings you a story which we think would be a good motion picture. And here is your part in the program. We ask you to write to Mr. Wanger, telling him whether or not you would like to have this play made into a motion picture, and why. Also include your choice of stars to play the leading roles. The best letter received each week will receive an award of $500 from our sponsor. The award is based not on the style of your letter, not on brilliant writing, but entirely on the reasons you set down as your opinion. And believe me, Hollywood is waiting for your vote. Whether or not you win a prize, your vote will help decide whether or not to film "So Gallantly Gleaming." The American picture-going public has long said it wished a voice in the choice of stories presented on the screen. Here is the chance for you to have that voice and make it heard across the nation. Write your letter now tonight. Address Walter Wanger, Hollywood, California.

"'Last week Mr. Wanger presented "Out of the Night", the sensational novel which has attracted such nationwide comment. A storm of argument was aroused. Sixty-eight thousand letters have been received to date, and we are happy to announce that Warner Brothers Studio have arranged to make this startling story into a film in the near future. So, thanks to your letters, you have helped Warner Brothers to their decision to film "Out of the Night."

"'Last week's best letter was from Mrs. William Wentworth of Brockton, Massachusetts. Congratulations, Mrs. Wentworth! Your check for $500 goes forward immediately.

"'Now, Mr. Wanger, I think we are all anxious to hear the opinions of your guests about tonight's show.'

(Interview with Board of Experts)

"Wanger: 'Thank you. Thank you very much. Thank you, Joan Bennett, Henry Hathaway, Hector Chevigny. Do you ladies and gentlemen, agree with the opinions of our guests? Do you agree that "So Gallantly Gleaming" should become a motion picture? And who do you think should play the leading roles? Won't you write and tell us. Remember that whether your letter is best and wins the prize or not, you are helping Hollywood decide on what to give you on the screen. Next week we will have something totally different for you, a story called "Two Arabian Knights." Until then, this is Walter Wanger saying, Good night.'

"Announcer: 'Walter Wanger Presents is brought to you at this same time each week by our sponsor. Original music for tonight's show was written and directed, as always, by Robert Armbruster. The cast included Hollywood's outstanding radio stars—Lurene Tuttle, Lou Crosby, Norman Field, Elliott Lewis, Lou Merrill, Frederick Shields, Paul Whitley, Norene Gamille, Gayne Whitman.

"'This is John Hiestand hanging out the "Goodnight" sign until we meet again next week at this same time. This is the National Broadcasting Company.'"

The following is a portion of the broadcast preceding and following the drama as actually put on the air by defendant:

"Announcer: 'Its The Flying Red Horse * * * the sign that identifies the *Mobilgas* and *Mobiloil* dealers who bring you * * * "Hollywood Preview" * * * with Mr. Otto Kruger!'

"Announcer: 'Tonight, on behalf of your Mobilgas and Mobiloil dealer * * Mr. Otto Kruger, eminent star of radio, stage and screen brings you another Hollywood Preview of a motion picture of the future! Tonight's story * * * "Growing Pains" * * * a comedy by Aurania Rouveral now scheduled for production by RKO Pictures.

"'And as our star * * * Miss Marcy Maguire!

"'Now * * * ladies and gentlemen * * * Otto Kruger!'

"Kruger: 'Thank you. Good evening, everyone. Well, its another Preview Night here in Hollywood, and Mobilgas invites you to share in the excitement. For just as the first showing of a new motion picture in the film capitol means bright lights and eager crowds, so does the same spirit of enthusiasm prevail on our radio version of Hollywood Preview. So, tonight it's "Growing Pains" * * * famous as a play * * * and now being prepared for filming at RKO. And as our star

* * * well, because "Growing Pains" is a story about irresistible youth, we wanted Hollywood's most enthusiastic, effervescent young lady in the leading role of Terry. And we found exactly that in the person of red-headed * * * Marcy Maguire.'

"Announcer: 'And now, "Growing Pains" * * *'

"Announcer: 'So ends tonight's Hollywood Preview Story.'"

(Interview with star follows.)

"Announcer: 'Now, as our theatre audience fills out cards giving their comments and indicating their favorites for the picture version of "Growing Pains", a special word of greeting to some new listeners.'" (Advertising for sponsor follows; announcements as to producer, director and music.)

[2] The problem of similarity between two compositions, whether literary, musical or dramatic, is a question of fact to be determined ultimately by a comparison of the two works upon the basis of the opinion of the average individual possessing a practical understanding of the subject. Although the majority of the decided cases involved a questioned infringement of a copyrighted work, it would seem that the test of whether or not an infringement existed would be the same as the question here involved—the determination of whether or not such similarity exists between plaintiff's and defendant's programs as to suggest to the average person the use by defendant of an idea originating with plaintiff upon proof of the other elements necessary to enable the plaintiff to recover. The analogy between the two is drawn by the court in De Acosta v. Brown, 2 Cir., 146 F.2d 408.

The parties have conceded that the applicable sections of the Civil Code, 980[1] and 983[2] as they read at the time plaintiff's cause of action arose, are but codifications of the common law. The common law right in literary property and the right existing under the copyright law are contrasted as follows: "The term 'copyright' is sometimes used to designate the property in intellectual productions conferred by the common law as well as that conferred by statute, the full phrase 'common-law copyright' being sometimes used. The justification for this use of the term at the present day is found only in the fact that the common law confers on the owner of an intellectual production the exclusive right to make first publication of it, that is, the right to copy it in the first instance. * * Whether the common law ever conferred a copyright in the sense of an exclusive right of continued publication and sale has been a matter of doubt and dispute, * * but however this may be, the range of rights and liabilities existing at common law with respect to intellectual productions is essentially and greatly different from those existing under the copyright statutes. [Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 28 S.Ct. 722, 52 L.Ed. 1086.] Speaking generally, common-law rights are limited to unpublished works, and all common-law property rights therein are lost on publication * * * while statutory copyrights relate mainly to published works, * * *. Again, *common-law rights in unpublished works are of a wider and more exclusive nature* than the rights conferred by statutory copyright in published works. The common law prohibits any kind of unauthorized interference with, or use of, an unpublished work on the ground of an exclusive property right, and the common-law right is perpetual, existing until lost or terminated by the voluntary act of the owner, * * * while a statutory copyright permits a 'fair use' of the copyright publication, without deeming it an infringement * * *." [Emphasis added.] 18 C.J.S., Copyright and Literary Property, § 2, page 138, et seq.; and cases there cited.

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[1] "Section 980. The author of any product of the mind, whether it is an invention, or a composition in letters or art, or a design, with or without delineation, or other graphical representation, has an exclusive ownership therein, and in the representation or expression thereof, which continues so long as the product and the representations or expressions thereof made by him remain in his possession."

[2] "Section 983. If the owner of a product of the mind intentionally makes it public, a copy or reproduction may be made public by any person, without responsibility to the owner, so far as the law of this state is concerned."

The test, with respect to infringement, which is laid down by the cases is that impression received by the average reasonable man upon a comparative reading of the two works "not by a dissection of sentences and incidents, suitable for the study of a digest or text-book, but inherently unnatural for any man who has the kind of brains that make him able to adapt a work of fiction." Frankel v. Irwin, D.C., 34 F.2d 142, 144. White-Smith Music Co. v. Apollo Co., 209 U.S. 1, 17, 28 S.Ct. 319, 52 L.Ed. 655, 14 Ann.Cas. 628; 13 C.J. § 276, note 30, page 1113; 18 C.J.S., Copyright and Literary Property, § 94, note 64; Harold Lloyd Corporation v. Witwer, 9 Cir., 65 F.2d 1, 18; Hewitt v. Coward, 180 Misc. 1065, 41 N.Y.S.2d 498; Dymow v. Bolton, 2 Cir., 11 F.2d 690; Twentieth Century-Fox Film Corp. v. Dieckhaus, 8 Cir., 153 F.2d 893; 15 Cornell L.Q. 633, 639.

In determining whether the similarity which exists between a copyrighted literary, dramatic or musical work and an alleged infringing publication is due to copying, the common knowledge of the average reader, observer, spectator or listener is the standard of judgment which must be used. Echevarria v. Warner Bros. Pictures, D.C., 12 F.Supp. 632; Sieff v. Continental Auto Supply, D.C., 39 F.Supp. 683; Barbadillo v. Goldwyn, D.C., 42 F.2d 881, 885.

[3] With respect to the comparison between the two programs and without unnecessarily "dissecting" them, there appears to be sufficient similarity to justify the finding of the jury as the "average, reasonable man." There are, it is true, certain dissimilarities which appear: The lack of the so-called Board of Experts on defendant's program; the fact that the studio audience only was requested to respond; and the rather less emphasis which is placed on the reaction of the public to the play it has heard. The element of prizes offered for the best letter was incorporated into defendant's program after it had made its first few appearances on the air and was continued for a period of six weeks. Each case must be determined on its own facts. Frankel v. Irwin, supra. "It is of course essential to any protection of literary property, whether at common-law or under the statute, that the right cannot be limited literally to the text, else a plagiarist would escape by immaterial variations. That has never been the law, but, as soon as literal appropriation ceases to be the test, the whole matter is necessarily at large, so that, as was recently well said by a distinguished judge, the decisions cannot help much in a new case. Fendler v. Morosco, 253 N.Y. 281, 292, 171 N.E. 56." Nichols v. Universal Pictures Corporation, 2 Cir., 45 F.2d 119, 121. "Evidence of these differences is relevant upon the question of infringement, but if such differences are shown to exist, the question remains for the trier of fact to decide the issue." Universal Pictures Co. v. Harold Lloyd Corporation, 9 Cir., 162 F.2d 354, 361. Pellegrini v. Allegrini, D.C., 2 F.2d 610. "Slight difference and variations will not serve as a defense." Universal Pictures Co. v. Harold Lloyd Corporation, supra, 162 F.2d 361. Fleischer Studios, Inc. v. Ralph A. Freundlich, Inc., 2 Cir., 73 F.2d 276, 278; Nutt v. National Institute Incorporated for the Improvement of Memory, 2 Cir., 31 F.2d 236, 238.

[4] We then have a question of fact—that of the similarity between the two programs. This question of fact was decided adversely to defendant by the jury whose duty it was to make the determination. The rule is settled that this determination will not be interfered with upon appeal where there is evidence to sustain it. The evidence, in the form of the two programs alone, shows that there is substantial similarity to support the verdict.

[5] The next contention made by the defendant is that the defendant had no access to plaintiff's program idea. There is evidence in the record to show that plaintiff submitted his program to several officials and employees of the broadcasting company at different times during the years 1942, 1943 and 1944. Implicit in this submission was the belief that if the program were used he would be compensated therefor. It was admitted by defendant's wit-

ness Hudson at the trial that it was the custom in the radio industry to pay for such ideas when and if they were used.

[6, 7] It is conceded by the defendant in its brief that plaintiff's idea had been reduced to the concrete form of a script format and recording. The next question to be discussed is whether or not plaintiff's idea as such was so new and novel as to be worthy of protection. It may be conceded at the outset that there is nothing new in a play broadcast over the air; it may also be conceded that there is nothing new in the use of the words "Hollywood Preview" in connection with the first showing to the public of a *motion picture;* it may also be noted that audience participation, as such, is not new to radio. But when all of these elements are joined to make one idea for a radio program, it is the *combination* which is new and novel. An author who takes existing materials from sources common to all writers, arranges and combines them in a new form, giving them an application unknown before, is entitled to a copyright, notwithstanding the fact that he may have borrowed much of his materials and ideas from others, provided they are assembled in a different manner and combined for a different purpose, and his plan and arrangement are a real improvement upon existing modes; for the labor of making these selections, arrangements and combinations has entailed the exercise of skill, discretion and creative effort. Edwards & Deutsch Lithographing Co. v. Boorman, 7 Cir., 15 F.2d 35. "If the author has accomplished a unique and useful result through the application of intellectual labor and literary or artistic skill, his work is entitled to a copyright which will protect the plan, arrangement and combination of the materials therein, even though all the materials of such work, or some parts of its plan, or the arrangement and modes of illustrating the subject matter thereof, may be found separately, or in a different form or setting, or in a different combination in other distinct works." Ball, The Law of Copyright and Literary Property, p. 247. Barsha v. Metro-Goldwyn Mayer, 32 Cal.App.2d 556, 90 P.2d 371. It has been previously pointed out that an author's right in the fruits of his intellectual labor at common law is even broader than that which he has under the law of copyright.

It was admitted by Hudson, defendant's principal witness, that prior to the time the program in question was placed on the air that there was no program in which the listening audience in the studio or the listening audience on the radio were asked to give their opinions as to the suitability of the material broadcast by radio for motion picture products. He further admitted that it was a new idea for the listening audience, whether studio, or the entire listening public, to comment on the prospective stars to appear in the proposed productions. The defendant, however, maintains that its studio audience participation was merely atmosphere and was not intended to give the public any real participation in the choice of future pictures. If this was the true intention of defendant, the following excerpt from the testimony of Hudson shows that the studio audience was not so advised nor led to believe:

"Q. When you first put the program on the air starting on May first your studio audience was asked to submit comment first as to whether they thought the material suitable for pictures, and second, the persons they would like to see in the leading roles, isn't that right? A. That is right."

[8] Thus the evidence shows that defendant's principal witness, a man who had been in the radio business for some years, believed that a plan such as plaintiff's was new in the sense that the particular combination of ideas had not before been used in radio. It is also evident that it was the custom in the radio industry to pay for such ideas. Furthermore, the question of originality of plaintiff's program is not one of law to be determined by the court but is one of *fact* for the jury's determination. Yadkoe v. Fields, 66 Cal.App.2d 150, 159, 151 P.2d 906; Dezendorf v. Twentieth Century-Fox Film Corp., 9 Cir., 99 F.2d 850, 851; New York Belting & Packing Co. v. New Jersey Car-Spring & Rubber Co., 137 U.S. 445, 450, 11 S.Ct. 193, 34 L.Ed. 741.

The next contention made by defendant is that the jury arbitrarily ignored the uncontradicted, unimpeached testimony of defendant's witness, Hudson. The record shows that this witness' testimony was contradicted and impeached at different times throughout the trial. His testimony with respect to the so-called program evolved by him in 1940 (before defendant had access to plaintiff's work) which it is contended is the one broadcast by the defendant company, is worthy of mention. He testified that the idea back of his program was to promote the sale of stories by authors who could not get a hearing from important motion picture executives. He admitted that he had not considered having any audience participation feature, and, of course, no prize offered for the best letters, nor had he considered the title "Hollywood Preview." It would seem that the audience participation feature, whether the studio audience or the entire listening public, was one of the more salient parts of plaintiff's program. The members of the listening, movie-going public, may well have been sufficiently intrigued with the thought that they were having a voice in the selection of "moving pictures of the future" so as to increase the popularity rating of the program. There was a great deal of testimony at the trial concerning the "Hooper" system of ratings. This is a system used to ascertain the number of listeners tuned in to a particular program. It was also shown at the trial that the percentage of listeners increased with respect to this particular program after the "prize for the best letter" feature was added. Using the same test here as to the similarity between the program actually broadcast and Hudson's program, it would seem that defendant's contention is without merit. It would not be apparent to the "reasonable man" upon a comparison of the two that there was such similarity to raise the inference that defendant's program was that originated by Hudson in 1940.

[9, 10] Defendant's contention that there can be no liability to pay for an idea which has been made public is without merit when the facts of this case are considered. When plaintiff made his audition recording before an audience in the National Broadcasting Company's studio he was not making his idea "public property" within the meaning of the law. Prior to publication an author may make copies of his production and enjoy the benefit of limited or restricted publication without forfeiture of the right of a general publication. The communication of the contents of a work under restriction, known as a "restricted or limited" publication, is illustrated by performances of a dramatic or musical composition before a select audience, private circulation of the manuscript, etc. Ball, Literary Property and Copyright, 473; Werckmeister v. American Lithographic Co., 2 Cir., 134 F. 321, 324; Palmer v. De Witt, 47 N.Y. 532, 543, 7 Am. Rep. 480; American Tobacco Co. v. Werckmeister, 207 U.S. 284, 28 S.Ct. 72, 52 L.Ed. 208, 12 Ann.Cas. 595; Nutt v. National Institute Incorporated for the Improvement of Memory, supra; Ferris v. Frohman, 223 U.S. 424, 32 S.Ct. 263, 56 L. Ed. 492; Uproar Co. v. National Broadcasting Co., D.C., 8 F.Supp. 358, affirmed 1 Cir., 81 F.2d 373.

[11] With respect to defendant's motion for a new trial which was denied by the trial court, various contentions are made by defendant as to why it should have been granted. First, it is said that the jury's verdict was so excessive that it must have been given under the influence of passion or prejudice. There is evidence in the record to show that plaintiff spent several years in the preparation of his idea for a radio program; that he had a recording made of it when the audition was held which entailed the employment of various screen and radio actors, technicians and the like. There is evidence to show that plaintiff's idea was of no value whatsoever to him after its use by the defendant. As was said in Yadkoe v. Fields, 66 Cal.App.2d 150, 161, 151 P.2d 906, 912: "Moreover, the implied finding that the nature of the material here involved is such that no value attaches thereto aside from the use thereof, and that once such material is used the value therein is gone, is fully justified by the evidence. * * * Under the circumstances here presented, appellant's contention as to lack of evidence of the value of the use of the material is without merit." The above quoted case involved the affirmation by the

District Court of Appeal of a jury verdict of $8,000 damages given for the use of isolated "gags". In the present case, both plaintiff and his expert witness testified as to the estimated worth of the program idea, and as to the custom in the industry to pay the author a certain percentage of the production costs based on the number of weeks a show was on the air. "The fact that personal property which is injured or destroyed by the wrongful or negligent act of another, has no market value, does not restrict the recovery to nominal damages only; its value or the plaintiff's damages must be ascertained in some other rational way and from such elements as are attainable. In such case the proper measure of damages is generally its actual value or its value to the owner. The value of an article may be shown by proof of such elements or facts as may exist—such as its cost, the cost of reproducing or replacing it, its utility and use * * *." Universal Pictures Co. v. Harold Lloyd Corporation, 9 Cir., 162 F. 2d 354, 370, quoting from 15 Am.Jur. 554, 555. It would appear that the evidence was sufficient to support the finding of the jury as to the amount of damages, and that the verdict was not given under the influence of passion and prejudice.

[12, 13] The newly discovered evidence claimed by defendant is shown by the affidavit of one James Allen who states that in 1935 he conceived the idea of a radio program on which would appear stories presented in dramatic form to the public as a "showcase" of possible literary material for the legitimate stage. This idea was registered with "Billboard", a theatrical publication in New York City in 1935. In 1939, this idea was registered with the Screen Writers' Guild under the possible title, "Play Preview." It contained no element of audience participation or offer of prizes. The idea back of his program was to present the stories to "the attention of stage and screen producers" and not to the public generally. Allen's 1939 prospectus did not set forth any of the details of his idea. Plaintiff was working for Allen as musical director at that time, and he states that he made several suggestions with respect to the program. This is denied by Allen in his affidavit. There are affidavits in the record to the effect that plaintiff had discussed his program idea in 1938 with the affiants. These affidavits present the same conflict as the evidence adduced at the trial. They were before the court upon the motion for a new trial. A motion for a new trial on this ground is to a large extent addressed to the discretion of the trial judge, and an appellate court will not disturb his ruling unless it is manifest that a gross or unmistakable abuse of discretion appears. Kirschbaum v. McCarthy, 5 Cal.2d 191, 54 P.2d 8; Cooper v. Kellogg, 2 Cal.2d 504, 42 P.2d 59; Buckhantz v. R. G. Hamilton Co., 71 Cal.App.2d 777, 163 P.2d 756; Montaldo v. Hires Bottling Co., 59 Cal.App.2d 642, 139 P.2d 666. It cannot be said that there was such an abuse of discretion in the present case.

The judgment is affirmed.

GIBSON, C. J., and SHENK and SPENCE, JJ., concur.

SCHAUER, Justice.

I concur in the judgment.

The problem in this case is to me a closer one and more difficult of solution than that presented in Golding v. R.K.O. Pictures Inc., CalSup., 208 P.2d 1. In Golding there is no substantial similarity between the two works except possibly in the so-called "central core," which, in this decade, as I have shown (208 P.2d 8), is no more novel or original than (on a claim of like date) the Star Spangled Banner. But here there is cognizable similarity or deducible relationship between every substantial element of the program which defendant produced and that which was proposed by plaintiff. Likewise, the evidence shows ample opportunity for piracy. The sole controlling question then is one of fitness for literary protectibility.

The problem here is more difficult than in Golding because here we are in a newer field; all of its vistas have been by no means explored. The merchandise offered for sale in this case—and assertedly pirated—is of a quite different character from that involved in Golding. The craft of story-plotting, together with the art of story-telling, has come down through the centuries, and legislatures and courts long have experimented with affording a measure of monopolistic or property-right protectibility to literary compositions of conventional nature even though all plotted stories, it is said, must be but an application of one or more of "The Thirty-Six Dramatic Situations." (Georges Polti.) Although original plots (dramatic situations) were exhausted centuries ago, original and novel ideas for handling old plots seem inexhaustible, and as long as sufficient originality in treatment or handling of the old plot appears the law endeavors to afford property protection.

In Golding, where the details and whole treatment of plaintiffs' play and defendants' picture are essentially different, and where the only possibly cognizable similarity is in the so-called "central core" or "basic plot," we can turn to a plot catalog and it becomes immediately obvious that no property right of plaintiffs has been appropriated in The Ghost Ship. But here, as above indicated, the problem and its solution are not so simple; the answer cannot as yet, I think, be found in a catalog.

The plaintiff here did not write a story or a play. He does not claim originality in the handling of any dramatic plot. He does claim to have originated a plan for a radio program. Such a plan, if truly original, may constitute a protectible "product of the mind" (see Civil Code, § 980). The plan formulated by plaintiff has been set forth fully in the majority opinion and is largely again quoted in the dissenting opinion of Justice Traynor; it need not be repeated here. Suffice it to say that such plan proposed this version of the "theatre of the air" type of weekly program: Recognized plays—at least plays which had already been produced or scheduled for production in motion picture form—would not be used; instead, sketches or scenarios which the author was offering for motion picture use would be adapted for radio presentation; the special announcer or "producer" for the radio presentation would be a prominent picture figure; he would ask the radio audience to send in their opinions of the show with particular reference as to whether they would like a motion picture version and their ideas for casting the parts; a cash prize would be awarded each week to the author of the "best letter"; the program would be denominated "———— [the producer] Presents" and, generically, it was referred to as a "Hollywood Preview" or "Preview Parade." Plaintiff does not claim to have himself authored any play offered for use on the proposed program.

Several years after the plaintiff's plan was submitted to defendant it (in 1945) produced a program entitled "Hollywood Preview." Like plaintiff's plan it embodied a theatre-of-the-air type presentation "of a motion picture of the future" with announcements pertaining to the production by an "eminent star of radio, stage and screen"; the studio audiences were requested to "fill out cards giving their comments" on the proposed picture production and "suggesting their favorite stars for the motion picture." Likewise, the defendant in connection with the program it produced, announced a six-weeks prize-contest for best letters relating to the program in which letters, it was suggested, the listeners should "express their opinion of the stories 'previewed'" and "vote for the stories they would like to see on the screen."

The strong similarity between plaintiff's program-plan in all its essential features and that used by defendant is patent; the evidence establishes (under rules which historically have governed appellate courts) that plaintiff submitted his plan to defendant and that there was opportunity to appropriate it. The only serious question for us then, as I view it, is this: Is the plan presented by plaintiff such an original product of the mind as to be legally the subject of private ownership? If it is, the verdict must stand; if not, the defendant is entitled to judgment.

A fair answer to such critical question requires this further factual analysis. No single basic element of plaintiff's program can be said to be novel or to have originated with him; all such elements had been used before. Plaintiff, however, did suggest what appears to have been a novel adaptation and application of the audience participation idea—its adaptation and application, theoretically, to aid producers in the selection of stories for picture production. The real object of the audience participation technique is, of course, an appeal to the interest of the listeners. This program, it would seem, was devised to appeal particularly to "movie fans," to win their radio program attention through catering to their motion picture interest. Upon the record it cannot be held that this particular application of the audience participation appeal, as it was dressed up and treated by plaintiff, was not originated by him nor that its admittedly somewhat varied and limited use in the program produced by defendant was so unsubstantial as to be legally negligible.

With that view of the record I cannot but agree with Justice Carter that "An author who takes existing materials from sources common to all writers, arranges and combines them in a new form, giving them an application unknown before, is entitled to a copyright, notwithstanding the fact that he may have borrowed much of his materials and ideas from others, provided they are assembled in a different manner and combined for a different purpose, and his plan and arrangement are a real improvement upon existing modes; for the labor of making these selections, arrangements and combinations has entailed the exercise of skill, discretion and creative effort."

TRAYNOR, Justice.

I dissent. In my opinion the evidence does not support the implied finding of the jury that defendant appropriated a program idea originated by plaintiff.

Plaintiff bases his action on the premise that defendant used a radio program that he originated, under an implied agreement to reimburse him for the reasonable value thereof.

The question whether plaintiff has a protectible property interest in his program turns upon whether the program is marked by an originality directly attributable to plaintiff's ingenuity. He cannot claim ownership in ideas, combinations of ideas, or materials incorporated into his program that are in the public domain and not the result of his own creative endeavor. Dorsey v. Old Surety Life Ins. Co., 10 Cir., 98 F.2d 872, 873, 119 A.L.R. 1250; Sheldon v. Metro-Goldwyn Pictures Corporation, 2 Cir., 81 F.2d 49, 53-54; Harold Lloyd Corporation v. Witwer, 9 Cir., 65 F.2d 1, 24; Gerlach-Barklow Co. v. Morris & Bendien, 2 Cir., 23 F.2d 159, 161; Dymow v. Bolton, 2 Cir., 11 F.2d 690, 691; Fred Fisher, Inc. v. Dillingham, D. C., 298 F. 145, 149; American Code Co. v. Bensinger, 2 Cir., 282 F. 829, 834. See also 18 C.J.S., Copyright and Literary Property, § 25, page 166; Press Pub. Co. v. Monroe, 2 Cir., 73 F. 196, 51 L.R.A. 353, 363; Amdur, Copyright Law and Practice, 67, 69.

Plaintiff testified that the basic idea of his program, for the use of which he claimed a reimbursement of $100,000, was to give the people of America "a voice in what pictures Hollywood shall produce in the years to come." His idea took the form of a proposed weekly radio program entitled "Walter Wanger Presents," "Preview Parade," or "Hollywood Preview," which was to present a play not yet made into a motion picture or scheduled for production. The listening public was to be encouraged to write letters, by an offer of prizes for best letters, commenting upon the motion picture value of the plays and suggesting stars for the leading roles. Thus would the public have a voice in selecting stories and stars for motion pictures.

The evidence is without conflict that virtually none of the elements of the proposed program to give the public a voice in this selection is original. There is nothing original in the idea of linking dramatized stories on the radio with the glamour of Hollywood. The following programs, broadcast nationally, were also based upon this idea: "Lux Theater of the Air," "Hollywood Star Time," "Screen Guild Theater," "Hollywood Premiere," "Hollywood Playtime," "Hollywood Players," "This is Hollywood."

There is nothing original about plaintiff's title "Hollywood Preview." There was uncontradicted testimony that during the period defendant's program was broadcast, another program with the same title was broadcast locally over other stations. Moreover, these words have long been associated with the previews of Hollywood motion pictures, notably at Grauman's Chinese Theater and at the Carthay Circle Theater. To the millions of movie-conscious persons at whom all these programs are aimed, the title has become generic and descriptive, symbolizing the glamour associated with Hollywood, the bright lights, the milling throngs waiting for a glimpse of the celebrities attending a first showing of a motion picture. "There can be no property in words which are merely generic or descriptive." Johnston v. Twentieth Century-Fox Film Corporation, 82 Cal.App.2d 796, 808, 187 P.2d 474, 482. That this title is generic in that sense is clearly indicated by plaintiff's use of it in the script of his proposed program, not as its title (the proposed title was "Walter Wanger Presents"), but as a descriptive term, indicating the first performance of a proposed motion picture. In giving their program this title, defendants appropriated nothing in which plaintiff could claim a property interest.

There is nothing original in the idea of listener participation in a radio program. There have long been swarms of radio programs in which listeners have been importuned to participate. Thus listeners on the Jack Benny program were importuned to submit letters on the topic "I hate Jack Benny because—." Listeners on the program entitled "The Shadow" were importuned to relate in a hundred words or less why they use Camay Soap. Listeners on the program entitled "Listeners' Digest" were importuned to write on what they considered the outstanding radio entertainment they had heard in the preceding week.

There is nothing original in the idea of giving prizes to radio listeners for best letters. The idea of giving prizes for best letters is one of the oldest in the history of American advertising.

There is nothing original in the idea of soliciting the comments of listeners as to whether a radio program merits commercial presentation. The Major Bowes program solicited the comment of listeners on the amateurs on the program with the object of determining whether they should receive professional engagements.

The evidence is also without conflict that there is nothing original about the following elements or combination thereof in plaintiff's program: repetition and emphasis of the title throughout the broadcast, introduction of the master of ceremonies by the announcer, a master of ceremonies prominent in the motion picture industry, announcement of the title of the play to be presented and the stars therein, and announcement of the author of the play. These elements have for years been a part of almost every program featuring radio stories with a Hollywood connection. Defendant, as well as plaintiff, may use these elements freely either singly or in combination. See, Cain v. Universal Pictures Co., D.C., 47 F.Supp. 1013, 1017.

It may be possible to combine such hackneyed elements so imaginatively that they comprise an original program idea, or to give them a new twist that places them in the category of fresh material. A new twist to a worn idea may be as much entitled to credit as an entirely new idea. "No man writes exclusively from his own thoughts, unaided and uninstructed by the thoughts of others. The thoughts of every man are, more or less, a combination of what other men have thought and expressed * * *." Emerson v. Davies, 8 Fed.Cas.No.4,436, pages 615, 618, 619. "Presenting old material in a new plan or arrangement is sufficient to lend copyrightability to the resulting work." Amdur, Copyright Law and Practice, 86; Universal Pictures Co. v. Harold Lloyd Corporation, 9 Cir., 162 F.2d 354, 363; Edwards & Deutsch Lithographing Co. v. Boorman, 7 Cir., 15 F.2d 35, 36. Two architects may originate similar designs for the same structure, specifying the use of identical materials; each has a property interest in his design. Similarly two writers may create two original stories out of the same problem; "Thais" is the creation of Anatole France, and "Miss Thompson"

("Rain") of Somerset Maugham. And in the literature of music there are many creative variations by one great composer on the themes of another.

Plaintiff has made no unique combination or interpretation of old material. Whatever originality there may be in his program lies in a fresh variation of the listener participation idea, a variation of the idea in the Major Bowes program of having the listeners participate in determining whether amateur artists should become professionals. Although the evidence is without conflict that previous to the presentation of plaintiff's program to defendant there was no radio program in which the listeners participated in determining the selection of stories and stars for motion pictures, there is a question whether plaintiff has conceived such a variation of the listener participation idea that will support a claim to originality. Originality of ideas in radio programs must be assessed in the light of the fact that many programs are commonplace presentations of commonplace materials. Inevitably many ideas in this field may have a claim to originality by virtue of their attention-getting possibilities, even though they lack the brilliance commonly associated with creative thought. A fresh application of the familiar, however dull or commonplace it may appear to the critical, may be a marketable idea if it gives enough promise of winning the attention of the public. It is not for the court to consider the quality of an idea or to pass judgment on the public's taste; the problem before it is not one of aesthetics but of property rights. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251–252, 23 S.Ct. 298, 47 L.Ed. 460. On the other hand, in the fertile field of commonplaceness there is also a propagation of ideas whose claims to originality are spurious, for whatever value they may have rests not on their uniqueness but on their resemblance to the familiar. The value of a fresh application of an idea that has thrived on repetition may lie, not in the application, but in the familiar idea itself. The secret of success of such programs as plaintiff's seems to be listener participation, and since listener participation has already been used for such a variety of purposes, it is open to question whether its application to plaintiff's purpose is imaginative enough to compel one to say that something new has been added, that there has been a variation of the old that in some measure transforms it. See, Hirsch v. Paramount Pictures, D.C., 17 F. Supp. 816, 818.

Whatever the validity of plaintiff's claim to originality for his application of the listener participation idea, it constitutes his only claim to originality, and defendant is not liable if it did not copy that application.

There can be no finding of copying without proof that defendant had access to plaintiff's program. Twentieth Century-Fox Film Corp. v. Dieckhaus, 8 Cir., 153 F.2d 893, 894, certiorari denied, Dieckhaus v. Twentieth Century-Fox Film Corp., 329 U.S. 716, 67 S.Ct. 46, 91 L.Ed. 621; Lewys v. O'Neill, D.C., 49 F.2d 603, 608, 610. Access is established by proof that employees of defendant read or heard plaintiff's program before or in the course of the development of defendant's program. Kustoff v. Chaplin, 9 Cir., 120 F.2d 551, 560. There is substantial evidence that before defendant's program was broadcast, plaintiff submitted his program, including script, format, and records, to defendant for the purpose of selling it to defendant or of licensing defendant's use thereof. There was a conflict in the evidence as to whether Hudson, defendant's Western Program Director, developed defendant's program before any possibility of access to plaintiff's program. The jury resolved this conflict against defendant. Proof of access, however, is not fatal to defendant's defense for it establishes merely that defendant had the opportunity to copy, not that it actually copied. Kustoff v. Chaplin, supra, 9 Cir., 120 F.2d 551, 560; Cain v. Universal Pictures Co., supra, D.C., 47 F.Supp. 1013, 1015. If coupled, however, with proof that defendant's program embodies an idea similar to the idea in plaintiff's program of applying listener participation to the selection of stories and stars for motion pictures, proof of access will support an inference of copying. See, Shipman v. R. K. O. Radio Pictures, 2 Cir., 100 F.2d 533, 538; O'Rourke v. R. K. O. Radio Pictures, D.C., 44 F.Supp. 480, 482; Hirsch v. Paramount Pictures, supra, D.C., 17 F.Supp. 816, 818.

It must therefore be determined whether defendant's programs embody this idea of plaintiff's. Only a similarity as to this idea has relevance to the issue of copying. If there is no evidence thereof, defendant is not liable no matter how much general similarity may be apparent in the two programs as a whole to the average reader or listener.

The majority opinion holds that a finding of copying will be upheld on appeal if "such similarity exists between plaintiff's and defendant's programs as to suggest to the average person the use by defendant of an idea originating with plaintiff. * * * In determining whether the similarity which exists between a copyrighted literary, dramatic or musical work and an alleged infringing publication is due to copying, the common knowledge of the average reader, observer, spectator or listener is the standard of judgment which must be used. * * * The evidence, in the form of the two programs alone, shows that there is substantial similarity to support the verdict." This statement assumes that a general similarity between the two programs justifies submitting to the jury the issue of copying. Recovery can be allowed, however, only if there is similarity between the programs in regard to the original aspects of plaintiff's program.

The majority opinion holds that plaintiff has met this requirement by introducing evidence that his program contains an original idea. Once he has done this, the mere fact of introduction of the two programs into evidence is enough to allow the case to go to the jury and to support a verdict reached thereon. If the jury finds for the plaintiff on the issue of originality, it then compares the programs as an average listener would. If it receives the impression from its common knowledge that the similarity between the two programs "is due to copying," this impression and common knowledge establish that defendant copied its program from plaintiff, and defendant is liable for the reasonable value thereof. The jury may determine that defendant is liable for copying, even though it is evident that plaintiff's protectible property interest in his program comprises only a small part thereof, and even though it is evident from a comparison of the two programs that there is no similarity between them in regard to the original idea of plaintiff's program. Such a procedure may have the prejudicial effect of supporting a charge of piracy even though substantial similarity between two programs results from the use in both of stock situations or standardized techniques long used in the radio industry and therefore in the public domain. See, Harold Lloyd Corporation v. Witwer, 9 Cir., 65 F.2d 1, 17; Moore v. Ford Motor Co., D.C., 28 F.2d 529, 536; Echevarria v. Warner Bros. Pictures, D.C., 12 F.Supp. 632, 635; 18 C.J.S., Copyright and Literary Property, § 113, page 231. It is therefore of the greatest importance to narrow the issue of similarity. If the jury is permitted to reach its verdict on the basis of a general comparison of the programs in their entirety, there is great risk that similarity between the programs in their unoriginal aspects will be weighed to defendant's disadvantage and that plaintiff will be permitted reimbursement for the unoriginal elements of his program, in which he has no property right. If a general similarity may of itself support a verdict in plaintiff's favor an appellate court would be powerless to afford relief from such a verdict, even though the only evidence of copying is similarity between the unoriginal elements contained in both programs.

Such a result is not supported by the weight of case authority. In Harold Lloyd Corporation v. Witwer, 9 Cir., 65 F.2d 1, plaintiff sought to enjoin the exhibition of a motion picture by the defendant on the ground that it constituted an infringement of a magazine story previously published by the plaintiff. Admittedly there was substantial similarity in plot and in several isolated comedy sequences, and on this basis, the trial court gave judgment for the plaintiff. The Circuit Court of Appeals for the Ninth Circuit, however, reversed the judgment, stating that there was no basis as a matter of law for a verdict for the plaintiff unless an examination of the two scripts revealed a similarity in those elements of plaintiff's production that were the product of his own ingenuity and creative talent. In discussing the fact that plaintiff relied upon admitted similarities in basic elements of each production, the court stated: "In the case at bar, if it be assumed that there are such similarities between the story and the play as to provoke in the casual observer the consciousness that there is such a similarity between them, and that copying may be inferred therefrom, we are still confronted with the fact that mere similarity does not necessarily involve literary piracy or an infringement of a copyright. Such similarities then as exist would require further analysis to determine whether or not they are novel in the story and thus coyrightable. The copyright of a story only covers what is new and novel in it, so that the question of infringement involves a consideration of what is new and novel in the story to which the author has acquired a monopoly which has been mispppropriated by another. * * * 'It should also be borne steadfastly in mind, that if a work is not entirely original, there is no copyright in the unoriginal part, which will prevent its use, separately, or in combination, with matter not covered by copyright. Hence, of course, any inquiry as to infringement must exclude *permissible reproduction* of such *non-original matter.*'" 65 F.2d 23-24.

In Dymow v. Bolton, 11 F.2d 690, the Circuit Court of Appeals for the Second Circuit also reversed a trial court verdict for the plaintiff that had been reached upon admitted similarity in non-original elements of the two productions. In stating that infringement could not be established by cutting and trimming down to basic themes and concepts, the court stated: "This incomplete skeleton the two plays have in common, but it is with real difficulty that the flesh and blood, the incidental, yet essential, adornment and trimming, of the plays can be cut away to show similarity between a few bones. This difficulty is fatal to plaintiff's case * * * that copying which is infringement must be something * * * 'recognized as having been taken from' the work of another." 11 F.2d 692. See also Twentieth Century-Fox Film Corp. v. Dieckhaus, 8 Cir., 153 F.2d 893; Nichols v. Universal Pictures Corp., 2 Cir., 45 F.2d 119; Frankel v. Irwin, D.C., 34 F.2d 142; Cain v. Universal Pictures Co., D.C., 47 F.Supp. 1013.

According to these authorities, therefore, the issue before this court is not, as the majority opinion holds, whether there is substantial similarity between the two programs to support the jury's verdict, but whether there is substantial similarity between the two programs with respect to plaintiff's original idea. The cases relied upon by the majority indicate that only when there is substantial evidence of such similarity to support an inference of copying is the question of copying submitted to the jury. Universal Pictures Corp. v. Harold Lloyd Corporation, 9 Cir., 162 F.2d 354; Fleischer Studios, Inc. v. Ralph A. Freundlich, Inc., 2 Cir., 73 F.2d 276; Fendler v. Morosco, 253 N.Y. 281, 171 N.E. 56. Defendant's motion for a directed verdict raised the issue whether there was such similarity as to plaintiff's original idea. If there was insufficient evidence to support a finding of such similarity, then no proper inference of copying could be drawn, and the trial court should not have let the case go to the jury on the basis of the general similarity between the two programs. In denying the motion for a directed verdict, the trial court committed reversible error. Hewitt v. Coward, 180 Misc. 1065, 41 N.Y.S.2d 498. In reversing the judgment, this court would not be substituting its judgment for that of the jury, as the majority opinion suggests, but would be determining that there was insufficient evidence to support the implied finding that there was similarity between the two programs with respect to plaintiff's original idea.

Plaintiff's program was based on the idea, in his own words "the most important idea in my show," that it would afford the public a "voice in what pictures Hollywood shall produce in the years to come." This idea is emphasized in virtually every paragraph of the program: "Wanger: How do you do, ladies and gentlemen. Welcome to our Hollywood Preview Parade, a radio show designed for your pleasure *and to give you a voice in what pictures Hollywood shall produce in the months to come.* Hollywood is very interested in giving you motion pictures you want to see. *Unfortunately producers do not and cannot always know just what you do want. This is the reason for this 'Preview Parade.'* Each week we plan to present a radio story we think will make a good film. We ask you to send us your opinion and suggest players for the leading roles. Our sponsor will give worthwhile cash prizes for the best letters, but more about that later.

"Of the five stories we have so far presented this series, three will be made into motion pictures *largely because of your voting.* * * *

"Boardman: * * * *Each week Mr. Wanger selects a story which he feels should be made into a picture.* You are asked to write to Mr. Wanger and give him your opinion. *The sponsors pay $500 for the best letter written by one of our listeners and if enough of you vote for it our play will be produced as a motion picture.*

"Wanger: * * * 'So Gallantly Gleaming' tells a thrilling and romantic story. * * * Listen closely. *Do you think it should be made into a motion picture? Your votes will decide.*

"Boardman: * * * Now again *a word as to the real idea behind this program. Each week Walter Wanger Presents brings you a story which we think would be a good motion picture. And here is your part in the program. We ask you to write to Mr. Wanger, telling him whether or not you would like to have this play made into a motion picture, and why. Also include your choice of stars to play the leading roles. The best letter received each week will receive an award of $500 from our sponsor.* * * * *And believe me, Hollywood is waiting for your vote.* Whether or not you win a prize, *your vote will help decide whether or not to film 'So Gallantly Gleaming.' The American picture-going public has long said it wished a voice in the choice of stories presented on the screen. Here is the chance for you to have that voice and make it heard across the nation.* * * *

"Last week Mr. Wanger presented 'Out of the Night'. * * * A storm of argument was aroused. 68,000 letters have been received to date, and we are happy to announce that Warner Brothers Studio have arranged to make this startling story into a film in the near future. *So, thanks to your letters, you have helped Warner Brothers to their decision to film 'Out of the Night'.* * * *

"Wanger: * * * Thank you, [board of experts] * * * Do you, ladies and gentlemen, agree with the opinions of our guests? *Do you agree that 'So Gallantly Gleaming' should become a motion picture?* And who do you think should play the leading roles? Won't you write and tell us. *Remember that whether your letter is best and wins the prize or not, you are helping Hollywood decide on what to give you on the screen.* * * *" (Italics added.)

It is apparent from defendant's programs that their basic idea was to simulate the "first showing of a new motion picture in the film capitol" and thereby to capture in its "radio version of [a] Hollywood Preview," the "same spirit of enthusiasm" and to make its listeners feel they were viewing that glamorous event. The programs were described as a "Hollywood Preview of a motion picture of the future", as a preview of a "new story written especially for the screen", and "now scheduled for production" or "now in preparation" at one of the motion picture studios. The public was to be given "a glimpse into the movies of tomorrow" and nobody at any time was asked to influence their selection. The *studio* audience was requested to "[fill] out cards giving their comments" on the play and "suggesting their favorite stars for the motion picture" for the purpose of giving a Hollywood atmosphere by adapting to a broadcast of motion pictures "previewed" on the air, the custom of having the motion picture audience fill out preview cards.

In contrast the radio audience comments solicited in plaintiff's program were not for the purpose of atmosphere; they were indispensable to his idea of giving the public a voice in the selection of motion pictures to be filmed. On August 21, 1945, defendant announced that a contest awarding prizes for best letters would be staged for a six-weeks period; that listeners would thus be given "a chance to express their opinion of the stories 'previewed'" and "to vote for the stories they would like to see on the screen." Defendant's contest was the time-honored advertising scheme used to increase sales of the sponsor's gasoline. To participate, listeners had to get entry blanks from the sponsor's service stations. The contest, lasting only six weeks, was an incident of the program not its core. Defendant's program did not, in its contest feature, or otherwise, give the listening public the impression that "if enough of [the listeners] vote for it [the] play would be produced as a motion picture." It was specifically announced on defendant's programs that a "motion picture of the future" was being presented: on three programs it was stated that the plays were in production.

A comparison of defendant's program with the application in plaintiff's program of the listener participation idea, makes it clear that defendant did not in any of its programs copy that idea. There is a fundamental difference between the themes of the two programs. The basic idea of plaintiff's program was listener participation in the selection of stories and stars for motion picture production in the future. The basic idea of defendant's programs was listener participation in the simulation of whatever glamour attends a Hollywood preview. If there is kinship between the two programs, it rests on their common capitalization of Hollywood glamour. But defendant stops short of executing plaintiff's idea that the public might do more than behold the glamour that spells Hollywood, that it should participate in determining by what and by whom it should be bedazzled.

EDMONDS, J., concurs.

FINNEY v. LOCKHART et al.

Civ. 16973.

District Court of Appeal, Second District, Division 1, California.

July 7, 1949.

Hearing Granted Sept. 1, 1949. *

1. Damages ⚷94

There is no hard and fast rule fixing proportion between actual and exemplary damages awarded.

2. Conspiracy ⚷1

Elimination of all but one of defendants from jury's consideration as alleged conspirators by granting motion for judgment of nonsuit as to all other defendants did not preclude jury from finding remaining defendant guilty of conspiracy.

3. Appeal and error ⚷907(3)

On appeal, on judgment roll alone, from judgment for plaintiff, court must assume that there was evidence supporting material allegations of complaint.

4. Conspiracy ⚷1

To hold a defendant responsible for participating in conspiracy, other coconspirators need not be named as defendants.

◆

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Action by Robert William Finney against James Lockhart and others to recover damages for inducing persons not to purchase dog food from plaintiff. From a judgment for plaintiff against named defendant, he appeals.

Affirmed.

Howlett & Elson, Eugene M. Elson, Los Angeles, for appellant.

Richard K. Gandy & Robert G. Cockins, Robert G. Cockins, Santa Monica, for respondent.

DORAN, Justice.

As described by appellant, "This action was instituted by the filing of a 'Complaint for Damages for Inducing Persons Not to Enter Into a Business Relationship'". It appears from the complaint that plaintiff was "engaged in business as a merchant of dog and pet food"; that defendants Lockhart and Stratman, as partners, were engaged in the same business "and were competitors of the plaintiff"; that defendants conspired, "among themselves to ruin plaintiff's business".

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* Subsequent opinion 217 P.2d 19.

A trial by jury resulted in a verdict for plaintiff and against defendant Lockhart in the sum of $1 and exemplary damages in the sum of $2,000; at the conclusion of plaintiff's case a "motion for judgment of nonsuit" was granted as to all of the other defendants.

Quoting from appellant's brief, "The only question raised on this appeal by Appellant is the amount of the verdict for exemplary damages rendered against him. Appellant claims that the verdict, insofar as it awarded $2,000.00 exemplary damages, was excessive and was awarded under the influence of passion and prejudice in that it was grossly disproportionate to the general or actual damages found by the jury to have been suffered by Plaintiff."

The record on appeal consists of the clerk's transcript only. Appellant points out that, "The complaint alleged a conspiracy on the part of Appellant with the other Defendants, who no longer are in the case, to injure and ruin the business of Plaintiff by causing people who were actual and potential buyers of pet food to believe that the horse meat sold by Plaintiff, for such purpose, was diseased and came from diseased horses. The Complaint further alleged that various statements were made by Appellant and by employees of his, to certain individuals. It was then alleged that said statements were false and malicious and by reason thereof Plaintiff had been greatly damaged and his business greatly impaired in that people on hearing and learning thereof ceased to patronize Plaintiff, all to his damage thereof in the sum of $50,000.00. The jury however found this damage to be only $1.00."

Appellant then argues that, "The jury could not have found Lockhart a member of a conspiracy for the reason that the alleged conspirators were eliminated from the jury's consideration."

[1] It is also argued that "where exemplary damages are assessable, the exemplary damages awarded must bear a reasonable proportion to the actual damages awarded". Wilkinson v. Singh, 93 Cal. App. 337, 269 p. 705, 708, is cited in support of the last mentioned argument. But, in said case reference to such a doctrine is dictum. Moreover, the opinion recites, "We fully appreciate the fact that there is no hard and fast rule fixing the proportion between actual and exemplary damages, in cases where exemplary damages are recoverable." Appellant's argument with regard to exemplary damages in the circumstances lacks support in the law. See Scott v. Times Mirror Co., 181 Cal. 345, 184 P. 672, 12 A.L.R. 1007; Clark v. McClarg, 215 Cal. 279, 9 P.2d 505, 81 A.L.R. 908, and Singleton v. Singleton, 68 Cal.App.2d 681, at 703, 157 P.2d 886.

[2-4] Appellant's argument relating to the conspiracy as quoted above is without merit. With only the judgment roll before the court on appeal it must be assumed there was evidence to support the material allegations of plaintiff's complaint. Moreover it is not the law that a defendant is not responsible for participating in a conspiracy unless one or more of the other co-conspirators are named a defendant or defendants.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

CITY OF SAN DIEGO v. SOUTHERN CALIFORNIA TEL. CO.

Civ. 3656.

District Court of Appeal, Fourth District, California.

July 11, 1949.

Rehearing Denied July 29, 1949.

Hearing Denied Sept. 8, 1949.

1. Municipal corporations 🔑79

The 1896 constitutional amendment made provisions of city freeholders' charter paramount and controlling over general state laws with respect to municipal affairs so far as control over such matters was given city by such provisions. Const. art. 11, § 6, as amended in 1896.

2. Municipal corporations 🔑680(5)

The fact that primary franchise for telephone service is matter of state concern does not necessarily prevent matter of granting secondary franchise for particular exclusive use of city streets by telephone company from being a municipal affair controlled by city freeholders' charter under constitutional amendment. Const. art. 11, § 6, as amended in 1896.

3. Municipal corporations 🔑680(5)

The matter of permitting telephone installations permanently occupying portions of city streets is primarily municipal affair, control of which rests with same authority to which matters of improving and maintaining streets and controlling obstructions therein are delegated.

4. Municipal corporations 🔑79

Existence of state franchise covering primary use of streets for travel, together with state regulation of general business operated, is not inconsistent with city charter requirement of city franchise covering secondary and more special use of streets, as for telephone installations, if necessary authority therefor has been delegated to city by state.

5. Municipal corporations 🔑79

The use of city streets by telephone company in operation of telephone system is municipal affair within constitutional amendment making provisions of city freeholders' charter paramount and controlling over general state laws with respect to such affairs, especially since such question must be considered in light of what was considered municipal affair at time of enactment of statute authorizing telephone corporations to construct lines along any public road or highway in state. Civ.Code, § 536.

6. Municipal corporations 🔑680(5)

The sections of San Diego city charter, giving city general police powers and powers to make and enforce laws and regulations not in conflict with general laws or charter to regulate and control use of streets and public places for all purposes and prevent obstructions thereto, to regulate and control use of streets for suspension of electric wires, to regulate opening of street surfaces for laying of telephone wires, etc., give such city broad enough control of its streets to include power to grant telephone company franchise to use streets in conduct of its business, though such power is not specifically granted by charter.

7. Municipal corporations 🔑680(5)

The provision of San Diego city charter that every grant of franchise shall be subject to repeal or modification does not nullify right, implied from other provisions of charter, to issue franchise for use of city streets by telephone company, on theory that franchise must be effective for definite time and that right subject to repeal or modification at any time is mere permit, as only questions are whether permission for such use is required and whether city is authorized by charter to grant such permission.

8. Municipal corporations 🔑680(5)

The fact that word "franchise" is not expressly used in provisions of San Diego city charter clearly giving city power to grant franchise for use of its streets by telephone company, though used in later provisions relating to railways, does not negative such power under rule "expressio unius est exclusio alterius."

9. Municipal corporations 🔑696

A telephone company's use of city streets, without city franchise required by law, for maintenance of 350,000 miles of wire, 14,000 poles, 400 miles of ducts, and 60 trench miles of conduits, amounted to "public nuisance" subject to abatement by city. Civ.Code, § 3479.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Public Nuisance".

10. Municipal corporations 🔑696

The city of San Diego was vested with general power to require telephone company, making unauthorized use of city streets for maintenance of its wires, poles, etc., to remove such encroachments and obstructions.

11. Municipal corporations 🔑697(1)

The matter of abating public nuisance by requiring telephone company to remove wires, poles, etc., unlawfully maintained by it in city streets after expiration of its city franchise, was within broad scope of powers vested in superior court in city's equity suit to enjoin such occupation of streets and abate nuisance. Civ.Code, § 3479.

12. Telegraphs, telephones and radio 🔑10 (10)

The state's offer of telephone franchises by 1905 statutory amendment authorizing telephone corporations to construct lines along any public road or highway in state did not extend to such secondary use of streets in cities already given control of such matter by their charters. Civ.Code, § 536.

13. Constitutional law 🔑101
Telegraphs, telephones and radio 🔑10 (16)

A telephone company, acquiring state franchise with respect to certain territory under statute authorizing such companies to construct lines along any public road or highway in state, has vested right, which may not be interfered with by any local authority, and does not lose such right by subsequently acting for a time in compliance with city franchise. Civ.Code, § 536.

14. Municipal corporations 🔑697(1)

The San Diego city ordinance, granting franchise to operate telephone system over, under and along all public streets and places "now or hereafter existing" in such city for specified period, did not give city such control over telephone company's use of streets in areas annexed to city after passage of act authorizing telephone corporations to construct lines along any public road or highway in state as to entitle city to injunction to abate nuisance arising from company's use of streets in such areas after expiration of such franchise. Civ.Code, § 536.

Appeals from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by the City of San Diego against the Southern California Telephone Company for an injunction against occupation of plaintiff's streets and other public places for conduct of defendant's telephone business without a franchise from the city and abatement of such public nuisance. From portions of the judgment rendered, defendant appeals, and from another part thereof, plaintiff appeals.

Affirmed.

J. F. DuPaul, City Attorney, Shelley J. Higgins, Special Counsel, San Diego, T. B. Cosgrove, Special Counsel, Los Angeles, for plaintiff, appellant and respondent.

Pillsbury, Madison & Sutro, San Francisco, Lawler, Felix & Hall, Los Angeles, John W. Holmes, Pasadena, Francis N. Marshall, San Francisco, for defendant, appellant and respondent.

BARNARD, Presiding Justice.

This action was brought to determine whether or not the defendant, in the operation of its telephone system, is occupying portions of streets in San Diego without a legal right so to do.

The city first adopted a freeholders' charter in 1889. The defendant succeeded to the rights of the Pacific Telephone & Telegraph Company. The latter company and its predecessors had obtained the right to maintain poles, wires and other equipment for telephone purposes over the city streets for 30-year periods, through city Ordinances adopted in 1886, 1896 and 1904. In 1914, the Pacific Telephone & Telegraph

Company filed a petition with the city requesting the privilege of constructing and maintaining a system of telephone and telegraph wires over, under and along all of the public streets and places "now or hereafter existing" in said city. This petition declared that one of the Ordinances under which the company had been operating would expire in 1916; that another would expire in 1926, but that a doubt existed with respect to its validity; and that this application was filed for the purpose of removing any doubts as to the validity of the company's franchises. Pursuant to that application Ordinance No. 5681 was adopted July 6, 1914, granting such a franchise and privilege for the period of thirty years. A written acceptance was filed and from its effective date until its expiration on August 7, 1944, the grantee and the defendant, in the operation of its telephone business within San Diego, occupied the public streets and places pursuant to and in compliance with the terms of Ordinance No. 5681. Each year between 1914 and 1929, a statement was filed by the telephone company showing its gross receipts and the amounts due to the city "arising from" the use and possession of the franchise granted by Ordinance No. 5681. In 1930, the defendant notified the city that in pursuance of an order of the Railroad Commission the Pacific Company had sold to the defendant and assigned to it certain franchises "among which is Ordinance No. 5681, under which this Company is operating in San Diego." Each year between 1930 and the expiration date in 1944, a similar statement of gross receipts was filed in which it was stated that the defendant was the successor in interest of the franchise granted by Ordinance No. 5681. It clearly appears, as the court found, that continuously for a period of 58 years the defendant and its predecessors operated the telephone system in San Diego under city franchises which were applied for and granted, and that by their dealings with the city during that period they inferentially conceded that the city had authority to grant such franchises. From 1914 to 1944, the terms of Ordinance No. 5681 were complied with both with respect to the territory within the original city as it existed in 1914, and as that territory was increased by some twenty-seven annexations to the city and a consolidation with East San Diego, all of which took place after April 24, 1916.

In August, 1944, the city notified the defendant that it was maintaining a public nuisance by occupying the streets and public places of the city for its telephone business unlawfully and without permission of the city and that, unless application was immediately made for a renewal of the franchise granted in 1914, or for a new franchise for that purpose, legal proceedings would be instituted to abate the nuisance. No such application having been made, this action was brought. So far as material here, the complaint alleged that the right to occupy the streets and public places of the city for the conduct of a telephone business granted by Ordinance No. 5681 had expired on August 7, 1944; that the defendant has failed and refused to apply for a renewal or extension of that franchise, or for a new franchise; that the defendant in carrying on a telephone business within the city is occupying the streets and public places unlawfully, without permission and without having secured a franchise from the city for that purpose; and that demand and notice, as above indicated, has been served upon the defendant. The prayer was for an injunction restraining the defendant from occupying the streets or public places of the city without first having secured a franchise from the city so to do; that the defendant be ordered forthwith to abate the public nuisance; and for general relief.

The answer, while very long, may be briefly summarized by saying that it denied that the defendant or its predecessors ever operated in San Diego under Ordinance No. 5681; denied that that Ordinance was ever valid or effective insofar as the operation of any such telephone business is concerned; alleged that the defendant is engaged in operating a general public utility, telephone and telegraph system and service, both intrastate and interstate, and that its operations in San Diego are but a part of a general integrated system of communication which extends throughout the state and, through connecting lines, throughout the United States and foreign countries; alleged that for many years prior to July 16, 1944, and continuously since that time, the defendant and its predecessors have at all times owned a right and franchise granted by the state of California covering the use of all public roads and highways within the state for the installation of telephone and telegraph lines, including the streets and public places in San Diego; alleged that the defendant has continuously used and exercised the rights thus given by the state and pursuant to that right, and not otherwise, has used the streets of San Diego; admitted receipt of the "purported" notice and demand above mentioned; denied that the defendant has created or maintained a public nuisance or that it is occupying the highways and public places of the city without the consent or permission of the city; alleged that its use and occupancy of the streets of the city has at all times been pursuant to, and in acceptance of, the tender and offer made by the state to telephone and telegraph corporations; and denied that it is now occupying the streets and public places of the city for a telephone business, or otherwise, without a franchise so to do.

While the court's findings are voluminous their general effect is to find and hold (1) that with respect to the territory within the original city, before the annexations above referred to, the occupancy and use of the streets for the purposes of the telephone system were and are subject to the control of the city under the provisions of its freeholders' charter; and (2) that with respect to those portions of the city which were annexed to or consolidated with the city subsequent to the reenactment of section 536 of the Civil Code in 1905, such use of the streets is subject to and governed by section 536. Accordingly, the court entered a judgment which, in brief, ordered the defendant to remove its poles, wires, conduits and other equipment, except those used exclusively for strictly telegraphic service, from the public streets and places within the area which was within the corporate boundaries of the city on March 19, 1905; enjoined the defendant from further occupying the streets and public places in the original city, as thus described; and provided that said order and injunction shall be ineffective if, within thirty days after the judgment becomes final, the defendant shall apply to the city for a new franchise granting permission to thus occupy the streets and public places of the original city, and shall compensate the city at the rate fixed by Ordinance No. 5681 for such use of the streets within the original city from August 8, 1944, until the first day of the month immediately preceding the filing of such application. It was further provided that the order and injunction should be ineffective if the city should refuse to grant such a franchise to the defendant, and jurisdiction is reserved to make any necessary modification of the judgment. The defendant has appealed from those portions of this judgment which affect its operations within the original city. The city has also appealed from the judgment insofar as it denied relief to the city with respect to those portions of the present city which were annexed to or consolidated with the city, beginning with the year 1916.

Defendant's Appeal

[1] San Diego adopted its freeholders' charter in 1889. It is well settled that by the 1896 amendment to section 6 article XI of the state Constitution the provisions of such a charter were made paramount and controlling over general state laws with respect to matters which are municipal affairs, and insofar as control over such matters was given to the city by the provisions of the charter. City of Pasadena v. Charleville, 215 Cal. 384, 10 P.2d 745; City of San Jose v. Lynch, 4 Cal.2d 760, 52 P.2d 919. The controlling questions on this appeal are whether such use of the streets as that here involved is a municipal affair, within the meaning of the constitutional provision, and whether a right to control such use was included in the provisions of the 1889 charter.

The defendant contends that its use of the city streets, here in question, is not such a municipal affair. While many points are incidentally argued the defendant mainly contends in this connection that it operates a state-wide system of telephone communication, tying the state together; that the right of such a system to exist necessarily involves its right to use the city streets; that a city's right to evict the system from such use of city streets would adversely affect the entire state; that modern developments and improvements in telephone service, with its extension to and importance in all business carried on in the state, have changed the question of street usage for that purpose from a matter of local to a matter of state control; that section 536 of the Civil Code, since its amendment in 1905, has given the right to a telephone corporation to install its poles and lines upon any public road or highway in the state; that this statute expresses the state's concern in state-wide telephone service and determines, as a matter of state policy, that such use of the streets is a state affair; that this being now a state affair the state statute applies and controls with respect to the streets of the city also, regardless of any provisions in the city charter; and that while the city still has certain police powers it has no power to interfere with or stop the service being rendered by this state-wide system, this being a matter which is entirely within the control of the Public Utilities Commission.

It is also argued that the state's concern in the matter of the use of city streets for purposes affecting the entire state is further evidenced by the fact that the State Highway Department has taken control of many streets in connection with the establishment of through highways; that these various developments reflect a different theory of utility status, now regulated by a state agency, and of control over the use of city streets which has come about since the decision in Sunset Telephone & Telegraph Co. v. Pasadena, 161 Cal. 265, 118 P. 796; that that case was decided on the pro tanto theory (that section 536 granted a franchise on different roads progressively as the state's offer was accepted by the installation and use of equipment), which theory was later abandoned; that this Pasadena case has, in effect, been overruled or outmoded; that as early as 1920 a contrary view was taken in the case of Ex parte Daniels, 183 Cal. 636, 192 P. 442, 21 A.L.R. 1172, which recognized that the use of city streets as part of a highway system had become a matter of state-wide concern; that this view has been followed in many later decisions, including County of Los Angeles v. Southern California Telephone Co., 32 Cal.2d 378, 196 P.2d 773; that the latter case recognized that municipal affairs change with conditions, that a telephone company's right to use the streets is a state-wide entity, and its use of streets is not exclusive because it uses them only to the extent necessary to serve the public, and is not permanent since it may be ordered to move its poles; and that since the use of city streets here involved is no longer a municipal affair it follows that section 536, as amended in 1905, granted a franchise to the defendant's predecessors which was state-wide and which is effective and controlling with respect to the use of the city streets in San Diego.

It may first be observed that while there has been a tremendous development and change in the breadth and scope of telephone service under modern conditions, the resulting interference with the primary use of such streets by the public has correspondingly increased. The burden added by an expanding telephone system, with its increased use of the streets for that purpose, and with the accompanying inconvenience caused by almost continual installations, improvements and the moving of permanent equipment, would seem to have increased rather than lessened the extent and degree of local concern involved.

[2-4] There is a natural distinction between the ordinary use of streets by the public for travel and other purposes, and the exclusive and more or less permanent use of portions of streets for the purposes here in question by individuals or corporations. This distinction has long been recognized. In speaking of the latter use by a telegraph company the court said, in City of St. Louis v. Western Union, 148 U.S. 92, 13 S.Ct. 485, 488, 37 L.Ed. 380: "* * * this use is an absolute, permanent, and exclusive appropriation of that space in the streets which is occupied by the telegraph poles. To that extent it is a use different in kind and extent from that enjoyed by the general public." This distinction has been recognized in many cases in this state, the use for travel being referred to as the primary use and the more

exclusive use being referred to as the secondary use. Not only is this distinction an entirely logical one but it is one which may be applied also to franchises granting rights which involve and affect these separate and distinct uses. That a distinction exists between a primary franchise granting a right to control a business affected with a public interest, and a secondary franchise, giving a right to occupy definite portions of certain streets, has long been recognized. City of Richmond v. Southern Bell Telephone & Telegraph Co., 174 U.S. 761, 19 S.Ct. 778, 43 L.Ed. 1162; Western Union Telegraph Co. v. Hopkins, 160 Cal. 106, 116 P. 557. The fact that a primary franchise for telephone service is a matter of state concern does not necessarily prevent the matter of granting a secondary franchise, giving the right to a particular and exclusive use of streets, from being a municipal affair. Logically, the matter of permitting installations which permanently occupy portions of streets would seem to be primarily a municipal affair, and control thereof should naturally rest with the same authority to which the matter of improving and maintaining streets, and controlling obstructions therein, is delegated. There is nothing inconsistent between the existence at the same time of a state franchise covering the primary use of streets for travel, together with state regulation of the general business operated, and the requirement of a franchise from the city covering the secondary and more special use of the streets, provided only that the necessary authority has been delegated by the state to the city. In speaking of a state franchise authorizing the business of furnishing electricity, and the requirement for a certificate under the provisions of the Public Utilities Act, the court said, in Oro Electric Corp. v. Railroad Commission, 169 Cal. 466, 147 P. 118, 121: "This is an entirely different question from that of the local control of the streets, and power over the two subjects may well be vested at the same time in different governmental bodies, without the one in any way clashing with or interfering with the other." This view has been recognized both in the statutes and in the court decisions in this state. Where the subject matter has involved the primary use of the streets, or matters affecting the general conduct of the business, a state interest and control has been increasingly recognized. On the other hand, where the subject matter involved the secondary and individual use of the streets local control has been recognized, unless the right of such control was nonexistent at the time section 536, as amended in 1905, became effective.

[5] In Sunset Telephone & Telegraph v. Pasadena, 161 Cal. 265, 118 P. 796, 801, it was definitely held that the use of city streets, with which we are here concerned, was a municipal affair within the meaning of section 6 of article XI of our constitution, as amended in 1896, and that the provisions of the city charter were therefore controlling over a claim of right arising from and based upon section 536 of the Civil Code, as amended in 1905. The distinction between the primary and secondary uses of streets, above referred to, was pointed out in that decision and it was also pointed out that from the very nature of its business a telephone company necessarily requires the exclusive use of a much larger portion of a city's streets and public places than does a telegraph company and thus encumbers them "with a network of wires and poles and fixtures, to a much greater extent than a telegraph system would do."

The defendant contends that while this Pasadena case has never been directly overruled it has been "outmoded" and departed from in principle by later cases. It is argued that the Pasadena case was based upon the pro tanto theory that the offer made by section 536 was accepted piecemeal, as the telephone company actually used certain streets; that this pro tanto theory was abandoned shortly after the decision in the Pasadena case and following the opinion in the case of Russell v. Sebastian, 233 U.S. 195, 34 S.Ct. 517, 58 L.Ed. 912, L.R.A.1918E, 882, Ann.Cas.1914C, 1282; and that, in effect, the holding in the Pasadena case has been wiped out by later decisions.

The Pasadena case was not based upon the pro tanto theory suggested but was based upon the fact that the requisite control over its streets had been delegated to a charter city at the time when the state's offer to telephone companies was first made through the 1905 amendment to section 536. It does not appear that this basic principle of the Pasadena case has ever been abandoned or changed. The cases relied on by the defendant have not had this effect. In Ex parte Daniels, 183 Cal. 636, 192 P. 442, 21 A.L.R. 1172, it was held that the regulation of traffic is not one of those municipal affairs in which chartered cities are given a power superior to that of the state legislature by section 6 of article XI of the Constitution. That principle has been followed in many cases and is thoroughly established, but it relates to the general control of traffic, the primary use of streets, and not to the secondary or more exclusive use of portions of city streets which is here involved. There is no intimation in that case or in the cases following it that the sort of use with which we are here concerned is not a municipal affair. In other cases, notably in City of Beverly Hills v. Los Angeles, 175 Cal. 311, 165 P. 924, it has been held that a city had no right to interfere with a franchise granted by the state; but this has been done upon the express ground that a state's offer of a franchise had been accepted before the city claiming the right was authorized to act in that regard.

The Pasadena case, 161 Cal. 265, 118 P. 796, was cited in City of San Diego v. Kerckhoff, 49 Cal.App. 473, 193 P. 801; Bank v. Bell, 62 Cal.App. 320, 217 P. 538; City of Oakland v. Hogan, 41 Cal.App.2d 333, 106 P.2d 987; and State of California v. Marin Municipal Water Dist., 17 Cal.2d 699, 111 P.2d 651. More nearly in point with the case now before us it was cited with approval in Sincerney v. City of Los Angeles, 53 Cal.App. 440, 200 P. 380 and followed in City of Salinas v. Pacific Tel. & Tel. Co., 72 Cal.App.2d 494, 164 P.2d 905. In County of Los Angeles v. Southern California Telephone Co., 32 Cal.2d 378, 196 P.2d 773, while passing upon the purpose and effect of the 1905 amendment to section 536, the court expressly referred to this Pasadena case and to the City of Salinas case as holding that this 1905 amendment did not grant a franchise to use the streets of a city which had previously been given full control of its streets under a freeholders' charter.

We conclude that, both logically and by decision, the matter in question should and must be held to be a municipal affair within the meaning of the 1896 amendment to section 6 of article XI of the Constitution. This is especially true since the question should be considered in the light of what was then considered as a municipal affair and governed by the situation which existed in 1905 when the state's offer was first made to telephone companies. City of Salinas v. Pacific Tel. & Tel. Co., 72 Cal. App.2d 494, 164 P.2d 905.

[6] The defendant further contends that even though such a use of the city streets be considered a municipal affair control over such a matter was not given to the city by the provisions of the 1889 charter; and that any such franchises issued by the city after 1905 were invalid. The powers given to the city are set forth in Chapter II of Article II of this charter. Section 1 of this chapter is divided into 53 subdivisions. So far as material here, these provide or read as follows:

1. Provides for general police powers, and also the power to make and enforce such other "laws and regulations as are not in conflict with general laws or this charter."

"2. To regulate and control the use of the streets, sidewalks, highways, roads and public places for any and all purposes; to prevent encroachments upon and obstructions to the same, and require the removal of any encroachments or obstructions thereon."

"3. To regulate and control the use of the streets and sidewalks for signs, sign posts, awnings, awning posts, drinking fountains, horse troughs, urinals, all posts for the suspension of electric wires; for traffic and sale therein; for exhibiting banners, placards, or flags in or across the same, or from houses or other buildings, and for all other purposes."

"5. To regulate the opening of street surfaces for the laying of gas or water mains, of telegraph or telephone wires; for the building and repair of sewers; for the erection of gas or electric lights, or for any other use or purpose."

"31. To fix and determine the rate of compensation to be charged and collected by any person, company, or corporation in this city for the use of telephones; * * *."

44. To open or close any street, road or highway upon making compensation to persons whose property may be taken or injured provided that "no compensation shall be allowed for damage to gas or water pipes, railway tracks, telegraph or telephone posts or wires, or other property or thing laid above, along, in, or under any street, highway, park, place, or other public property."

46. To grant authority to construct street railways upon or over any of the streets of the city, with further powers in that connection.

47. To allow any railroad company to enter the city and make its way to the water front providing that no exclusive franchise or privilege shall be granted to such railroad company, and with further provisions.

Section 3 of this chapter reads: "Sec. 3. The Common Council shall have power to make all rules and regulations necessary to carry into execution all powers vested by this charter, or by law, in said city, or in any department or officer thereof."

Section 5 provides that no franchise for the construction of a wharf into the bay shall be granted except on certain conditions in addition to those required by general law.

Section 6 reads in part: "Every grant of a franchise, right or privilege shall be subject to the right of the Common Council at any time thereafter to repeal, change, or modify the said grant, * * *".

Section 7 reads: "No exclusive franchise or privilege shall be granted for laying pipes or other conduits under any of the public streets or through any public place for the use of any telegraph, telephone, or other mode of transmitting intelligence or electric or any motive power."

Section 9 provides that authority shall not be granted to construct a street railway over any of the streets of the city except upon the conditions named therein.

The controlling question here is not whether the matter of granting a franchise to a telephone company for the use of the streets was specifically mentioned in the charter, but it is whether the essential power of control over the use of the streets for such a purpose was granted to the city by the charter provisions. In our opinion, a grant of such power to the city rather clearly appears. The intent to give the city control over such a matter more or less directly appears in several of the subdivisions of section 1, above referred to. In subdivision 1 thereof, in addition to police powers the power is given to make and enforce other laws and regulations which are not in conflict with general laws or this charter. No general state law covering the matter in question then existed. In subdivision 2, the power is given to regulate and control the use of streets and public places "for any and all purposes" and to prevent encroachments upon or obstructions to the same. In subdivision 3 the power is given to regulate and control the use of the streets for a number of purposes, including "the suspension of electric wires." This would seem, reasonably, to include the wires used in a telephone system. In subdivision 5, the power is given to regulate the opening of street surfaces for the laying of telegraph or telephone wires. This is a part of the use of the streets here in question, and in view of modern developments in telephone service has come to be a very important part of such use. These provisions indicate an intention to give to the city a control of its streets which is broad enough to include the matter here in question. City of Owensboro v. Cumberland Telephone & Telegraph Co., 230 U.S. 58, 33 S.Ct. 988, 57 L.Ed. 1389; Oro Electric Corporation v. Railroad Commission, 169 Cal. 466, 147 P. 118.

In addition to the sections of the charter just referred to, other provisions strongly tend to confirm the view that it was intended to give to the city control over this use of the streets. Subdivision 31 authorizes the city to fix charges for the use of telephones. Subdivision 44, in providing for damages to private property in connection with the opening or closing of streets, provides that no compensation shall be allowed for damage to "telegraph or telephone posts or wires, or other property" along or under any street or other public property. This strongly implies that the city has a right of control in this regard, which it may freely use. Section 3 gives the power to make all rules and regulations necessary to carry into execution all powers vested in the city. Section 7 provides that no exclusive franchise or privilege shall be granted for laying pipes or other conduits under the streets or public places "for the use of any telegraph, telephone or other mode of transmitting intelligence or electric or any motive power." Aside from any other inferences to be drawn therefrom section 7 would strongly imply that a right to grant such franchises existed. Gibbons v. Ogden, 9 Wheat. 1, 6 L.Ed. 23.

[7, 8] The defendant argues that any right to issue a franchise covering the use of its streets by a telephone company which might otherwise be implied from the provisions of the charter is nullified and destroyed by the portion of section 6, above quoted, providing that every grant of a franchise shall be subject to repeal or modification. It is argued that a franchise must be made effective for a definite time, and that a right given subject to repeal or modification at any time is a mere permit. Regardless of any technical distinction as to the name by which any such permission is called, we are here concerned only with whether permission for such use was required and whether the city was authorized by its charter to grant such permission. It is also argued that the word "franchise" is not expressly used in the charter provisions although that word is used in later provisions relating to railways and railroads, and that the rule expressio unis est exclusio alterius must be applied. We think the provisions of this charter are sufficiently clear that we are not required by any such rule of construction to give them an interpretation contrary to that adopted by the trial court. Where the power in question is so clearly intended to be given it should not be interpreted away because some of the other provisions of the charter, relating to railroads, use the word "franchise". For some 60 years all parties concerned acted upon a practical interpretation of the provisions of the charter which was in accord with the view taken by the trial court. While this fact, in itself, is not controlling it is very suggestive if the meaning of the charter provisions, in the respect here in question, is considered in any way doubtful. We are here concerned with the power which had been given to the city at the time section 536 was amended in 1905. Beyond question, the courts would have had no difficulty, prior to that time, in holding that under these charter provisions the city has been given the right and power to grant such a franchise covering this secondary use of its streets for this particular purpose, which is clearly distinguishable from the use of such streets by the general public for traffic purposes. City of Salinas v. Pacific Tel. & Tel. Co., 72 Cal.App.2d 494, 164 P.2d 905. If they were sufficient then no good reason appears why they are not still sufficient.

[9-11] Finally, the defendant contends that its use of the streets cannot be considered a public nuisance, although the court so found. It appears that the defendant then had 350,000 miles of wire, 14,000 poles, 400 miles of ducts, and 60 trench miles of conduits within the city. The extensive use of the streets for this purpose is fully apparent. If, as we have held, the defendant's use of the streets for the purposes and in the manner in question is unauthorized by law it sufficiently appears that it amounts to a public nuisance. Civil Code, sec. 3479; Hill v. City of Oxnard, 46 Cal.App. 624, 189 P. 825. Moreover, if the defendant's use of these streets is unauthorized the city was vested with general power to require the removal of the encroachments and obstructions which constitute the essence of that use. Vanderhurst v. Tholcke, 113 Cal. 147, 45 P. 266, 35 L.R.A. 267; Laura Vincent Co. v. City of Selma, 43 Cal.App.2d 473, 111 P.2d 17. In any event the entire matter was within the broad scope of the powers vested in the court in this equity case.

[12] Under the controlling issues, as we view them, it is unnecessary to consider other points incidently raised by the defendant, or to consider or analyze many cases cited in support thereof or cited in support of the contention, which may be conceded, that in recent years there has been a tendency to increase the power and control of the state over many matters which were formerly considered purely local. As we view it, we are concerned here with the matter as it existed in 1905, when an offer of a telephone franchise was first made by the state through the amendment to section 536. The offer as then made did not extend to this secondary use of streets in chartered cities, which had already been given control in that regard, and no inconsistency appears as between section 536 and the charter provisions.

Plaintiff's Appeal

[13, 14] With respect to the city's appeal it appears that the various annexations to the city and the one consolidation all occurred after April 24, 1916. It also appears that the defendant and its predecessors had operated a telephone system in those areas for a considerable time prior to 1916. The city's contention on its appeal is that in the proceedings which led to the franchise granted by Ordinance No. 5681, the petition requested and the Ordinance granted a franchise to operate a telephone system over, under and along all of the public streets and places "now or hereafter existing" in the said city of San Diego for a period of 30 years. It is argued that in thus accepting the privileges given it under Ordinance No. 5681 the defendant is presumed to have done so with the knowledge that such territory might subsequently be annexed to or consolidated with the city of San Diego, that the defendant entered into this contract with the city notwithstanding any right it might have had under section 536 as amended in 1905, insofar as these areas are concerned, that the rule of contemporaneous interpretation by the parties should be applied, and that it follows that the annexed areas may not be segregated from the rest of the city, in the respect here in question.

We are not here concerned with the effect these matters might have had upon the contract between the parties, expressed in Ordinance No. 5681, had the defendant attempted to violate the terms of that contract during the 30-year period of its existence. This they did not do and the sole question on this appeal depends upon the situation as it existed in 1916 and thereafter, when the various annexations to the city were made. No charter provisions to the contrary existed when the amended section 536 took effect in the areas which were later annexed to San Diego. It is now clearly established that when a telephone company has acquired a state franchise through its acceptance of the offer made by section 536, as amended in 1905, with respect to a certain territory, it has a vested right which may not be interfered with by any local authority. City of Beverly Hills v. Los Angeles, 175 Cal. 311, 165 P. 924; County of Los Angeles v. Southern California Telephone Co., 32 Cal.2d 378, 196 P.2d 773. This right would not be lost by subsequently acting, for a time, in compliance with a franchise issued by the city. City of Oakland v. Great Western Power Co., 186 Cal. 570, 200 P. 395. It follows that this portion of the judgment must be sustained.

For the reasons given, the judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

DODGE v. SAN DIEGO ELECTRIC RY. CO. et al.

Civ. 3913.

District Court of Appeal, Fourth District, California.
July 8, 1949.

Rehearing Denied Aug. 4, 1949.

Hearing Denied Sept. 1, 1949.

1. Trial 🔑260(1)

Instructions need not be given in particular language requested, but it is sufficient if subject matter is properly covered and law applicable to case is fairly and fully given.

2. Trial 🔑240, 242

Proposed instructions which are argumentative and misleading should not be given.

3. Trial 🔑244(2)

Instructions should not draw jury's attention to particular facts.

4. Trial 🔑244(1)

An instruction that unduly overemphasizes issues, theories or defenses either by repetition or by singling them out or by making them unduly prominent should not be given although instruction may be a legal proposition.

5. Trial 🔑253(7)

Where instruction directs verdict for plaintiff if jury finds certain facts to be true, it must embrace all things necessary to show legal liability on defendant's part to warrant conclusion that plaintiff is entitled to verdict.

6. Trial 🔑240

Repetitious reference, in instructions, that under circumstances related the jury "must find in favor of plaintiff" or "in favor of defendant" is improper, under theory that it amounts to argument rather than fair discussion of law.

7. Trial 🔑260(2)

If trial judge, by instructions given, fairly and fully inform jury concerning law applicable to issues before it, plaintiff could not be heard to say on appeal that trial court erred in failing to give his proffered instructions.

8. Trial 🔑228(3)

Instruction which told jury in negative, rather than a positive, manner the degree of care which carrier owed to passenger was not objectionable. Civ.Code, § 2100.

9. Carriers 🔑321(21)
Trial 🔑296(10)

Instruction that general human experience justified inference that if person did not see that which was in plain sight, or that he listened, but did not hear that which could have been heard in exercise of ordinary care, it followed that either there was an irreconcilable conflict in such evidence or person was negligently inattentive, had no application to action for injury sustained by bus passenger, but giving of such instruction was not prejudicial error in view of various instructions given, as a whole, defining degree of care required of common carrier to passengers for hire. Civ.Code, § 2100.

10. Carriers 🔑321(21)

Plaintiff's proffered instruction that happening of accident as described created inference that accident arose from failure or neglect on part of defendant bus company to use highest or utmost care for safety of its passengers, and that burden was shifted to defendant to rebut such inference by proving that it had exercised utmost care and that there had been no negligence "whatsoever" on its part, was properly refused as failing to state correct proposition of law. Civ.Code, § 2100.

11. Carriers 🔑316(1)

The doctrine of res ipsa loquitur in personal injury action by passenger against bus company does not shift burden of proof, but burden always remains with passenger. Civ.Code, § 2100.

12. Trial 🔑296(3)

In action by passenger against bus company for injuries allegedly sustained when bus made sudden stop, where jury was properly instructed that plaintiff was passenger, and that as carrier defendants were "required by law to use the utmost care and diligence for the safe carriage" of plaintiff, no prejudice resulted to plaintiff from use of phrases "care required by law" and "due care" in describing care which defendants were required to exercise. Civ.Code, § 2100.

13. Carriers ⚷321(9)

In action by passenger against bus company for injuries allegedly sustained by passenger when bus made sudden stop, instruction as to duty of bus driver when confronted with emergency, as given, was proper statement of law. Civ.Code, § 2100.

14. Appeal and error ⚷928(1)

Where plaintiff offered no proof in trial court to support his contention on appeal that instruction in language of statute defining a "through highway" and instruction defining right of way rule under statute were not authorized because evidence failed to show that boulevard at which accident occurred was a "through boulevard" as thus defined, it would be presumed on appeal that "stop signs" were erected as provided by law and that boulevard was such a through highway. Vehicle Code, §§ 82.5, 552.

15. Carriers ⚷318(4)

Evidence supported jury's finding that bus driver, in making sudden stop which allegedly injured passenger, was compelled to do so in order to avoid collision with automobile which entered intersection without stopping at stop sign or slowing down to any degree, and that bus driver was not guilty of any negligence which would render bus company liable for passenger's injuries. Civ.Code, § 2100; Vehicle Code, §§ 82.5, 552.

16. Trial ⚷296(1)

Proof that isolated passages in one single instruction might have been amenable to criticism failed to establish prejudicial error where instructions, when considered in their entirety, stated law of case fairly and clearly and correct rule of law was so specifically stated and restated to jury that any claimed error played no part in jury's deliberation.

17. Costs ⚷3

The right to recover costs is entirely statutory, and the measure of the statute is the measure of the right.

18. Costs ⚷184(1)

Where plaintiff in personal injury action refused to submit to medical examination, and trial court upon defendants' motion appointed two medical experts to make such examination, trial court, in its discretion, was authorized under statute to fix reasonable compensation for services rendered for such examination, and to apportion the costs and charges to the several parties, and was authorized to tax such amount as costs. Code Civ.Proc. § 1871.

◆

Appeal from Superior Court, San Diego County; Robert B. Burch, Judge.

Action by Herbert N. Dodge against San Diego Electric Railway Company and another to recover for injuries allegedly sustained by plaintiff while riding as a passenger on bus belonging to named defendant. From judgment for defendants and from order retaxing costs on a settled statement in lieu of a clerk's and reporter's transcript, the plaintiff appeals.

Affirmed.

Vernon F. Bennett, San Diego, for appellant.

Huntington P. Bledsoe, F. Morton Cameron, San Diego, for respondents.

GRIFFIN, Justice.

Plaintiff brought this action to recover damages arising out of an accident wherein he was injured while riding as a passenger on a bus belonging to defendant corporation and operated by defendant E'Golf, an employee. La Mesa Boulevard, in the City of La Mesa, is a through boulevard running east and west. Palm Avenue runs north and south. Boulevard stop signs were erected on it as one approaches the intersecting corner. While proceeding westerly on La Mesa Boulevard the bus stopped at the northeast corner of the intersection. Plaintiff trailed nine other passengers in entering the bus, and was wending his way to a rear seat when it started up. When it reached the center of Palm Avenue, the operator of the bus, according to his testimony, observed an automobile traveling north on Palm Avenue. It was about to enter the intersection without stopping at the stop sign or slowing down to any degree. In order to avoid a serious collision, which then appeared unavoidable, he forcibly applied his brakes to make an emergency stop and was successful, by a matter of inches, in avoiding a collision with the automobile so passing the pathway of the bus. Plaintiff, who was still standing, lost his balance or was thrown to the floor and was injured.

Plaintiff alleged in his complaint that defendants so carelessly, recklessly and negligently drove and operated and violently jerked the bus that plaintiff was thrown down with great force and violence and was permanently injured. He sought damages against both defendants. They answered, denied generally the allegations of the complaint, and as a separate defense pleaded contributory negligence of the plaintiff and also that the accident was not caused by reason of lack of any care on the part of any of the defendants, but was unavoidable, under the circumstances related, and that the operator of the automobile, in failing to make the boulevard stop was the sole and proximate cause of the accident and of plaintiff's injuries.

The trial court held the evidence of contributory negligence insufficient and took from the jury any such claim and refused any instructions based thereon.

The jury returned a verdict for defendants. Plaintiff appeals from the judgment and from the order retaxing costs on a settled statement in lieu of a clerk's and reporter's transcript. However, the so-called settled statement contains two volumes of transcript, which contain most all of the testimony taken at the trial, in addition to the instructions offered, given, and refused.

[1–7] It is plaintiff's principal argument that the trial court should have granted his motion for new trial based upon the trial court's refusal to give all of the instructions proposed by him or on the grounds that the instructions as given were erroneous. Plaintiff offered about 26 instructions which covered his version of the evidence. They were most favorable to his theory of the case. One general instruction (No. 11) contained about 1700 words. It minutely detailed plaintiff's interpretation of the issues presented by the complaint and answer. The subject matter contained within this general instruction was sufficiently covered in a general instruction given by the trial court. Many of the instructions offered by the plaintiff and refused by the trial court contained one or two statements, either in the body or at the conclusion of each, that defendants, under the circumstances related, "were required at all times, in starting, operating and stopping said bus, to use and to exercise the utmost and highest degree of care and diligence that very cautious persons would use", and if defendants failed "even in the slightest" to use such care they were negligent and if such negligence was the proximate cause of the injury their verdict "must be in favor of plaintiff". The refused instructions were in the nature of formula instructions, each purporting to set forth the circumstances under which the jury would have been required to return a verdict in favor of the plaintiff. They were repetitious in substance and unduly emphasized plaintiff's theory of the case and stated that under those circumstances a verdict "must be returned in favor of plaintiff". The degree of care required by law of a common carrier was repeatedly stated to be the "utmost" and "the highest" degree of care and diligence of "a very cautious person". Section 2100 of the Civil Code declares "A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill." It would be a useless consumption of space and energy to fully set forth all of the 26 instructions offered and to carefully analyze them. Some contain erroneous statements of substantive law. Others were not necessarily applicable, or were sufficiently covered by other instructions. Recognizing the task presented in analyzing the 104 instructions offered by both plaintiff and defendants and the confusion that might exist in the minds of the jurors by giving the many instructions requested by both parties, the trial judge refused all but one of these proffered instructions and proceeded to give his own instructions on the subject matter contained therein. The instructions as given, generally speaking, were taken from Book of Approved Jury Instructions (B.A.J.I.). The use of these forms has been commended by reviewing courts. Temple v. De Mirjian, 51 Cal.App. 2d 559, 566, 125 P.2d 544; Reed v. Stroh, 54 Cal.App.2d 183, 188, 128 P.2d 829; and Wilkerson v. Brown, 84 Cal.App.2d 401, 190 P.2d 958. There is abundant authority to the effect that it is not necessary for the court to give instructions in the particular language requested. If the subject-matter is properly covered and the law applicable to the case is fairly and fully given, that is sufficient. Folger v. Richfield Oil Corp., 80 Cal.App.2d 655, 182 P.2d 337; 24 Cal.Jur. 806, sec. 79. Proposed instructions which are argumentative and misleading should not be given. Tower v. Humboldt Transit Co., 176 Cal. 602, 169 P. 227. Instructions should not draw the jury's attention to particular facts. It is error to give and proper to refuse an instruction that unduly overemphasizes issues, theories or defenses either by repetition or by singling them out or making them unduly prominent although the instruction may be a legal proposition. Chutuk v. Southern Counties Gas Co., 21 Cal.2d 372, 132 P.2d 193; McNally v. Casner, 128 Cal.App. 680, 18 P.2d 94; Robertsen v. Brown, 37 Cal. App.2d 189, 99 P.2d 288. When an instruction directs a verdict for the plaintiff if the jury finds certain facts to be true, it must embrace all things necessary to show a legal liability on the part of the defendant to warrant the conclusion that the plaintiff is entitled to a verdict. Rush v. Lagomarsino, 196 Cal. 308, 237 P. 1066; Ebrite v. Crawford, 215 Cal. 724, 12 P.2d 937; Tice v. Pacific Electric Railway Co., 36 Cal.App.2d 66, 96 P.2d 1022, 97 P.2d 844. Repetitious reference, in the instructions, that under the circumstances related the jury "must find in favor of plaintiff" or "in favor of defendant" has been condemned. Taha v. Finegold, 81 Cal.App.2d 536, 184 P.2d 533. The giving of such formula instructions has been criticized under the theory that they frequently amount to an argument rather than a fair discussion of the law. Elsey v. Domecq, 114 Cal. App. 42, 299 P. 794; Douglas v. Southern Pacific Co., 203 Cal. 390, 393, 264 P. 237. The court then gave 37 instructions which, in general, covered the same subject matter as those proffered by the plaintiff to which plaintiff takes exception individually and collectively, and in minute detail criticizes them. Time and space preclude a complete statement of the instructions as given, the objections thereto, and an analysis of the reasons for the conclusions we have reached. If the trial judge, by the instructions given, did fairly and fully inform the jury concerning the law applicable to the issues before it, the plaintiff may not be heard to say that the court erred in failing to give his proffered instructions. Tice v. Pacific Electric Railway Co., supra.

Suffice to say, the court instructed the jury that the defendant company was a common carrier and as such acted only through its officers and employees and the actions and omissions of such employees, done under the scope of its authority are, in contemplation of law, the acts and admissions respectively of the corporation whose agents they are; that the defendant E'Golf was such an agent and that his conduct should be deemed by the jury to have been the conduct of the corporation; that Dodge was a passenger for hire; that the degree of care required was that specified in section 2100 of the Civil Code.

[8] An instruction in the exact language of 204(d), page 298 B.A.J.I. was given. The objection to it is that by this instruction the jury was told in a negative, rather than a positive, manner, the degree of care required of the defendant railway company. We see no merit to this objection.

The court then properly defined "proximate cause" and then added that the law does not recognize only "one proximate cause" of an injury but that the acts and omissions of two or more persons may work concurrently as the efficient cause, and in such a case, each of the participating acts of omission is regarded in law as a proximate cause.

[9] One of plaintiff's main objections centers around instruction No. 26. The first paragraph thereof is copied from instruction No. 140 B.A.J.I. page 169, in which it is stated: "General human experience justifies the inference" that if the person did not see that which was in plain sight, or that he listened, but did not hear that which he could have heard in the exercise of ordinary care, it follows that either there is an irreconcilable conflict in such evidence or the person was negligently inattentive. Plaintiff takes exception to the use of the words "ordinary care" as being inapplicable in the instant case, and claims that the instruction, as given, only required the bus driver to use "ordinary care" in looking. Then follows, in the same instruction, an exception, stating that circumstances may have prevented a person of "ordinary prudence", in the same situation, from reacting to his perceptions as he otherwise would have done.

The instruction, although proper in form when applied to an accident where ordinary negligence is involved, has no application to injuries to passengers arising out of an accident involving a bus carrying persons for reward. The rule as to the degree of care required in such case is clearly stated in section 2100 of the Civil Code.

However, the instruction, as given, was a general one and explanatory of what "inferences human experience" would justify. The evidence shows that the bus driver did see the operator of the other car approaching but, believing that he would obey the law and stop at the intersection, he proceeded onward into the intersection. The jury was elsewhere and repeatedly instructed that the defendant carrier was "required to exercise the utmost care and diligence for the safe carriage of the plaintiff" and that "although a person who himself was exercising the care required of him by law had a right to assume that others would obey the law, and could act upon such assumption, still "one is not justified in ignoring obvious danger although it is created by another's misconduct nor is he ever excused from exercising the care required of him by law", and that defendants were responsible to plaintiff even though the defendants' negligence was not the sole cause of the accident, "for the operator of said bus and the defendant railway corporation are liable * * * if any negligence or failure on their part, even though slight, to use the utmost and highest degree of care * * * for the safety of plaintiff * * * should concur or join with that of another, such as the driver of another vehicle, in producing such injury, damage or loss", and that the "fact that the bus driver had the right of way, if such be the fact, does not excuse him from the exercise of that degree of care which the law enjoins upon a common carrier for the safe transportation of its passengers."

In view of the various instructions given, as a whole, and those given by the court on the degree of care required of a common carrier to passengers for hire, it cannot be said that a different verdict might have ensued if the criticized instruction had not been given, or that the giving of such an instruction was prejudicial error. Blanton v. Curry, 20 Cal.2d 793, 129 P.2d 1; Stamper v. Schemmel, 69 Cal.App.2d 449, 159 P.2d 66; De Priest v. City of Glendale, 74 Cal.App.2d 464, 473, 169 P.2d 17; Douglas v. Southern Pacific Co., 203 Cal. 390, 396, 264 P. 237.

[10, 11] Objection is taken to the failure to give plaintiff's proposed instruction and the giving of an instruction by the court on the res ipsa loquitur rule. Plaintiff's proffered instruction was rightfully refused. By its terms it instructed the jury that the happening of the accident, as described, creates an inference that the accident arose from the failure or neglect on the part of the defendant to use the highest or utmost care for the safety of its passengers; that when such inference arises, the burden is shifted to defendants to rebut such inference, by proving that defendants did exercise the utmost care and that there has been no negligence "whatsoever" on their part. Such is not the law. The doctrine of res ipsa loquitur does not shift the burden of proof, but the burden always remains with the passenger.

Allbritton v. Interstate Transit Lines, 31 Cal.App.2d 149, 87 P.2d 704; Armstrong v. Pacific Greyhound Lines, 74 Cal.App.2d 367, 168 P.2d 457. The instruction, as given, is identical with No. 206-B, B.A.J.I., page 321, and sufficiently covers the subject matter. Karsey v. San Francisco, 130 Cal.App. 655, 20 P.2d 751.

[12] Many of the instructions given described the care necessary as "care required by law" and "due care". The jury had been properly instructed that the plaintiff was a passenger and that as a carrier, defendants were "required by law to use the utmost care and diligence for the safe carriage" of plaintiff. No prejudice resulted from the use of these phrases. 7 A.L.R. 135; Stadler v. Pacific Electric Ry. Co., 23 Cal.App. 571, 138 P. 943.

[13] Plaintiff complains of the court's instruction copied from 204-J, B.A.J.I. page 306, as to the duty of the driver of a bus when confronted with an emergency. The instruction, as given, is a proper statement of the law. Bovette v. Los Angeles Transit Lines, 78 Cal.App.2d 860, 179 P.2d 80; McKinnon v. United Railroads of San Francisco, 55 Cal.App. 96, 203 P. 122.

[14] The court gave an instruction in the language of section 82.5 of the Vehicle Code defining a "through highway", which requires that vehicles entering it from intersecting highways are required to stop, when stop signs are erected as provided by the Vehicle Code. The instruction also defines the right of way rule under section 552 of the Vehicle Code. Plaintiff argues that the evidence fails to show that La Mesa Boulevard was a "through boulevard" as thus defined. The evidence is without conflict that there were boulevard stop signs erected and standing even with the property line of La Mesa Boulevard on Palm Avenue, facing traffic about to enter and cross that boulevard from the north and south. The City Clerk of La Mesa testified, without objection, that that boulevard was a "main highway" and that under the city ordinance all automobiles approaching it must come to a stop before entering it. The ordinance was received in evidence. He then testified that in 1945, there were erected, by the proper authorities, stop signs as here indicated. Counsel for plaintiff raised no issue at the time of trial and did not contend there that the stop signs were not properly installed or that La Mesa Boulevard was not a through highway. He offered no proof to support his present contention. Throughout the case he referred to the "stop signs" on Palm Avenue, and to La Mesa Boulevard as a through highway. It must therefore be presumed on appeal that they were erected as provided by law and that La Mesa Boulevard was such a through highway. Lenning v. Chiolo, 63 Cal.App.2d 511, 517, 147 P.2d 410; Lindenbaum v. Barbour, 213 Cal. 277, 285, 2 P.2d 161; Bender v. Perry, 37 Cal.App.2d 206, 213, 99 P.2d 319.

[15] Plaintiff, in his brief, sets forth considerable testimony of various witnesses which he claims impeaches or destroys the value of the testimony of the defendant driver and establishes his negligence beyond question. No good purpose can be served by restating that testimony. It is sufficient to state that the verdict of the jury was supported by the evidence and that the evidence opposed to it only created a conflict therein and this conflict was decided adversely to plaintiff. Kazanjian v. Pacific Greyhound Lines, 92 Cal.App.2d 210, 206 P.2d 887, 889.

[16] We have reviewed, with much care and deliberation, the several instructions given and also those refused. We have read the entire transcript on appeal and we are convinced that the basic issues were fairly presented to the jury. A motion for a new trial was considered and denied by the trial court. While isolated passages in one single instruction may have been, in the respects indicated, amenable to criticism, the instructions, when considered in their entirety, state the law of the case fairly and clearly and the correct rule of law was, in this respect, so specifically stated and restated to the jury that we feel any claimed error, as indicated, played no part in the jury's deliberation, at least sufficient to believe that a different verdict would have otherwise been rendered. No prejudicial error in this respect resulted. Gladstone v. Fortier, 22 Cal.App.2d 1, 70 P.2d

255; Perbost v. San Marino Hall-School, 88 Cal.App.2d 796, 199 P.2d 701.

Plaintiff, upon motion and affidavit, moved to tax certain items of cost, i. e. "expert witness fees and examination" of medical experts appointed by the court. Defendant, in writing, moved the trial court for an order requiring plaintiff to submit to a physical examination before competent and skilled physicians and surgeons. After hearing, a signed order was made appointing two such medical experts to examine plaintiff "on behalf of said defendants" and that defendants' attorney furnish plaintiff's attorney copies of their reports and that costs and expenses "attending such examination" be paid in the first instance by defendants but may be included as an item of cost in this action. The trial court struck from the cost bill "expert witness fees" of the two doctors but, by order, allowed one of them, $45, and another, $30, as "examination fees". Plaintiff appealed from this portion of the order and cited such cases as Bathgate v. Irvine, 126 Cal. 135, 148, 58 P. 442, 77 Am.St.Rep. 158; Faulkner v. Hendy, 79 Cal. 265, 21 P. 754; and Crabtree v. Houghton, 191 Cal. 33, 214 P. 846; which cases were decided before section 1871 of the Code of Civil Procedure was added by Stats.1925, p. 305, which now provides for the calling, by the court, of expert witnesses "required by the court or any party to such action" to investigate and testify relative to the matters in issue, and provides for the fixing of the compensation of such experts for such services as may have been rendered, at such amount as to the judge may seem reasonable and for the apportionment of such charges as the judge may determine, and that such charges may be taxed as costs. This section has been held constitutional. Estate of Hastings, 206 Cal. 524, 274 P. 973. Its provisions are discussed in City of Los Angeles v. Clay, 126 Cal.App. 465, 14 P.2d 926.

[17] It is true that the right to recover costs is entirely statutory and "the measure of the statute is the measure of the right." Moss v. Underwriters' Report, Inc., 12 Cal. 2d 266, 274, 83 P.2d 503, 507.

[18] We conclude that where plaintiff refused to submit to medical examination, as here indicated, and the defendants moved the trial court to appoint two medical experts to make such examination and the medical experts were thus named and appointed by the court by written order, and plaintiff was ordered to submit to an examination, and where the trial court, in effect, found that such expert evidence would be required by the court or by any party to such action, the trial court, in its discretion was, under the provisions of sec. 1871 of the Code of Civil Procedure authorized to fix a reasonable compensation for the services rendered for such examination, and to apportion the costs and charges to the several parties, and is authorized to tax such amount as costs. Metropolitan Water District v. Adams, 23 Cal.2d 770, 147 P.2d 6; Puppo v. Larosa, 194 Cal. 721, 230 P. 440; Estrin v. Fromsky, 53 Cal.App.2d 253, 127 P.2d 603; City of Long Beach v. Anderson, 139 Cal.App. 130, 33 P.2d 875.

Since the charges allowed appear to be reasonable and no issue on that question is presented, the order allowing these items as costs should be sustained.

Judgment and order allowing costs affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

93 Cal.App.2d 23

FIRESTONE TIRE & RUBBER CO. v. INDUSTRIAL ACC. COMMISSION et al.

Civ. 17025.

District Court of Appeal, Second District,
Division 3, California.
July 18, 1949.

1. Workmen's compensation 🔑622

Acceleration or aggravation of a pre-existing disease is an injury in the occupation causing such acceleration, within workmen's compensation act.

2. Workmen's compensation 🔑556

A person suffering from a pre-existing disease who is disabled by an injury proximately arising out of his employment is entitled to compensation even though a normal man would not have been adversely affected by the event.

3. Workmen's compensation 🔑1546

Evidence supported finding that exertion by claimant, having pre-existing arteriosclerosis, in carrying tires during course of his employment was a direct precipitating cause of his coronary thrombosis or "heart attack", so as to constitute an injury arising out of and in course of employment within compensation act.

4. Workmen's compensation 🔑1724

The determination of question as to whether compensable injury is permanent or temporary is question of fact to be ascertained from evidence.

5. Workmen's compensation 🔑1642

Finding that injuries sustained by claimant during course of his employment consisting of "heart attack" brought on by exertion caused temporary rather than permanent partial disability would be set aside as not supported by evidence, where there was medical testimony that claimant's disability had become permanent and that claimant would never again be able to do other than light work, and such testimony was not controverted.

◆

Petition by Firestone Tire & Rubber Company of California, employer, to review an award of Industrial Accident Commission of State of California granting compensation to John Dewey Davidson, claimant.

Award annulled and case remanded.

Kearney, McCartney, Scott & Clopton, Los Angeles, for petitioner.

T. Groezinger, Robert Ball, San Francisco, for respondent Industrial Accident Commission.

Thelma S. Herzig, Los Angeles, for respondent John Dewey Davidson.

WOOD, Justice.

Petition for a writ of review whereby it is sought to annul an award of the Industrial Accident Commission.

The commission made findings that the applicant, Mr. Davidson, sustained injury arising out of and occurring in the course of his employment, consisting of "precipitation of coronary thrombosis"; that the injury caused temporary total disability "beginning February 11, 1948, to and including September 19, 1948," entitling the applicant to $30 per week during that time; that the injury also caused temporary partial disability "beginning September 20, 1948 to and including November 19, 1948 and thereafter," during which time work of a type which the applicant could perform was not available to him, entitling him to $30 per week during continuance of such temporary partial disability or until further order of the commission; that applicant was entitled to be reimbursed for the reasonable value of medical care and treatment, and was entitled to further medical care and treatment at the expense of defendants. An award was made in accordance with the findings.

Petitioner contends that the "heart attack" suffered by applicant did not arise out of his employment.

The applicant, who was 51 years of age at the time of the injury, was employed by defendant in February, 1944, and worked for defendant steadily thereafter until February 10, 1948, the date of the injury. For a period of approximately four months prior to February 10, 1948, applicant had been working as an attendant in defendant's "uncured" tire storage department. He performed his services in a long aisle which was about 8 feet wide, and in performing those services he went back and forth over a distance of approximately 70 feet. It was his duty, after tires came from the starching machine, to take them from the floor or a conveyor belt, and place them in metal racks, which racks were constructed one above the other along one side of the aisle—the highest racks being approximately 12 feet above the floor. In order to place tires on the higher racks it was necessary for him to lift the tires with a long pole. It was customary for the operator of the starching machine, after putting starch on tires, to throw them on the floor. Sometimes the tires would accumulate on the floor of the aisle in such quantities that applicant could not use a hand truck in moving them, and then he would carry the tires. It was also applicant's duty to select certain tires and throw them down chutes to operators of a bagging machine.

On the day the injury occurred, applicant commenced work about 6 a. m. There was evidence that at that time the aisle was full of tires and no tires had been carried from the "back" for the bagging machine; that the operators of the bagging machine were "hollering" for tires; that in order to get tires for them the applicant had to "wade" through tires on the floor, and carry tires from the rear of the aisle —4 at a time—2 in each hand. There was also evidence that on that morning all the racks were full except the top racks, and that applicant used a 7-foot pole to place tires up on those racks. Applicant testified that he would "pole" tires up on the racks, and then he would run and bring tires for the "baggers"; that he ran continuously; that while doing this work he felt as if his shoulders were pulling loose; and that between 8 and 9 a. m. he felt pain in his chest. About 10 a. m. applicant went to the foreman and complained of pains in his chest. Later that morning he again complained of pains in his chest, and he was sent to the company hospital. His pain became progressively worse, and he was removed to another hospital. Dr. Hunter, applicant's physician, diagnosed his condition as coronary thrombosis.

Dr. Engelberg, a specialist in internal medicine and cardiology, who had examined appellant and had made a cardiogram and taken a history of his case, testified (regarding the cause of the injury) that in his opinion the work applicant "was doing that morning [February 10, 1948] was a direct precipitating cause of his coronary thrombosis." Dr. Engelberg stated in a letter of September 20, 1948, as follows: "In my opinion severe physical effort such as he [applicant] was engaged in while at work on the morning of February 10, 1948 can be, and in this case was, the direct cause of his heart attack."

[1-3] There was evidence indicating that applicant had arteriosclerosis prior to the thrombosis. "Acceleration or aggravation of a pre-existing disease is an injury in the occupation causing such acceleration." Naughton v. Retirement Board of S. F., 43 Cal.App.2d 254, 260–61, 110 P.2d 714; Knock v. Industrial Acc. Com., 200 Cal. 456, 461, 253 P. 712; see also Lumbermen's Mut. Cas. Co. v. Ind. Acc. Com., 29 Cal.2d 492, 496, 175 P.2d 823. Petitioner asserts, in support of its argument that there was no industrial causation, that applicant had done hard work all his life and was a prematurely aged man; that there was nothing unusual about applicant's employment on the day of the injury, and that the work was within the ability of any normal man. In the case of Liberty Mut. Ins. Co. v. Ind. Acc. Com., 73 Cal.App.2d 555, 166 P.2d 908, the applicant, who had previously been employed at hard physical labor by another employer, suffered a heart attack while lifting a sack of peanuts which weighed about 120 pounds. The uncontradicted medical evidence therein showed that the applicant had a preexisting heart disease and that effort and exertion were contra-indicated for a man of his age and physical condition. In affirming an award in favor of the applicant in that case, the court stated 73 Cal.App.2d at page 559, 166 P.2d at page 911; "A person suffering from a pre-existing disease who is disabled by an injury proximately arising out of the employment is entitled to compensation even though a normal man would not have been adversely affected by the event. * * * It is obvious that whether

the employment proximately precipitated the collapse of a pre-existing diseased heart and proximately caused it to collapse before normal progressive developments would have resulted in the collapse is a question of fact." The evidence in the present case supports the finding that applicant's injury arose out of and occurred in the course of his employment.

[4, 5] Petitioner also contends, in effect, that the commission should have found that the injury caused permanent partial disability instead of finding that it caused temporary partial disability.

In support of its contention, that the disability is permanent, petitioner relies on the following testimony given by Dr. Engelberg at a hearing on September 23, 1948:

"Q. Do you anticipate any change for the better or worse? A. No. You see, he had his attack in February and now it is September. That is seven months. That is usually time enough for the completion of the improvement that is going to occur so I do not anticipate any further improvement in his condition. I don't anticipate he is going to get worse either unless he gets any more heart attacks.

"Q. In other words, you think his condition now is stationary and permanent? A. Except for the eventuality of any further attacks, yes. * * *

"Q. Your previous answer would indicate you couldn't state any opinion as to how long his condition has been stationary and permanent. A. No, I gather it has been about like this for the past month or two because whereas we keep coronaries—try to keep them from going back to work approximately for about three months, actually, the really firm healing of the heart takes at least six months. There is lots of evidence to show that."

It appears from that testimony that applicant's disability had become permanent at some time prior to the hearing on September 23, 1946. The determination of the question as to whether an injury is permanent is a question of fact to be ascertained from the evidence. Wold v. Industrial Acc. Com., 42 Cal.App.2d 512, 513, 109 P.2d 398. There was no evidence, medical or otherwise, which controverted the testimony of Dr. Engelberg that applicant's disability had become permanent. Counsel for applicant asserts that, at a hearing on November 19, 1948, the applicant testified he had improved. The transcript of the testimony at that hearing does not disclose testimony to that effect. Counsel apparently has reference to a statement in a letter written by Dr. Engelberg on September 20, 1948, wherein he reported that while examining applicant on September 9, 1948, applicant stated to him that he had improved somewhat in the past few months. In addition to the above quoted testimony of Dr. Engelberg that applicant's disability became permanent, there were written statements by applicant's attending physician and by Dr. Engelberg and another physician to the effect that applicant was able to do light work but he would never again be able to do other than light work. The finding that the injury caused temporary partial disability beginning September 20, 1948, is not supported by the evidence. In the case of Industrial Indem. Exch. v. Ind. Acc. Com., 90 Cal.App.2d 99, 202 P.2d 850, applicant sustained a heart injury when a bandsaw broke and a small piece of steel lodged in his heart. The commission made an award therein for temporary total disability. There was evidence in that case that the applicant was incapable of performing any work, and that there was no prospect that his condition would improve, but his general condition might be improved by certain medical treatment. In annulling the award in that case the court stated, 202 P.2d at page 851: "His disability is now permanent though his physical condition may be subject to change for the worse or to slight periodic improvement."

The award is annulled and the case remanded to respondent commission for further proceedings.

SHINN, P. J., and VALLÉE, J., concur.

92 Cal.App.2d 730

BRANT et al. v. BIGLER.

Civ. 17011.

District Court of Appeal, Second District, Division 1, California.

July 7, 1949.

1. Vendor and purchaser ⚷58, 76

In a contract for sale of realty, delivery of deed and payment of purchase price are dependent and concurrent conditions, and neither party can place the other in default unless he is able to perform or tender performance.

2. Contracts ⚷318

In interpretation of ordinary contracts and instruments transferring property, construction which avoids forfeiture must be made if possible.

3. Vendor and purchaser ⚷116, 339

Where agreement for sale of realty required escrow deposit of balance of purchase price within stated time, and allowed vendor to retain initial deposit on breach, but required return if vendor failed to deposit deed, and escrow instructions permitted vendor to use escrow deposit if instruments were filed for record enabling procurement of title insurance showing title in purchaser, vendor was not entitled to use escrow deposit to obtain title from third party, and hence purchaser could cancel agreement and recover initial deposit without making escrow deposit, upon failure of vendor to tender title.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by Edmund Brant and Dolores Brant against Clark O. Bigler for a declaration that defendant had defaulted under an agreement to purchase realty, and for other relief. From an adverse judgment, plaintiffs appeal.

Judgment affirmed.

Alfred Beck, Los Angeles, Elsa Kievits, Santa Monica, for appellants.

Cecil L. Lacy, Ernest L. English, French & Indovina, Santa Monica, for respondent.

WHITE, Presiding Justice.

This is an appeal by plaintiffs from an adverse judgment in an action for declaratory relief wherein plaintiffs sought a declaration that defendant had defaulted under an agreement to purchase certain real estate from plaintiffs and that plaintiffs were entitled to recover and retain the sum of $1,000 paid by defendant and deposited in escrow pursuant to the agreement of sale. The judgment of the trial court was that plaintiffs take nothing and that the escrow holder return to defendant the $1,000 deposited by him.

On May 18, 1946, the parties entered into a written agreement for the sale of the real property involved by plaintiffs to defendant for the sum of $14,500. The agreement recited the receipt by plaintiffs of the sum of $1,000 to apply on the purchase price, and provided that the buyer would "deposit an additional $13,-500 and his necessary instruments in escrow with the Santa Monica Escrow Co. within 35 days." The agreement contained the further provision that: "The seller is to furnish at his expense in said escrow a Deed and a Policy of Title Insurance showing title condition as provided for above. In the event same is not furnished within a reasonable time, then buyer shall have the right to cancel this agreement and his deposit is to be returned."

With respect to default by the buyer, the agreement provided: "If buyer fails to deposit the money and his instruments and complete the purchase as provided herein, then the seller shall be relieved of any obligation hereunder, and may retain the deposit of buyer as consideration for accepting this agreement."

On May 20 the plaintiffs executed escrow instructions and delivered defendant's check for $1,000 to the escrow agent. A day or two later defendant signed "buyer's instructions" reading, in part: "I will hand you $14,500 ($1,000 having been deposited herewith) and any additional funds and instruments, required from me to enable you to comply with these instructions, which you are to use provided on or before

June 24, 1946, instruments have been filed for record entitling you to procure Standard Owner's or Joint Protection policy of title insurance, with title company liability for the amount of total consideration * * * showing title vested in Clark O. Bigler, a widower * * *."

The sellers' instructions, on the same printed form as defendant buyer's stated that sellers would hand the escrow agent "all instruments and money necessary for me to comply therewith, including a deed, * * * which you are authorized to deliver provided you hold in this escrow for the account of the parties executing said deed the money and instruments deliverable to *me* under these instructions. * * *." It was further directed by the sellers that "You are instructed to transfer the net proceeds of this sale to the Glendale Federal Savings and Loan Association * * * for credit to our account in their Escrow No. 814 wherein we are acquiring title to the above property. It is requested that you file concurrently with them."

As appears from the foregoing, and as is conceded to be the fact, the sellers were without title to the property, but proposed to acquire title through an escrow pending in Glendale Federal Savings and Loan Association and further proposed to use the purchase-money to be deposited by defendant in the Santa Monica escrow to consummate the transfer in the Glendale escrow. The plaintiffs could not deliver title unless and until defendant had deposited the full purchase price in the Santa Monica escrow, and then only through the device of simultaneous delivery of deeds and money in the two escrows.

On June 6, 1946, the Santa Monica escrow was amended to provide that defendant should deposit the sum of $9,100 instead of $13,500 as the balance of the purchase price, the difference of $5,400 being represented by an existing mortgage encumbrance on the property.

On June 26, 1946, defendant advised the Santa Monica escrow agent in writing that he was unable to complete the escrow and asked that it be cancelled and his $1,000 returned.

It appears that plaintiffs had made a written agreement to purchase the property from Mr. and Mrs. Reeves for $13,500 and had made a $500 deposit; the Reeves in April, 1946, had deposited a deed to plaintiffs in the Glendale escrow, under the terms of which plaintiffs were required to pay the purchase price into escrow on or before June 24, 1946. The plaintiffs having failed to place the required funds in the escrow, it was cancelled by the Reeves on June 28, 1946.

It is asserted by appellants that the trial court erred in the following particulars:

"1. Finding of Fact No. 4 to the effect that Santa Monica (Escrow Company) 'could not lawfully use the buyer's said funds until the plaintiffs were first vested with title to said real property' is not supported by the evidence and results from a misinterpretation of the contract between the parties and the escrow instructions given pursuant thereto.

"2. The findings and judgment place a construction upon the contract and escrow instructions which is not supported by but is contrary to the terms and provisions of those writings."

It is appellants' contention that defendant was not entitled to disaffirm the contract on the ground that when it was entered into plaintiffs did not have title; in fact, he never did disaffirm it on that ground; and that defendant having failed to deposit the purchase price in escrow, pursuant to the terms of the contract, plaintiffs are entitled to retain the $1,000 deposit as consideration for making the agreement.

We are in accord with the views of the trial judge as expressed in his "Memorandum Ruling" upon the rendition of judgment: "Defendant did not agree that the plaintiffs could use the money, nor did he agree it or any part of it could ever be transmitted out of escrow until he was vested with title. He had a right to stand on his own contract. The plaintiffs could have put the defendant in default on or prior to June 24, 1946, had they borrowed money or otherwise procured the grant deed from the Reeves and delivered it to the Santa Monica escrow. As they did not do so, they likewise defaulted on June 24. That being the situation they cannot predicate any cause of action against the defendant."

[1] In a contract for the sale of real estate the delivery of the deed and the payment of the purchase price are dependent and concurrent conditions. King v. Stanley, 32 Cal.2d 584, 590, 197 P.2d 321; Cates v. McNeil, 169 Cal. 697, 706, 147 P. 944; Whittier v. Gormley, 3 Cal.App. 489, 86 P. 726; Civ.Code, § 1657. Neither party to such a contract can place the other in default unless he is able to perform or tender performance. Downer v. Buehrle, 90 Cal. App.2d 719, 203 P.2d 795; McDorman v. Moody, 50 Cal.App.2d 136, 122 P.2d 639; Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 55 P. 713, 43 L.R.A. 199, 69 Am.St. Rep. 17. As stated in 55 Am.Jur. 930: "* * * To entitle a vendor to declare a forfeiture of the contract and retain a deposit or purchase money paid, there must have been an offer or ability on his part to perform dependent or concurrent stipulations * * * It has also been held that a vendor, who, at the time of contracting to sell land, has not perfected his title to it, cannot claim a forfeit deposited by the purchaser to secure performance on his part on the latter's repudiation of the contract before the time for performance arrives, unless he shows that he has perfected his title so as to be in a position to perform his own agreement."

It may be that appellants could have conveyed a good title had they been able to "use" funds deposited by respondent in the Santa Monica escrow for the purpose of consummating the Glendale escrow, but respondent never agreed that the funds to be deposited by him could be so used and respondent was not a party to the Glendale escrow. Appellants argue that the use of an escrow distinguishes this case from those which hold that a vendor must make a good tender in order to place the vendee in default. This contention cannot be upheld.

Under the contract, appellants could not put respondent in default without tendering performance. Under the escrow instructions the escrow holder could "use" the funds to be deposited only "provided on or before June 24, 1946, instruments have been filed for record." Appellants could not perform unless they "used" the funds in order to accomplish the very thing which was a condition precedent to their right to "use" the funds.

[2, 3] Concededly, the parties hereto were each attempting to realize a profit through purchase and immediate resale of the property without investing or risking any substantial sum, and also concededly, respondent was fully aware of the fact that appellants proposed to consummate the transaction through the transfer of the funds to the Glendale escrow and the simultaneous delivery and recording of instruments. Nevertheless, neither the contract nor the escrow instructions authorized the appellants to use the funds of respondent to acquire the title which they had agreed to convey. Undoubtedly, an agreement and instructions could have been drawn so as to express the intention that respondent's funds were to be so used, but this was not done. Further, assuming that a construction in accord with appellants' contentions would be reasonable, it is elementary that the construction which avoids a forfeiture should be favored. As stated in Ballard v. MacCallum, 15 Cal.2d 439, 444, 101 P.2d 692, 695: "We have two possible constructions, one of which leads to a forfeiture and the other avoids it. In such a case the policy and rule are settled, both in the interpretation of ordinary contracts and instruments transferring property, that the construction which avoids forfeiture must be made if it is at all possible. See Hawley v. Kafitz, 148 Cal. 393, 83 P. 248, 3 L.R.A.,N.S., 741, 113 Am.St.Rep. 282; Henck v. Lake Hemet Water Co., supra [9 Cal.2d 136, 69 P.2d 849]; Restatement, Property, sec. 45, comment i."

For the reasons stated, the judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

92 Cal.App.2d 824

MORENA v. MERCER et al.

Civ. 3929.

District Court of Appeal, Fourth District, California.

July 12, 1949.

Landlord and tenant 🔑180(4)

Where lessee of restaurant was wrongfully evicted by lessor, value of services rendered by lessee's wife as cook were deductible in determining net profits of business and damages.

◆

Appeal from a judgment of the Superior Court of Imperial County, Hon. Luray J. Mouser, Judge. Affirmed in part. Reversed in part.

Action for damages for wrongful eviction by Louis D. Morena against Sam L. Mercer and Bob Davis. From a judgment for plaintiff, defendant appeals.

Judgment affirmed in part; reversed in part.

George R. Kirk, El Centro, for appellant.

Whitelaw, Whitelaw & Yeager, El Centro, for respondent.

MUSSELL, Justice.

This is an action for damages for wrongful eviction. The defendant Bob Davis, owner of a cafe in Niland, California, on August 13, 1946, orally leased the premises to plaintiff on a week to week basis at an agreed weekly rental of $17.50. Plaintiff paid the required rental to and including the last payment made on November 13, 1946. On November 12, 1946, defendant notified plaintiff that he desired possession of the cafe on or before November 15, 1946. The refusal of plaintiff to vacate resulted in his eviction from the cafe by defendant who locked the doors and took possession of plaintiff's stock in trade. Plaintiff received no notice terminating the tenancy and on November 27, 1946, filed this action alleging damages in the sum of $154.50 for loss of food stuffs and other personal property taken by defendant, and further damages for loss of profits in the sum of $92.50 per week from November 15, 1946, to date of entry of judgment.

The trial court gave judgment for the special damage in the sum of $154.50, and $1775.14, loss of profits. From the latter amount a deduction of $700.00 was made for the earnings of plaintiff in other employment. A motion for a new trial was made and granted by the court for the purpose of receiving and considering evidence concerning the reasonable value of the services of plaintiff during the time he was operating the business.

Plaintiff and his wife operated the cafe. She did the cooking and he waited on tables, bought the supplies and performed the other necessary work in the management and conduct of the business. At the second trial evidence was introduced upon which the court found that the reasonable value of the services of plaintiff, together with the reasonable value of meals withdrawn from the business by plaintiff and his wife from November 15, 1946, to April 2, 1947, amounted to $1362.20. This amount was deducted from the $1775.14, which had been awarded for loss of profits, and an amended judgment was entered in favor of plaintiff for $154.50 for loss of goods and the further sum of $412.94 damages for loss of profits after deducting the value of plaintiff's services and the value of meals furnished plaintiff and his wife.

Defendant appeals from the amended judgment and argues that the trial court should have deducted the reasonable value of the services of plaintiff's wife as cook in determining the amount of net profit of the business. In order to ascertain the net profit, all sums expended in conducting the business are to be considered. McCready v. Bullis, 59 Cal.App. 286, 292, 210 P. 638. In Landon v. Hill, 136 Cal.App. 560, 29 P.2d 281, the court, in ascertaining the net profits of a bakery business operated principally by the plaintiff lessee through his own efforts, held that the value of plaintiff's labor formed no part of the lease, and that in order to determine the profits of the business done by plaintiff, the item of labor, whether performed by himself or others, must be taken into consideration. In the instant case the court properly deducted the reasonable value of plaintiff's services but should have also deducted the reasonable value of the services of his wife as cook. There was testimony that she worked many hours each week, and that a cook's wages were $1.25 an hour, or $10.00 to $12.00 for an eight hour shift.

Defendant contends that plaintiff was entitled to recover for loss of profits for one week only as the landlord could have terminated the lease by giving proper notice. However, it is not necessary to decide that question in view of what we have here said concerning the error in the computation of the net profits of the business.

The evidence supports the findings and judgment of the court as to the item of damage amounting to $154.50 and costs, and that portion of the judgment is affirmed. The portion of the judgment awarding $412.94, as found by the court for loss of profits, is reversed. Each party to pay his own costs on appeal.

BARNARD, P. J., and GRIFFIN, J., concur.

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92 Cal.App.2d 748

SHIPLEY v. CITY OF ARROYO GRANDE et al.

Civ. 16685.

District Court of Appeal, Second District, Division 2, California.

July 8, 1949.

1. Municipal corporations 🔑755(1)

Under Public Liability Act, a city is liable for injuries to persons or property while lawfully on its streets only if such injuries result from dangerous or defective condition of such streets. St.1923, p. 675, § 1 et seq.

2. Automobiles 🔑301(3)

Allegation that at point where automobile went onto sidewalk curb did not exceed two inches in height did not show a dangerous or defective condition of street which would render city liable for injuries sustained by pedestrian when struck by automobile. St.1923, p. 675, § 1 et seq.

3. Evidence 🔑14

That an automobile in absence of driver's negligence may be parked against a two-inch curb or even in front of a painted line is a fact of common knowledge.

4. Automobiles 🔑187

Where negligent operator of an automobile propels it against a person lawfully on city street, city is not liable for resulting injury to such person. St.1923 p. 675, § 1 et seq.

5. Automobiles 🔑259

A city is not liable for injuries caused by motor vehicles merely because it may appear that its streets and curbs, which are in no sense dangerous for careful use, could possibly be made secure against peril by a more elaborate construction or by installing one of a similar type. St.1923, p. 675, § 1 et seq.

6. Automobiles 🔑187

Liability of a city may not be created by conduct of a motorist who disregards the law or negligently operates his automobile to the detriment of others. St.1923, p. 675, § 1 et seq.

7. Automobiles 🔑252

That ancient city ordinance, nullified by general statute, permitted motor vehicles to be parked diagonally to curb did not render city liable for injury to pedestrian struck by automobile while on sidewalk of city, since to repeal or enforce an ordinance is an incident of governmental power, and failure to do either does not impose liability on the city. Vehicle Code, § 588.

8. Automobiles 🔑12

The statute prohibiting, with certain exceptions, angle parking on state highways was enacted for the protection and benefit of motorists traveling along state highways and not to benefit pedestrians on streets other than state highways. Vehicle Code, § 588.

9. Automobiles ⚿258

Pedestrian struck by automobile while on sidewalk of city could not recover against city for resulting injury by merely showing that she was injured by reason of city's failure to erase in conformance with statute diagonal lines marking street for angle parking, since she could not show that statute prohibiting angle parking on state highways was intended for protection of a class to which she belonged. Vehicle Code, § 588.

◆

Appeal from Superior Court, San Luis Obispo County; Ray B. Lyon, Judge.

Action by Mrs. Addie Shipley also known as Mrs. Calim Shipley, against the City of Arroyo Grande and another, to recover for injuries sustained by plaintiff when struck by an automobile while walking on a sidewalk in defendant city. Named defendant's demurrer to amended complaint was sustained without leave to amend, and from judgment dismissing action as to named defendant, plaintiff appeals.

Judgment affirmed.

Buck & O'Reilly, by John F. Runner, San Luis Obispo, for appellant.

Kaetzel and Kaetzel by Jack P. Kaetzel, and Richard F. Harris, San Luis Obispo, for respondent.

MOORE, Presiding Justice.

Plaintiff sued for damages for personal injuries sustained as a result of being struck by an automobile owned and operated by defendant, Opal Renfro. The latter having apparently lost control, her machine proceeded over and across a curb and onto the sidewalk, crushing plaintiff, a pedestrian, against an adjacent building.

The city's demurrer to the amended complaint was sustained without leave to amend. From the ensuing judgment of dismissal comes this appeal.

The sole question for decision is whether a valid cause of action was, or could be, stated against the city with respect to a "dangerous or defective condition" of a public street under the provisions of the Public Liability Act of 1923. Stats.1923, p. 675.

[1] The liability of a city for injuries to persons or property while lawfully on its public streets arises only in case such injuries result from the dangerous or defective condition of such streets. Statutes, 1923, supra; Hanson v. City of Los Angeles, 63 Cal.App.2d 426, 428, 147 P.2d 109; Miller v. City of Palo Alto, 208 Cal. 74, 75, 280 P. 108.

[2] While the amended complaint alleges that "by reason of the * * * dangerous and defective condition of said street * * * plaintiff was struck", the pleading proceeds to recite that the driver's "car did fail to halt at the curb of the sidewalk * * * but continued on and over said curb and sidewalk to strike * * * the plaintiff." In her brief appellant says that "here there was at least a nominal curb to delineate the sidewalk from the street." Not even a slope of the terrain is alleged whereby a moving vehicle might accidentally proceed onto the sidewalk. The only attempt to allege a defective condition is that, at the point where the automobile went upon the sidewalk "the curb separating that portion of Branch street used for vehicular traffic from the portion * * * used for pedestrian traffic * * * did not at any time herein mentioned exceed two inches in height." The pleading is therefore devoid of a statement of facts from which it may reasonably be inferred that a "dangerous or defective condition" existed on respondent's street.

[3–5] It is a fact of universal knowledge that an automobile in the absence of its driver's negligence may be parked against a two-inch curb or even in front of a painted line. That a motorist would drive upon a low curb does not render it defective or dangerous. It is only the carelessly driven car that creates the peril. Therefore, no action against a city may be stated when a negligent operator of an automobile propels it against a person lawfully on the street. The statute of 1923, supra, fixing liability upon municipalities for injuries arising from the defective condition of a street meant just that and no more. In Campbell v. City of Santa Monica, 51 Cal. App.2d 626, 627, 125 P.2d 561, the plaintiff was struck by an automobile on the Promenade, a sidewalk created for pedestrians. Where no signs or barriers inhibited motor cars from using it or to warn pedestrians of the presence of vehicles, this court held that even though a city prohibit a negligent use of its sidewalks its failure to enforce its prohibitory ordinance imposes no liability. The Public Liability Act was not ordained for the purpose of protecting those who go upon city streets but only those who suffer by reason of a "dangerous or defective" condition there. If young Campbell could not recover where the city authorized some vehicles to drive on a sidewalk why should appellant herein be entitled to recover where no motorist was authorized to go upon a sidewalk? Certainly, her right of recovery could not arise from the presence of a two-inch curb when the Santa Monica sidewalk had no curb or barrier at all. A city is not liable for injuries caused by motor vehicles merely because it may appear that its streets and curbs which are in no sense dangerous for careful use could possibly be made secure against peril by a more elaborate construction or by installing one of a simpler type. Belcher v. City and County of San Francisco, 69 Cal.App.2d 457, 463, 158 P.2d 996. In Storen v. City of Chicago, 373 Ill. 530, 27 N.E.2d 53, the city was not liable where an automobile ran onto a sidewalk at a point where the curb had been cut away. It was not a defective construction nor was it in any way dangerous for the purpose to be served.

[6] In the instant case the harm was caused not by the condition of the curb but by the negligent operation of a motor vehicle by a third party. Liability of a city may not be created by the conduct of a motorist who disregards the law or negligently operates his car to the detriment of others. Therefore, since liability cannot be predicated upon the facts established by her pleading, an amendment thereof would be idle.

Bauman v. City and County of San Francisco, 42 Cal.App.2d 144, 108 P.2d 989, relied upon by appellant is distinguishable in that the dangerous, defective condition there considered was due to the improper use or method of operation of a playground by the city. There the proximity of the small children's sandbox to the baseball diamond created a high risk of danger arising out of the normal use of the facilities provided. In the instant case the normal use by motorists of the street provided by the city created no peril for pedestrians. Brooks v. City of Monterey, 106 Cal.App. 649, 290 P. 540, and Rafferty v. City of Marysville, 207 Cal. 657, 280 P. 118, are also distinguishable on their facts. In each an obviously defective, dangerous, or deceptive condition was permitted to exist. Such is not true in the instant case.

[7] Liability on the part of respondent was not created by the fact that an ancient ordinance permitted motor vehicles to be parked diagonally to the curbs. Such ordinance was nullified in 1935 by a general statute. Vehicle Code, sec. 588. However, to repeal or to enforce an ordinance is an incident of governmental power. A failure to do either does not give rise to liability on the part of the city. Campbell v. City of Santa Monica, supra, 51 Cal.App.2d 627, 125 P.2d 561.

[8, 9] Furthermore, section 588 was not adopted as an inhibition against angle parking or to benefit pedestrians on the streets other than state highways. It was enacted for the protection and benefit of motorists traveling along state highways. Therefore, appellant can not recover by merely showing that she was injured by reason of respondent's failure to erase the diagonal lines on its street in conformance with section 588. But to entitle her to recover against respondent it is necessary for her to show that section 588 was included in the Vehicle Code for the protection of a class to which she belonged. This she cannot do. Satterlee v. Orange Glenn School District, 29 Cal.2d 581, 590, 177 P.2d 279; Batemen v. Doughnut Corporation of America, 63 Cal.App.2d 711, 717, 147 P.2d 404; Figone v. Guisti, 43 Cal.App. 606, 609, 185 P. 694; Rest. Torts, p. 755, section 286, comment e. It follows that she cannot allege a cause of action against respondent.

The judgment is affirmed.

McCOMB and WILSON, JJ., concur.

93 Cal.App.2d 35

In re JAMESON'S ESTATE.

HOME v. BESSIRE et al.

Civ. 16994.

District Court of Appeal, Second District, Division 1, California.

July 19, 1949.

Rehearing Denied Aug. 4, 1949.

Hearing Denied Sept. 15, 1949.

1. Wills ⚷630(2)

Generally, where legacy or device is given to a person to be paid at a future time, it vests immediately, but when it is not given until a future time, it is contingent and does not vest until that time occurs.

2. Wills ⚷630(8)

Under will devising life estate in realty and residuary estate to husband, if he survived distribution of estate, devises to husband were made upon the condition precedent that he survive distribution of estate and neither his life estate nor interest in residue could vest until such condition was fulfilled, and in the interim the title to the realty and to residue vested in alternative beneficiaries subject to divestiture upon fulfillment of the condition. Probate Code, § 142.

3. Executors and administrators ⚷130(1), 131

Executor or administrator is entitled to possession of all property of decedent including real estate and all income, rents, issues and profits, during pendency of administration, to the end that rents and profits may be applied to payment of debts and charges. Probate Code, §§ 581, 920.

4. Executors and administrators ⚷1

The objects of probate proceedings are to administer and settle estates of deceased persons, to gather and preserve the property, pay debts and distribute balance to persons entitled thereto.

5. Wills ⚷736

Under will devising life estate in real property and residuary estate to husband upon condition that he survive distribution of estate, income from realty was available for expenses of administration, and a finding that husband was entitled to receive such income from date of death of testatrix was erroneous. Probate Code, §§ 581, 920, 950, 951.

6. Wills ⚷736

Where income from realty in hands of administrator was sufficient to cover expenses of administration, and was available for that purpose, requiring remaindermen to contribute thereto was improper. Probate Code, §§ 581, 920, 950, 951.

7. Husband and wife ⚷264

Declaration in deed or other instrument that spouses are to take as joint tenants, raises presumption that legal title is in the parties in accordance with such language and destroys statutory presumption that the property is community.

8. Husband and wife ⚷14(3), 249

Conveyance to spouses as joint tenants creates a joint tenancy in which the interests of the spouses are separate property.

9. Wills ⚷433

Under will devising life estate in realty, and residuary estate to husband, remaindermen were entitled to prove by any means available that husband and wife intended to convert their joint tenancy holdings into community property, and a declaration by husband in companion will, with respect to community character of property, would be admissible in evidence against husband as a declaration against interest. Code Civ.Proc. §§ 738, 1870, subd. 2.

10. Wills ⚷205, 433

Under statute, a will whether admitted to probate, or not, is admissible in evidence in an action to determine adverse claims to real or personal property, when validity or interpretation of a gift, devise, bequest or trust under such will is involved. Code Civ.Proc. § 738.

11. Witnesses ⚷192

Where remaindermen under will of wife contended that husband and wife had intended to convert joint tenancy holdings into community property, companion will of husband containing declaration with respect to community character of the property, was not inadmissible against husband as a privileged communication. Code Civ. Proc. §§ 738, 1870, subd. 2.

12. Executors and administrators ⚿298

Partial distribution of life estate in realty to husband could be made without exaction of a bond, statutory conditions having been met. Probate Code, § 1001.

◆

Appeal from Superior Court, Los Angeles County; W. A. Deans, Judge.

Proceeding in the matter of the estate of Grace Bessire Jameson, deceased, wherein John D. Home, administrator with the will annexed, filed his first account current and petition for allowance of fees, contested by Dean Burton Bessire and William Kent Bessire. From an order approving report of the administrator concerning the status of certain properties, ordering partial distribution of a life estate, and instructing the administrator concerning payment of a proportionate share of costs by remaindermen, the contestants appeal.

Order affirmed in so far as it decrees distribution of a life estate, and in other respects reversed.

William A. Monten and John A. Ellis, Los Angeles, for appellants.

Keane & Wickhem, Los Angeles, for respondent.

DRAPEAU, Justice.

This is an appeal by remaindermen from an order approving report of administrator with the will annexed concerning the status of certain properties, determining that they were held in joint tenancy and therefore not assets of the instant estate; ordering partial distribution of a life estate in real property to the life tenant, and instructing said administrator concerning the payment by the remaindermen of their proportionate share of costs of administration.

Grace Bessire Jameson died on July 10, 1946, leaving a will which was admitted to probate on October 7, 1946, by the terms of which she devised to her husband, James Marion Jameson, a life estate in a parcel of real property which she declared was her separate property, and in the event of his death, or if he did not survive distribution of her estate, said real property to go in equal shares to her nephews, appellants here.

Decedent declared that with the exception of such parcel of realty "all other property that I own at the date hereof is community property owned by myself and my husband; it is my intention to hereby dispose of all property that I am entitled to dispose of by law." All the rest and residue of her estate decedent devised and bequeathed to her husband "if he survives distribution of my estate"; otherwise it should go to her stepsons.

On March 24, 1947, petitioner was appointed administrator with the will annexed, and on April 22, 1948, he filed his first account current and petition for allowance of fees, to which one of the exceptions made thereto was that said administrator had not fully accounted for all the assets of the estate. Thereafter the court settled said account and found that said administrator did not have in his possession or under his control any property belonging to the estate other than as set forth in his account, the inventory and appraisement and the supplemental inventory and appraisement, and directed that "the administrator should investigate and determine whether or not there are other assets of the estate which should be brought into the estate."

Upon completion of his investigation, petitioner reported that "there were and are no other assets of this deceased which should be brought into the estate." Also, that he found "no evidence whatever of any agreement between deceased and James Marion Jameson that the foregoing property held in joint tenancy was to be considered, or was in fact, community property of said parties."

Based upon such report and the objections and demurrer of appellants thereto, the court made the order from which this appeal is taken, to-wit:

A. Settling the report of the administrator C. T. A.;

B. Decreeing that there are no other assets belonging to deceased whatsoever which have not been included by such administrator in the inventory and appraisement;

C. That any cash, bank accounts, automobile, trailer, stock, burial funds, or insurance jointly held by deceased and surviving husband "was and is joint tenancy property and no part of the estate of said deceased."

D. "That there are sufficient funds available in said estate, from the income from the real property to which James Marion Jameson is entitled, to pay his proportionate share or charges, all fees and expenses; * * * that James Marion Jameson is entitled to partial distribution of his life estate in the real property as prayed for"; and ordered such distribution.

The court further ordered that the administrator C. T. A. compute the amount necessary to close and settle the estate "including all charges, expenses of administration, statutory and extraordinary Administrator C. T. A. and attorney fees"; prorate the same between remaindermen and life tenant "after first exhausting the small amount of residue in said estate"; and "There being no funds available in said estate with which to pay the remaindermen's pro rata share of the total amount necessary to close said estate"; that administrator make demand for payment by remaindermen within thirty days, and for failure to pay to sell remaindermen's interest in order to raise funds to pay such share, any excess to be distributed to said remaindermen.

Appellants urge that the court erred in decreeing that the income from the real property from the date of death of testatrix belongs to the life tenant, and assert that "if the gift of the life estate does not vest until Mr. Jameson survive distribution," then the income from the real property is now available for expenses of administration; hence there is no need of contribution from appellants.

The condition here imposed is worded as follows:

"If my husband, James Marion Jameson, survives distribution of my estate, I give, devise and bequeath to him a life estate for the remainder of his natural lifetime in and to the following described real property: (description) * * *

"Upon the death of my husband, his life estate shall forthwith terminate, or if my husband does not survive distribution of my estate, said real property shall, in either event, go in equal shares to my nephews * * *.

"All the rest and residue of my estate, I give, devise and bequeath to my husband, James Marion Jameson, if he survives distribution of my estate. * * *

"If my husband, James Marion Jameson, does not survive distribution of my estate, I give, devise and bequeath all the rest and residue of my estate in equal shares to my stepsons * * *."

[1] In discussing the difference between contingent and vested remainders, the following appears in Re Estate of Blake, 157 Cal. 448, 459, 108 P. 287, 292: "The general rule is that, where the legacy or devise is given to a person to be paid at a future time, it vests immediately. When, however, it is not given until a future time, it is contingent and does not vest until that time occurs. As said in the note to Goebel v. Wolf, 113 N.Y. 405 (21 N.E. 388, 10 Am.St.Rep. 470), quoted approvingly by this court in Re Rogers' Estate, 94 Cal. 526, 530 (29 P. 962): 'The leading inquiry upon which the question of vesting or not vesting turns is whether the gift is immediate, and the time of payment or of enjoyment only postponed, or is future and contingent, depending upon the beneficiary arriving of age, or surviving some other person, or the like. * * * According to the prevailing doctrine, a postponement of the time of payment will not of itself make a legacy contingent unless it be annexed to the substance of the gift; or, as it is sometimes put, unless it be upon an event of such a nature that it is to be presumed that the testator meant to make no gift unless that event happened. Thus, where the legacy is given, payable or to be paid when the legatee attains the age of 21 years, the legacy vests immediately upon the death of the testator. It is a present gift, the time of payment only being postponed; but where the time is annexed, not to the payment only, but to the gift itself —as when the legacy is given to the legatee

at 21, or "if" or "when" he attains the age of 21—the legacy does not vest until the legatee attains that age. His attaining the age specified is a condition precedent; and, if the condition be not fulfilled, the legacy never vests.'"

Section 142, Probate Code, provides: "A condition precedent in a will is one which is required to be fulfilled before a particular disposition takes effect. It is to be deemed performed when the testator's intention has been substantially, though not literally, complied with. Nothing vests until such condition is fulfilled, except where fulfillment is impossible * * *."

In Re Estate of Cross, 163 Cal. 778, 781, 127 P. 70, joint and mutual wills of husband and wife provided: "In the event of the death of either one of the testators herein, if the survivor shall continue living for the period of 30 days thereafter, then * * * the whole estate of the deceased testator and of the community shall pass to the surviving husband or wife. * * *"

It was there argued that said clause was invalid because to sustain it would "suspend the vesting of his whole estate entirely for a period of 30 days after his death, leaving the title to all his property in abeyance and nowhere, and preventing its vesting anywhere for a period of 30 days."

The court held: "But the answer to this is that it is not humanly possible for a testator to do any such thing. The law itself intervenes and provides for the vesting of title. There was no failure to vest during the period of 30 days fixed by the will as the duration of the survivor's life before the terms of the will took effect. The rules and laws of inheritance and succession interposed wherever the will was silent, with the result that title vested in the heirs, devisees, or legatees, subject to divestiture if either spouse should survive the other for more than 30 days." See, also, In re Estate of Riemer, 69 Cal. App.2d 634, 636, 159 P.2d 677.

[2] Applying the foregoing principles of law to the facts herein, it is clear that the devises to the husband were made upon a condition precedent: that he survive distribution of testatrix' estate. Accordingly, neither his life estate in the realty nor his interest in the residue could vest until such condition was fulfilled. Until that time he had a mere expectancy in the property devised. In the interim, title to the life estate and to the residue vested in the remaindermen, i. e., the nephews and stepsons, respectively, subject to divestiture upon fulfillment of the condition.

[3, 4] With respect to the income from the realty, an executor or administrator is entitled to the possession of, and is chargeable with, all the property of a decedent, including real estate and all the income, rents, issues and profits thereof, during pendency of administration. Secs. 581 and 920, Probate Code. "This right (to possession) is given to the end that the rents and profits may be applied to the payment of debts and charges." 11b Cal.Jur. 256, Sec. 847. Moreover, as stated in 11a Cal.Jur. 67, sec. 18: "The objects of probate proceedings are to administer and settle the estates of deceased persons—to gather and preserve the property, pay debts and distribute the balance to the persons entitled thereto. * * * Because administration is conducted mainly for the purpose of securing to creditors payment of their claims, for that purpose the assets are subjected to the jurisdiction of the court, and to that extent administration is a proceeding for the benefit of creditors. When these payments have been accomplished, in the absence of express provisions in the will, the estate is to be distributed."

[5, 6] Therefore, the court's finding that the surviving husband is entitled to receive the income from the realty from the date of death of testatrix is erroneous. Also, since expenses of administration constitute preferred charges, Secs. 950 and 951, Probate Code, and the income in the hands of respondent is sufficient to cover such expenses, the court's order requiring appellants to contribute thereto, is likewise in error.

Appellants next contend that the court erred in denying them the right to inquire into the contents of Mr. Jameson's will. It is argued that since husband and wife executed separate, companion wills on the same day, the wife declaring that "all other property that I own at the date hereof is community property owned by myself and my husband," the contents of the husband's will became material in order to discover if the two wills constituted an agreement between them to convert property then held in joint tenancy into community property.

At the instant hearing, Mr. Jameson was asked by counsel for appellants: "Did your will, made at the same time, describe the property the same as Mrs. Jameson's will?

"Mr. Keane: I object to that, your Honor, on the ground, first: that it is a privileged communication, because it was entered into by Mr. Jameson at that time, and that he is not required to testify with reference to it; on the further ground: that there is no evidence that the will is still in existence.

"The Court: It will be sustained."

Counsel for appellants then stated that at the hearing for probate of Mrs. Jameson's will before Judge Clark (the transcript of which is included in the record now before this court)—Mr. Keane testified in the presence of Mr. Jameson that Mrs. Jameson's will dated March 23, 1944, was prepared by him as attorney for Mrs. Jameson; that "She came into my office with her husband, James Marion Jameson, and they both executed wills at the same time, companion wills. * * *"

Evidence was presented that customarily the parties held all their funds in "straight joint bank accounts, with a provision in the card that upon the death of one it went to the survivor"; that at death of wife there were two such accounts. Also that the personal property: an automobile, a trailer and two burial policies were paid for in part by husband from his own separate property and the balance from the joint accounts.

[7, 8] A declaration in a deed or other instrument that spouses are to take as joint tenants raises the presumption that the legal title is in the parties in accordance with such language, Chamberlain v. Chamberlain, 2 Cal.App.2d 684, 687, 38 P.2d 790; and destroys the statutory presumption that the property is community; such conveyance creates a joint tenancy in which the interests of the spouses are separate property. Launder v. Griffin, 60 Cal.App.2d 659, 664, 141 P.2d 236. Nevertheless, the case of Tomaier v. Tomaier, 23 Cal.2d 754, 757, 146 P.2d 905, 906, holds "It is the general rule that evidence may be admitted to establish that real property is community property, even though title has been acquired under a deed executed in a form that ordinarily creates in the grantee a common law estate with incidents unlike those under the law of community property. * * * It has in fact been held unequivocally that evidence is admissible to show that husband and wife who took property as joint tenants actually intended it to be community property. Hulse v. Lawson, 212 Cal. 614, 299 P. 525; Jansen v. Jansen, 127 Cal.App. 294, 15 P.2d 777; see Minnich v. Minnich, 127 Cal.App. 1, 8, 15 P.2d 804; Horsman v. Maden, 48 Cal.App.2d 635, 640, 120 P.2d 92."

[9] Accordingly, appellants were entitled to prove by any means available to them that Mr. and Mrs. Jameson intended to convert their joint tenancy holdings into community property. If, as is contended, the spouses made companion wills, a declaration therein with respect to the community character of the property would tend to prove an agreement between them that they intended it to be so classified. Clearly such a statement by Mr. Jameson under the circumstances here presented would constitute a declaration against interest and therefore admissible in evidence against him. Sub. 2, section 1870, Code of Civ.Proc. See, also, Mayfield v. Fidelity & Casualty Co., 16 Cal.App.2d 611, 617, 61 P.2d 83.

[10, 11] Pursuant to section 738, Code of Civ.Proc., a will whether admitted to probate or not is admissible in evidence in an action to determine adverse claims to real or personal property, when the validity or interpretation of a gift, devise, bequest or trust under such will is involved. Obviously, respondent's objection that the will was a privileged communication and inadmissible, cannot be sustained. Apropos of this is a statement in 3 Cal.Jur.Supp. 569, sec. 72; "The rule as to privileged

communications does not preclude the admission in evidence of conversations between husband and wife tending to show the absence of an intention to make a gift either in an action between the spouses, or in an action of a husband against the personal representative of the estate of his deceased wife. (Durrell v. Bacon, 138 Cal.App. 396, 403 [32 P.2d 644].)"

[12] Appellant's point that the court erred in ordering partial distribution of Mr. Jameson's life estate in the realty without exacting a bond cannot be sustained. Under section 1001 of the Probate Code, the court may dispense with such bond under certain conditions which apparently were met in the instant cause.

For the reasons stated, the order appealed from is affirmed in so far as it decrees distribution of a life estate in the realty to Mr. Jameson. In all other respects, the order is reversed and the cause remanded for further proceedings in accordance with the views herein expressed.

WHITE, P. J., and DORAN, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

92 Cal.App.2d 691

In re HART'S ESTATE.

HART v. McKAY et al.

Civ. 17105.

District Court of Appeal, Second District, Division 3, California.

June 30, 1949.

Hearing Denied Aug. 25, 1949.

1. Wills 🔑356

The right of appeal in probate matters is purely statutory. Probate Code, § 1240; Const. art. 6, §§ 4, 4b.

2. Wills 🔑356

As respects right of appeal, a proceeding to revoke probate of a will is a "probate matter" although it possesses some of the attributes of a civil action. Code Civ.Proc. § 963; Probate Code, § 1240.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Probate Matter".

3. Wills 🔑358

No appeal will lie from an order in probate not specified in section 1240 of the Probate Code except from an order granting a new trial following a judgment in a will contest. Probate Code, § 1240; Code Civ.Proc. § 963.

4. Wills 🔑358

An order denying a motion for a change of place of trial of a proceeding to revoke probate of a will is not appealable. Probate Code, § 1240.

Appeal from Probate Court, Los Angeles County; Clarence L. Kincaid, Judge.

Proceeding in the matter of the estate of William S. Hart, deceased, on the petition of William S. Hart, Jr., against William R. McKay and Thomas C. Gould, as executors of decedent's will, and others for revocation of the will. From an order denying petitioner's motion to change place of trial, petitioner appeals. On respondents' motion to dismiss the appeal.

Appeal dismissed.

Freston & Files, Eugene D. Williams and Ralph E. Lewis, Los Angeles, for appellant.

Spray, Gould & Bowers and Joseph A. Spray, Los Angeles, for respondents William R. McKay and Thomas C. Gould, executors of last will and testament of William S. Hart, deceased.

Fred N. Howser, Attorney General, and Elizabeth Miller, Deputy Attorney General, for respondent State of California.

Harold W. Kennedy, County Counsel, and Ernest Purdum, Deputy County Counsel, Los Angeles, for respondent Los Angeles County.

Howard B. Henshey, Hollywood, for respondent The Masquers Club of Hollywood, Cal.

B. D. Clanton, Sidney N. Bachtell and Thomas W. Howard, Los Angeles, for respondent Los Angeles Soc. for Prevention of Cruelty to Animals.

Kenneth Carey, Los Angeles, for respondent St. John's Church.

Tanner, Odell & Taft and Donald O'Dell, Los Angeles, for respondent Braille Institute of America, Inc.

Stimson & Edwards and Noel Edwards, Los Angeles, for respondent Father Neal Dodd Foundation of Hollywood, Cal.

Spray, Gould & Bowers and Joseph A. Spray, Los Angeles, for respondents Frances V. Bierck, Mary Ellen Hogewoning and Beatrice Hogewoning Hunt.

VALLÉE, Justice.

Motion to dismiss the appeal which is from an order denying a motion to change the place of trial of a proceeding to revoke probate of a will. The ground of the motion is that the order is non-appealable.

Respondents argue that the order is non-appealable because it is not one of the orders listed in Probate Code section 1240 from which an appeal may be taken and there is no authority in law for the appeal.

Appellant contends that Probate Code section 1240 is not an exclusive or complete compilation of all orders in probate made appealable but that it is coordinate with Code of Civil Procedure section 963, subdivision 2, that an order "changing or refusing to change the place of trial" is specifically listed in subdivision 2 of section 963 as an appealable order and that the appeal lies under subdivision 2. Counsel in their briefs and in the oral argument have extensively reviewed the authorities with marked ability and thoroughness.

[1, 2] The court has jurisdiction on appeal only of "such probate matters as may be provided by law." Const. Art. VI, secs. 4, 4b. The right of appeal in probate matters is purely statutory. Estate of Turner, 139 Cal. 85, 86, 72 P. 718. Although a proceeding to revoke probate of a will possesses some of the attributes of a civil action it is a probate matter. Estate of Patterson, 220 Cal. 370, 371, 31 P. 2d 197.

Prior to 1880, Code of Civil Procedure section 969 specified the judgments and orders of the probate court from which an appeal might be taken. It included as subdivision 8 an order "Granting or overruling a motion for a new trial." Section 963 was then, as now, the statute which prescribed the judgments and orders in civil actions and special proceedings from which an appeal might be taken. In 1880 section 969 was repealed and subdivision 3 was added to section 963. Subdivision 3 contained all of the provisions of section 969 except subdivision 8. Subdivision 2 of section 963 then provided that an appeal might be taken "from an order granting or refusing a new trial."

In re Bauquier Estate, 88 Cal. 302, 26 P. 178, 532, 533, decided after the changes in 1880, was an appeal from an order denying a motion for a new trial in a contested proceeding on an application for the appointment of an executrix. It was held that an order on a motion for a new trial in probate was appealable although such order was not one of those enumerated in subdivision 3 of section 963. The decision was grounded upon the proposition that subdivision 2 of section 963, which authorized an appeal "from an order granting or refusing a new trial," embraced "all such orders, whether made in probate proceedings or in civil actions."

From the decision in the Bauquier case to the enactment of the Probate Code in 1931 it was consistently held that the only appealable judgments and orders in probate matters were those listed in subdivision 3 of section 963 and an order granting or refusing a new trial in those proceedings in probate in which the motion was proper. See cases collected in 11A Cal.Jur. 204, 216, secs. 127, 139; 5 Cal.Jur. 10 Yr.Supp. 809, 812, secs. 127, 139.

Appellant relies upon Estate of Armstrong, 8 Cal.2d 204, 64 P.2d 1093. The Armstrong case was an appeal from an order granting a new trial in a will contest after probate. The respondents there contended that because such appeal was not expressly included in Probate Code section 1240 this right of appeal had been eliminated by implication. The court noted that ever since the decision in Re Bauquier, 88 Cal. 302, 26 P. 178, 532, it had been uniformly held that an order granting a new trial following a judgment in a will contest was appealable. It said that Probate Code section 1240 is a substitute for subdivision 3 of section 963 of the Code of Civil Procedure, that it was not the intent or purpose of the Code Commission in compiling the Probate Code to effect the repeal of any provision of the Code of Civil Procedure or of the Civil Code except such sections as were expressly repealed, and held that, 8 Cal.2d at page 208, 64 P.2d at page 1095: "In view of the declared policy of the Code Commission, and in the absence of any positive indication of an intention on the part of said commission to take away the right of appeal from an order granting a new trial in those proceedings in probate in which such motion is proper, we are satisfied that such right of appeal continues to exist, and that the order herein appealed from is an appealable order." We find nothing in the Armstrong case lending support to appellant's contention.

The Armstrong case was followed by Estate of O'Dea, 15 Cal.2d 637, 104 P.2d 368, which was an appeal from an order denying a motion to set aside an order of dismissal in a proceeding to determine heirship. The court in the O'Dea case stated, 15 Cal.2d at pages 638, 639, 104 P.2d at page 369: "Section 1240 of the Probate Code specifies the orders and judgments in probate from which an appeal will lie, and an order denying relief under section 473 of the Code of Civil Procedure is not one of the orders so specified. A proceeding to determine heirship is a matter in probate. In re Blythe's Estate, 110 Cal. 226, 42 P. 641. As this order denying the appellants' motion brought under section 473 of the Code of Civil Procedure to be relieved of their default was one made in probate, no appeal will lie from said order under the provisions of said section 1240 of the Probate Code. The only exception to this general rule confining appeals from orders or judgments in probate to those specified in said section 1240 of the Probate Code is that an appeal will lie from an order granting or denying a motion for a new trial in those proceedings in probate in which motion is proper. Estate of Allen, 175 Cal. 356, 165 P. 1011. [Use of "or denying" was an inadvertent error—"or refusing" was deleted in 1915—Stats.1915, p. 209.] The exception to the general rule is fully considered in the case of Estate of Armstrong, 8 Cal.2d 204, 64 P.2d 1093, and the reason therefor is explained in some detail. In that case we reiterate our adherence to the general rule, as stated above, and to the exception thereto as declared in the Estate of Allen, supra. Section 1240 of the Probate Code is simply the reenactment of subsection 3 of section 963 of the Code of Civil Procedure, and this court has on numerous occasions held that no appeal will lie from an order in probate denying relief under section 473 of the Code of Civil Procedure, *or from any other order not specified in subsection 3 of section 963 of the Code of Civil Procedure, with the one exception above mentioned.*" (Italics added.) The Supreme Court has not since deviated from this rule. Howaldt v. Superior Court, 18 Cal. 2d 114, 116, 114 P.2d 333; Estate of Green, 25 Cal.2d 535, 545, 154 P.2d 692; Howard v. Superior Court, 25 Cal.2d 784, 787, 154 P.2d 849; Estate of Butler, 29 Cal.2d 644, 645, 177 P.2d 16, 171 A.L.R. 343, Estate of Brady, 32 Cal.2d 478, 479, 196 P.2d 881.

In previous cases the precise contention made by appellant here has been made and rejected. In re Smith, 98 Cal. 636, 33 P. 744, was an appeal from an order granting a new trial and from an order permitting an amendment to a statement on a motion for a new trial, both orders having been made in a will contest. The appellant contended that the appeal was properly taken from both orders under Code of Civil Procedure section 963, subdivision 2, because that subdivision provided for an appeal "from an order granting or refusing a new trial" and "from any special order made after final judgment", and that the order permitting the amendment to the statement was a special order made after final judgment. The court held that an appeal did not lie from the order permitting the amendment of the statement and that it did lie from the order granting a new trial.

Estate of Wittmeier, 118 Cal. 255, 50 P. 393, was an appeal from an order of the probate court adjudging an executrix in contempt for refusing to obey a decree of distribution. The appeal was dismissed. The court said, 118 Cal. at page 256, 50 P. at page 393: "The provisions of subdivision 2 of section 963, relative to appeals from orders made after final judgment, are not applicable to probate proceedings."

Estate of Spafford, 175 Cal. 52, 165 P. 1, held that an appeal did not lie from an order denying a motion made under Code of Civil Procedure section 473 to vacate an order settling the account of an administrator, the court saying, 175 Cal. at page 53, 165 P. at page 1: "Appellants rely upon the opinion in the Estate of Bauquier, 88 Cal. 302, 26 P. 178, 532, wherein the court, in sustaining the right of appeal from an order denying a new trial to one named as executrix of a will and who had been adjudged incompetent, held that subdivision 2 of section 963 of the Code of Civil Procedure, which then authorized an appeal from an order granting or refusing a new trial, embraced all such orders whether made in probate proceedings or civil actions. There is nothing said in this opinion, however, which can be construed as authorizing an appeal from the order made in the case at bar."

Estate of Allen, 175 Cal. 356, 165 P. 1011, was also an appeal from an order made under section 473. The court stated, 175 Cal. at page 357, 165 P. at page 1011: "The provision of subdivision 2 that an appeal may be taken from a special order made after final judgment has no application to probate proceedings." See, also, Estate of Grussing, 15 Cal.App.2d 11, 59 P.2d 152. We do not think it can be said, as appellant suggests, that there are no final judgments in probate which can be followed by special orders and that this is the reason it has been held that an appeal does not lie from a special order made after final judgment in a probate matter.

[3] Appellant argues that in the cases heretofore decided in which it was held that an appeal did not lie with respect to a probate matter, the particular matter under consideration was one which did not come under *either* Probate Code section 1240 or its predecessor subdivision 3 of section 963, Code of Civil Procedure, or subdivision 2 of section 963, Code of Civil Procedure, and that, therefore, there was no necessity of examining the provisions of subdivision 2. We cannot agree. Special orders made after final judgment are appealable under subdivision 2. They have repeatedly been held non-appealable if made in probate. Estate of Cahill, 142 Cal. 628, 76 P. 383; Estate of Spafford, 175 Cal. 52, 165 P. 1; Estate of Allen, 175 Cal. 356, 357, 165 P. 1011; Estate of Bouyssou, 1 Cal.App. 657, 82 P. 1066; Estate of Sanders, 70 Cal.App. 127, 232 P. 733; Estate of Ryker, 92 Cal.App.2d 162, 206 P.2d 406. An order denying a motion for judgment notwithstanding the verdict was not appealable under section 963, subdivision 3. It is not appealable under Probate Code section 1240. It is appealable under subdivision 2 of section 963. Estate of Webster, 43 Cal.App.2d 6, 110 P.2d 81, 111 P.2d 355, notwithstanding the provision of subdivision 2, held that such a motion when made in a contest of a will is not appealable.

Estate of Baker, 170 Cal. 578, 150 P. 989, apparently relied upon by appellant, is not in point. The Baker case was distinguished in Estate of O'Dea, 15 Cal.2d 637, 639, 104 P.2d 368, Estate of Herrington, 79 Cal.App.2d 389, 390, 179 P.2d 650, and Estate of Sanders, 70 Cal.App. 127, 129, 232 P. 733.

[4] There is no warrant in law for an appeal from an order denying a motion for a change of the place of trial of a proceeding to revoke probate of a will and the appeal is abortive. We agree that there is as much necessity for an appeal from an order refusing to change the place of trial of a contest of a will as there is from such an order made in a civil action or in a special proceeding. The remedy, however, is with the legislature and not with the courts.

Appeal dismissed.

SHINN, P. J., and WOOD, J., concur.

92 Cal.App.2d 726

CARNATION CO. v. EL REY CHEESE CO. et al.

Civ. 13922.

District Court of Appeal, First District, Division 2, California.

July 6, 1949.

Rehearing Denied Aug. 15, 1949.

1. Appeal and error ⚿1099(1)

Affirmance on prior appeal of order denying motion for change of venue on ground of residence in a county other than that in which the action was brought was the law of the case on second appeal from a subsequent order denying motion for change of venue.

2. Venue ⚿52(1)

On motion for change of venue on ground of convenience of witnesses, the convenience of a witness who is a party cannot be considered.

3. Venue ⚿52(1)

On motion for change of venue on account of the convenience of witnesses, the court was entitled to consider whether the ends of justice would in fact be promoted and the fact that a company to all appearances was a party to the transaction involved although it had not technically appeared. Code Civ.Proc. § 397, subd. 3.

4. Venue ⚿58

Order denying motion for change of venue on ground of convenience of witnesses would be affirmed where notice fixed a certain date as the time when motion for change of venue would be made, but at such time there was no appearance on behalf of the movant and no motion was actually made, but only a brief in support of motion was presented to the court. Code Civ.Proc. § 397, subd. 3.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by Carnation Company against El Rey Cheese Company and others for money allegedly due under contract. From an order denying motion for change of venue, the defendant E. Hagan appeals.

Order affirmed.

Kimball Fletcher, Jr., Charles Williams, Los Angeles, for appellant.

Ernest J. Livengood, Oakland, Arthur D. Guy, Jr., Los Angeles, for respondent.

GOODELL, Justice.

This appeal was taken by defendant E. Hagan from an order denying his motion for change of venue.

The action was brought for $5,408.86 claimed to be owing on a transaction wherein defendants were alleged to have sold respondent a quantity of cheese for which respondent paid them $19,782 before discovering that it was unmerchantable; respondent alleged that after such discovery "the purchase thereof was rescinded by the parties by mutual oral agreement entered into at Oakland", pursuant to which the defective cheese was returned to defendants at Los Angeles, who agreed to reimburse respondent in full, including shipping costs, and that defendants then delivered to respondent at Oakland cheese of the market value of $14,828.40. The prayer for $5,408.86 is the difference between the $19,782 paid and the $14,828.40, plus freight charges of $455.26.

When appellant appeared in the action he moved for a change of venue on the ground that his residence was in Los Angeles county. His motion was denied; he appealed from the order and this court in 88 Cal.App.2d 857, 200 P.2d 19, affirmed it.

[1] With his answer to the first amended complaint appellant filed a new notice of motion for change of venue on the grounds (1) that his residence was in Los Angeles county, and (2) that the convenience of witnesses would be promoted by a trial therein. The affirmance on the first appeal settled the matter as far as the grounds therein presented were concerned and the motion on those grounds could not be renewed. Appellant's counsel so conceded at oral argument.

That leaves only the ground of convenience of witnesses for consideration. In support of that part of his motion appellant filed several affidavits, some by himself and three by employees of El Rey Cheese Company. In one of his affidavits appellant states that he is "the attorney-in-fact for El Rey Cheese Company and Taylor Maid Company."

[2] The convenience of a witness who is a party, Wrin v. Ohlandt, 213 Cal. 158, 1 P.2d 991, or the employee of a party, Security Investment Co. v. Gifford, 179 Cal. 277, 278, 176 P. 444, cannot be considered on such a motion. Di Giorgio Fruit Corp. v. Zachary, 60 Cal.App.2d 560, 141 P.2d 8.

The only defendant who appeared in this action is E. L. Hagan, sued as E. Hagan. His own affidavits, and each of the other three, show that the three affiants who claim their convenience would be served by the change are employees of El Rey Cheese Company, and it is claimed that that is but a fictitious name under which one *J. A.* Hagan carries on business. From these premises it is argued that the three affiants are not employees of a party. El Rey Cheese Company has been named and joined as a party defendant at all stages of this litigation. It is true that neither it nor *J. A.* Hagan has appeared herein by name, but there is no denying the fact that the company is a party.

It is difficult if not impossible to determine from the pleadings and affidavits just what are the relationships of the several defendants herein. In appellant's supplemental affidavit he describes himself as attorney in fact for El Rey Cheese Company, which is but another way of saying that that company is his principal and he its agent. If E. L. Hagan is defending for it, then *it* is the real party in interest. See Wrin v. Ohlandt, supra.

Moreover, in his verified answer appellant alleges that "the defendants orally agreed to sell and deliver to plaintiff a quantity of cheese" for $19,782, and, further, that the defendants did sell and deliver the cheese to the plaintiff. Those allegations include, of course, the named defendant El Rey Cheese Company. That company, then, by appellant's own sworn showing is definitely identified with this litigation.

In Barnett v. United Oil Company, 5 Cal.App.2d 175, 180, 42 P.2d 656, the court held that the convenience-of-employees rule "may properly be extended to include employees of one who is specifically asserted to be a necessary party" but who was *not joined*. If that be so, then the employees of a named party, actually joined, should certainly come within the rule, even though such named party has not appeared under its own name.

[3] Subd. 3 of sec. 397, Code Civ. Proc., provides for a change of venue "When the convenience of witnesses and the ends of justice would be promoted by the change." It is argued by respondent that appellant had to establish not only the first part of this provision, but also that "the ends of justice would be promoted by the change." Regardless of appellant's failure to make such showing this much is surely true—that the court was entitled to consider whether the ends of justice would in fact be promoted, and in that connection it could certainly weigh the fact that El Rey Cheese Company to all appearances was right in the middle of the transaction, despite the fact it had not technically appeared herein by name. Its "attorney in fact" had apparently assumed the burden of the defense.

[4] There is still another reason why this order must be affirmed. Appellant's notice fixed March 29, 1948 as the time when the motion for change of venue would be made. At that time, however, there was no appearance by or on behalf of appellant, the moving party, and no motion was actually made. Instead of appearing in court and presenting the motion, appellant mailed to the court a lengthy paper entitled "Brief in lieu of oral argument, in support of motion for change of venue." In 18 Cal.Jur. p. 650 it is said: "But making out and filing the application itself are not to make the motion; the attention of the court must be called to it, and the court must be moved

to grant an order." See, also, Colthurst v. Harris, 97 Cal.App. 430, 275 P. 868, and cases cited. Milstein v. Sartain, 56 Cal. App.2d 924, 931, 133 P.2d 836, cites many of the cases on the subject, and is in point.

It it only fair to say that counsel who now represents appellant was brought into this litigation recently and had to make the best of the record as he found it. The proceedings on the second motion for change of venue were apparently prepared by appellant himself.

The order is affirmed.

DOOLING, J., concurs.

92 Cal.App.2d 788

DAIKI OTSUKA v. BALANGUE et al.

KIKUYE SAKAMOTO v. BALANGUE et al.

MASAO UYESAKE v. BALANGUE et al.

OTSUKA v. BALANGUE et al.

HARUYE OTSUKA v. BALANGUE et al.

Civ. 17016–17020.

District Court of Appeal, Second District,
Division 2, California.
July 11, 1949.

1. Process 🔑127

The fact that service was made, rather than proof of service, vests court with jurisdiction to act.

2. Process 🔑127

The jurisdiction of court does not depend on preservation of proof of service but on fact that service has been made.

3. Evidence 🔑71

Where affidavit of service by mail recited that papers were "deposited in the mail" in Ventura, addressed to plaintiffs' attorneys at their offices in Santa Barbara, presumption existed that the papers were received by the addressees in regular course of mail. Code Civ.Proc. § 1963, subd. 24.

4. Evidence 🔑71

Where all papers required to support motion for change of venue were deposited in the mail in Ventura and received by plaintiffs' attorneys in due course of mail, presumption existed that the papers passed through post office at Ventura whether they were deposited in post office itself, in a letter box on street, or in a mail chute in an office building, or were delivered to a letter carrier. Code Civ.Proc. § 1963, subd. 24.

5. Venue 🔑60

Where all documents required to support motion for change of venue were placed in the United States mail, and they were timely received by plaintiffs' attorneys, affidavit of service which recited that the documents were "deposited in the mail", rather than that they were "deposited in United States Postoffice" was not so defective as to deprive court of jurisdiction to hear the motion. Code Civ.Proc. §§ 396b, 1013, 1013a, 1963, subd. 24.

6. Venue 🔑70

Where court had acquired jurisdiction to act on defendants' motion for change of venue, in actions for injuries allegedly sustained by plaintiffs in automobile accident, and defendants' affidavits of merits and of their residence in county in which accident occurred and to which change of venue was sought, were not denied, denial of motion for change of venue was error. Code Civ.Proc. §§ 396b, 1013, 1013a.

7. Venue 🔑84

Even if affidavit of service of documents required to support motion for change of venue were defective because affidavit recited that papers were deposited in the mail, rather than that they were "deposited in United States post office", the defect was waived where plaintiffs did not appear specially to object to service or proof of service but made a general appearance and resisted the motion. Code Civ. Proc. §§ 396b, 1013, 1013a.

Appeals from Superior Court, Santa Barbara County; Ernest D. Wagner, Judge.

Personal injury actions by Daiki Otsuka, minor by his guardian ad litem Haruye Otsuka, by Kikuye Sakamoto by Masao Uyesake, by George S. Otsuka and by Haruye Otsuka, against Mary Louise Balangue and another. From orders denying motions for change of venue, the defendants appeal.

Reversed with directions.

Edward Henderson, Ventura, J. F. Goux, Santa Barbara, for appellants.

Robertson, Schramm, Raddue & Parma and Edward W. Schramm, Santa Barbara, for respondents.

WILSON, Justice.

Appeals from orders denying change of venue from Santa Barbara County to Ventura County in five actions brought to recover damages for personal injuries to plaintiffs alleged to have been caused by the negligent operation of an automobile by defendants on a public highway in Ventura County.

In each case, on December 17, 1948, defendants transmitted to plaintiff, by United States mail, copies of (1) demurrer to complaint, (2) points and authorities in support of demurrer, (3) notice of motion for change of venue, (4) affidavit of merits, (5) points and authorities in support of motion for change of venue, and (6) affidavit of service by mail. All the foregoing papers were filed on December 18. The notice of motion for change of venue fixed the time for the hearing of the same for January 3, 1949. The affidavit of service by mail set forth that copies of all the papers had been placed in an envelope addressed to plaintiffs' attorneys and deposited with postage fully prepaid in the United States mail at Ventura. Copies of the documents that had been served by mail were personally served on plaintiffs' attorneys on December 29, and affidavit of personal service was filed on the same day.

The motions for change of venue came on for hearing on the day fixed in the notices. The motions were based on the notices of motion and affidavits on file which recited that defendants were residents of Ventura County. The motions were resisted by counsel for plaintiffs. The grounds of the resistance do not appear in the record. No evidence, oral or documentary, was introduced by plaintiffs in support of their opposition, and the motions were submitted on the evidence contained in defendants' affidavits. Thereafter the court denied the motions.

Plaintiffs contend that the order must be affirmed for the reason that defendants failed to comply with sections 396b, 1013 and 1013a of the Code of Civil Procedure. The applicable portions of those sections are as follows: Section 396b provides that an action may "be tried in the court where commenced, unless the defendant, at the time he answers or demurs, files with the clerk, * * * an affidavit of merits and notice of motion for an order transferring the action or proceeding to the proper court, *together with proof of service,* upon the adverse party, of a copy of such papers." Section 1013 provides: "In case of service by mail, the notice or other paper must be deposited in the *United States postoffice,* in a sealed envelope, with postage paid, addressed to the person on whom it is to be served, * * *. The service is complete at the time of the deposit, * * *" Section 1013a provides that "Proof of service by mail may be made by affidavit * * * showing the date and place of deposit in the mail * * * and also showing that the envelope was sealed and deposited *in the mail* with the postage thereon fully prepaid, * * *." (Emphasis added in the foregoing quotations.)

The chain of plaintiff's argument that proof of service is defective is that: (1) Section 396b requires the filing of the papers therein mentioned "together with proof of service," (2) under section 1013 the deposit of the papers must be "in the United States *postoffice*"; (3) section 1013a requires that proof of service by mail shall show that the papers were "deposited in the *mail*"; (4) defendants' affidavits of service by mail follow the language of section 1013a and recite that the papers were "deposited in the mail" instead of saying, in the phraseology of section 1013, that they were "deposited in the United States postoffice"; (5) by reason of the failure to use the words of section 1013a in the affidavit of mailing, the "proof of service" required by section 396b is defective and the court therefore did not acquire jurisdiction to hear the motion.

[1-4] It is the fact that service was made, rather than the proof of service, that vests the court with jurisdiction to act. Morrissey v. Gray, 160 Cal. 390, 395, 117 P. 438; Vail v. Jones, 209 Cal. 251, 255, 287 P. 99; Lindley v. Lindley, 49 Cal. App. 631, 633, 194 P. 85. The jurisdiction of the court does not depend upon the preservation of the proof of service but upon the fact that service has been made. Sichler v. Look, 93 Cal. 600, 608, 29 P. 220; In re Newman's Estate, 75 Cal. 213, 220, 16 P. 887, 7 Am.St.Rep. 146. Since the affidavit recites that the papers were "deposited in the mail" in Ventura, addressed to plaintiffs' attorneys at their offices in Santa Barbara, it will be presumed that they were received by the addressees in the regular course of mail. Code Civ.Proc., sec. 1963, subd. 24; First National Bank in Santa Ana v. Coast Consol. Oil Co., 84 Cal. App.2d 250, 254, 190 P.2d 214. Such assumption has not been denied by plaintiffs or their attorneys; in fact, it was confirmed during the oral argument when, in response to a question, plaintiffs' counsel conceded that all the papers above mentioned were received in his office on the day following the date of mailing in Ventura. Since the papers were deposited in the mail in Ventura and received by plaintiffs' attorneys in due course of mail the presumption is that they passed through the post office at Ventura whether they were deposited in the post office itself, in a letter box on the street, or in a mail chute in an office building, or were delivered to a letter carrier.

[5] Plaintiffs' strained technical objection that the affidavit of service is so defective as to deprive the court of jurisdiction to hear the motion, because it recited that the papers were deposited in the mail rather than in the post office, is just too tenuous and unsubstantial to appeal to this court. All documents required by law to support the motion for a change of venue to the proper county were placed in the United States mail, they were timely received by plaintiffs' attorneys, and for aught that appears in the record they were deposited in the post office. There is no evidence to the contrary. The record does not show that the objection urged in this court was made in the court below. Had the objection been there made defendants would have had an opportunity to apply for leave to file an amended affidavit of service.

[6] The court had jurisdiction to act and it was error to deny the motions. Defendants' affidavits of merits and of their residence in Ventura County were not denied in any particular. It was therefore their right, "an ancient and valuable right," to have the cases tried in that county. Lyons v. Brunswick-Balke-Collender Co., 20 Cal.2d 579, 584, 127 P.2d 924, 141 A.L.R. 1173; Goossen v. Clifton, 75 Cal.App.2d 44, 47, 170 P.2d 104.

[7] Furthermore, if there had ever been any validity in plaintiffs' contention that the proof of service is insufficient by reason of the use of the term "mail" instead of "post office," the objection has been waived. Plaintiffs did not appear specially to object to the service or the proof of service but made a general appearance and resisted the motion. The record does not indicate that their counsel questioned either the service or the proof of service. The settled statement in each case on which the appeal comes to this court recites: "The said motion was resisted by Edw. W. Schramm, Esq., of the firm of Robinson, Schramm, Raddue & Parma. That no evidence, either oral or documentary, was introduced by plaintiff in support of his opposition to said motion." Since it does not appear that plaintiffs resisted the motions on the ground that proof of service was defective they waived the right to contest the jurisdiction of the court to hear the motion. Lacey v. Bertone, 33 Cal.2d 649, 203 P.2d 755, 757 and cases cited. In that case the statutory service of an order

to show cause why an injunction should not issue was not made, but it was held that the party enjoined waived the lack of proper and timely service by making a general appearance.

The order denying the motion for change of venue in each case is reversed with directions to grant the motion.

MOORE, P. J., and McCOMB, J., concur.

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92 Cal.App.2d 776

WHEELER et al. v. BARKER.

Civ. 16749.

District Court of Appeal, Second District,
Division 2, California.
July 11, 1949.

Rehearing Denied July 26, 1949.

Hearing Denied Sept. 8, 1949.

1. Appeal and error 🔑989

A reviewing court must view evidence in light most favorable to party successful in trial court and resolve all conflicts in his favor; and if there is substantial evidence to sustain conclusions of trier of facts, reviewing court's power begins and ends with determination as to whether there is any substantial evidence sustaining the judgment.

2. Assault and battery 🔑35

In action against surgeon for damages for alleged technical assault arising out of allegedly unauthorized operation, evidence sustained verdict for surgeon.

3. Assault and battery 🔑42

In action against surgeon for damages for alleged technical assault arising out of allegedly unauthorized operation, conflicting evidence as to whether patient was told that operation was necessary, whether she orally consented, what operation she consented to, and as to whether written consent was signed after sedative was taken, and whether patient knew what she was doing was for the jury.

4. Assault and battery 🔑2

When surgeon is confronted with emergency or unanticipated condition, and immediate action is necessary for preservation of life or health of patient, and it is impracticable to obtain consent to operation which he deems to be immediately necessary, surgeon must do what occasion demands within usual and customary practice among physicians and surgeons in the same or similar localities, and is justified in extending operation and removing and overcoming condition without express consent of patient.

5. Pleading 🔑290(1)

Where surgeon by answer in patient's action for alleged technical assault pleaded consent to operation verbatim, and patient did not file affidavit denying consent within ten days after receiving copy of answer, genuineness and due execution of consent were admitted. Code Civ.Proc. § 448.

6. Pleading 🔑290(1)

Where hospital allowed patient to see her signature on written consent to operation, but kept text covered, and five months later patient began action against surgeon for alleged technical assault, and surgeon pleaded consent by answer, and on demand for inspection offered co-operation in getting consent from hospital files, but patient made no effort to see document and took no deposition of hospital officials, patient could not claim that failure to file affidavit of denial within ten days after receiving copy of answer did not result in admission of genuineness and due execution of consent. Code Civ.Proc. §§ 448, 449, 473, 2021.

7. Pleading 🔑290(1)

Where surgeon in patient's action for alleged technical assault pleaded consent to operation verbatim, and patient failed to file affidavit of denial within ten days after receiving copy of answer, patient could offer evidence to effect that signature was secured through fraud or duress or while she was under influence of a sedative, or that for any other reason she did not know what she was signing, notwithstanding admission of genuineness and due execution of the consent. Code Civ.Proc. §§ 448, 449.

8. Assault and battery 🔑43(1)

In patient's action for alleged technical assault arising out of allegedly unauthorized operation wherein surgeon pleaded written consent, instructions with reference to consent and admission of its genuineness and due execution fully covered the issues and properly charged that consent should be disregarded if patient did not know what she was doing because under influence of sedatives. Code Civ.Proc. §§ 448, 449.

9. Trial 🔑260(1)

Instructions requested by plaintiff, but sufficiently covered by other given instructions, were properly refused.

10. Trial 🔑295(1)

A reviewing court will not take into account one instruction separate from others, but all will be considered together, each in relation to and in connection with the others, and if they harmonize as a whole, and fairly and correctly state law pertinent to the case, a reversal of the judgment will not result because one instruction does not contain all applicable elements.

11. Assault and battery 🔑30

Where patient brought action for alleged technical assault arising out of allegedly unauthorized operation, and surgeon pleaded written consent to whatever operation might be necessary or advisable, court could properly admit evidence that necessity existed for removal of two thirds of patient's uterus, and that it was necessary for surgeon and assistant to make an emergency decision upon discovery of condition.

12. Assault and battery 🔑43(6)

In patient's action for alleged technical assault arising out of allegedly unauthorized operation, wherein surgeon pleaded written consent to whatever operation might be necessary or advisable, instruction that if doctor is confronted with emergency and uses his best judgment he is justified in proceeding with operation was proper under evidence that patient had internal tumor which had rapidly increased in size, and that preservation of patient's health depended upon removal of growth together with portion of uterus to which it was attached.

13. Trial 🔑121(1)

In patient's action for alleged technical assault arising out of allegedly unauthorized operation, argument by surgeon's counsel, confined to discussion of evidence concerning emergency of situation, and necessity for immediate decision as to what should be done, and following up of decision by completing operation, was not objectionable.

14. Evidence 🔑538

Where two cities in adjacent counties were 60 miles apart, and smaller was a rural community, and the larger a city of over 2,000,000 people, containing many large and modern hospitals, court properly refused to permit physician from larger city to express opinion based on hypothetical question relating to examination of patient by surgeon practicing in smaller community, his findings, his treatment, and his operation for removal of patient's internal organ.

15. Evidence 🔑538

Where city of Los Angeles and city of Ventura were in adjacent counties but 60 miles apart, and smaller was rural community, and the larger a city of over 2,000,000 people, containing many large and modern hospitals, court properly excluded evidence of physician who had practiced in New York City and Los Angeles as to existence of emergency justifying removal of patient's internal organs during operation by surgeon practicing in the smaller city.

16. Appeal and error 🔑1170(7)

Where physician in rural community in which operation was performed had expressed opinion that emergency did not exist and that immediate removal of patient's internal organ was unnecessary, and, for purpose of laying foundation for admission of his evidence another physician who had practiced in that county and in another was asked whether standard of practice of medicine was similar in the two counties, refusal to permit witness to answer, though error, was not prejudicial. Const. art. 6, § 4½.

Appeal from Superior Court, Ventura County; Charles F. Blackstock, Judge.

Action by Florence Wheeler and Edison G. Wheeler against Harry E. Barker for damages for an alleged technical assault arising out of an allegedly unauthorized surgical operation. From the judgment, and from the verdict and an order denying plaintiffs' motion for new trial, plaintiffs appeal.

Judgment affirmed, and attempted appeals from verdict and from order dismissed.

Marion P. Betty, Joseph D. Taylor, Los Angeles, for appellants.

William T. Selby, Sheridan, Orr, Bates & Barnes, Albert D. Barnes, Ventura, for respondent.

WILSON, Justice.

This is an action to recover damages for technical assault and battery—the performance by defendant, a physician and surgeon, of an alleged unauthorized operation on plaintiff, Florence Wheeler. See Valdez v. Percy, 35 Cal.App.2d 485, 491, 96 P.2d 142. The operation was performed in a hospital in the city of Ventura. A verdict was rendered in favor of defendant and plaintiffs have appealed from the judgment entered pursuant to the verdict. They have also purportedly appealed from the verdict and from the order denying their motion for a new trial, both of which are nonappealable.

For several months prior to the operation Mrs. Wheeler, who will be referred to as plaintiff, had been treated by defendant for continued vaginal bleeding. In January, 1946, defendant made a pelvic examination and found what appeared to be a small fibroid tumor on the anterior surface of the uterus. In succeeding months other examinations revealed the mass in the right ovarian region at first to be about half as large as a walnut which grew to the size of a lemon. During July plaintiff consulted physicians in Santa Barbara. One diagnosed her symptom as an ovarian cyst and the other as a growth on the uterus. Both recommended immediate surgery. Plaintiff told defendant of these examinations and recommendations. On August 1, 1946, plaintiff was again examined by defendant and he again advised surgery. After plaintiff had telephoned to her husband she consented to an operation.

Plaintiff testified that she consented only to the removal of her right ovary and nothing more. Defendant and his nurse testified that he told plaintiff it might be necessary to remove the right ovary or the uterus, depending on the condition found when her abdomen had been opened, and that he promised not to remove both ovaries, which was the only limitation requested by plaintiff.

On August 4 plaintiff went to the hospital where she signed a consent to "whatever anesthetic and operation which may be decided to be necessary or advisable." Clara Lorenzana, a registered nurse, signed as a witness.

Plaintiff contends that she has no recollection of ever having signed a release and that she did not sign it before she had taken a sedative. The nurse who signed the consent as a witness testified that plaintiff signed the release during the afternoon while she was awake and before any sedative had been given.

On August 5, 1946, defendant, assisted by another physician, performed the operation. Upon making the opening in plaintiff's abdomen they found the ovaries were not diseased but the mass which had been felt on examination was a large tumor attached to the uterus adjacent to the right ovary and the uterine wall was filled with multiple fibroid tumors. The surgeons consulted about the condition found and agreed that a subtotal hysterectomy was necessary and proceeded with that operation. Upon its completion plaintiff's husband was told what had been done and when the effects of the anesthetic had subsided plaintiff was likewise told what had been removed. Neither of them expressed any dissatisfaction. The postoperative course was normal. The first difficulty between the parties arose when defendant refused to give plaintiff sleeping pills which she requested. She became angry and ceased to be defendant's patient.

Defendant, his assistant surgeon and another local physician all testified that the operation was necessary in accordance with the standards of practice in the community to preserve plaintiff's health, and that she would have continued to suffer from the bleeding had the uterus not been removed. There was evidence that plaintiff's condition of health might have become worse, that the bleeding would have continued, and that the tumor might have become malignant. Plaintiff produced medical testimony that the operation was not necessary to preserve her health.

[1, 2] Plaintiff has argued the facts on this appeal upon the theory that the evidence given by her and in her behalf is to be accepted without regard to the evidence of any other witnesses. The rule is to the contrary. A reviewing court must view the evidence in the light most favorable to the party successful in the trial court and resolve all conflicts in his favor. If there is substantial evidence to sustain the conclusions of the trier of facts our power "begins and ends with a determination as to whether there is any substantial evidence" sustaining the judgment. In re Estate of Pohlmann, 89 Cal.App.2d 563, 201 P.2d 446, 449–50; Buckhantz v. R. G. Hamilton & Co., 71 Cal.App.2d 777, 779, 163 P. 2d 756; Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689. By reason of this rule it is sufficient to say that the evidence sustains the verdict of the jury and the ensuing judgment. We shall therefore confine our discussion to errors alleged to have been committed at the trial.

[3] Several of plaintiff's objections are with reference to the signed consent to the operation. Since the evidence is conflicting as to (1) the conversations between plaintiff and defendant in which plaintiff was told what operation was probably necessary, (2) their conversations in which plaintiff orally consented to an operation and what operation she consented to, (3) when the written consent was signed, whether before or after the sedative had been administered, (4) whether plaintiff knew what she was doing when she signed it, we must accept the verdict and judgment as conclusive on those matters. The document is general in its terms and contains a consent to whatever operation might be found to be necessary or advisable.

[4] The purpose of the operation was to stop the vaginal bleeding that had continued for several months and to remove the growth on the female organs. It was defendant's duty to do whatever was necessary to effect a cure. In exercising his best judgment as to what was the proper course to pursue he was performing a professional service for which he had been employed. When a surgeon is confronted with an emergency or an unanticipated condition and immediate action is necessary for the preservation of the life or health of the patient and it is impracticable to obtain consent to an operation which he deems to be immediately necessary, it is his duty to do what the occasion demands within the usual and customary practice among physicians and surgeons in the same or similar localities, and he is justified in extending the operation and in removing and overcoming the condition without the express consent of the patient. Preston v. Hubbell, 87 Cal.App.2d 53, 57–58, 196 P. 2d 113. 41 Am.Jur. 222, sec. 110.

[5] The consent to the operation was pleaded in haec verba by defendant in his answer. The genuineness and due execution are deemed to have been admitted since plaintiff did not file an affidavit denying the same within ten days after receiving a copy of the answer. Code Civ.Proc., sec. 448[1]; Stoneman v. Fritz, 34 Cal.App.2d 26, 29-31; Donovan v. Security-First National Bank, 67 Cal.App.2d 845, 852, 155 P.2d 856.

[6] Plaintiff claims that her failure to file such affidavit does not result in an ad-

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[1] Sec. 448: "When the defense to an action is founded upon a written instrument, and a copy thereof is contained in the answer, or is annexed thereto, the genuineness and due execution of such instrument are deemed admitted, unless the plaintiff file with the clerk, within ten (10) days after receiving a copy of the answer, an affidavit denying the same, and serve a copy thereof on the defendant."

mission of the genuineness and due execution of the instrument for the reason that she was not able to obtain an inspection of the document upon demand therefor as provided in section 449 of the Code of Civil Procedure.[2] It appears that in April, 1947, about five months before the action was commenced, plaintiff and her husband went to the hospital for the purpose of inspecting the consent and, according to plaintiff's testimony, the hospital attendant allowed them to see her signature but kept the text of the document covered. Since this occurrence was prior to the commencement of the action and defendant was not a party to the alleged concealment the rights of the parties are not affected. The facts with reference to the demand for inspection after plaintiff commenced the action are as follows: The answer was filed on September 5, 1947; on December 13 plaintiff filed her denial of the genuineness and due execution of the instrument; plaintiff's counsel assert that on September 11, 1947, they served by mail and filed a notice requesting an opportunity to inspect the document; defendant's attorneys deny having received such notice but, on October 20, after obtaining knowledge that plaintiff desired an inspection, wrote to her attorneys stating that the document was not in the possession of defendant or his counsel but was in the files of the hospital and offered their cooperation in securing permission of the officials of the hospital for an inspection. It does not appear that plaintiff thereafter made any effort to see the document; she not only had defendant's consent and his offer of cooperation but she could have taken the deposition of an official of the hospital under section 2021 of the Code of Civil Procedure.[3] She did not take such deposition nor did she make an application for relief under section 473 of the Code of Civil Procedure for her failure to file an affidavit within the time provided in section 448.

[7] Notwithstanding plaintiff's admission of the genuineness and due execution of the consent, she had a right to offer evidence to the effect that her signature was secured through fraud or duress or while she was under the influence of a sedative, or for any other reason she did not know what she was signing. She testified without objection from defendant that she was not aware of what she was signing and that she signed the document after a sedative had been administered. In both of these particulars she was contradicted by the nurse who signed as a witness to her signature. In view of the conflict the implied finding of the jury against her contentions will not be interfered with by a reviewing court.

Plaintiff complains of the instructions given to the jury with reference to the consent and the admission of its genuineness and due execution. The instructions with reference thereto are in effect as follows:

(a) If the jury found she was under the effects of sedatives or narcotics and that she did not know what she was doing when she signed the document, the jury was to disregard it and its provisions entirely and find that she did not consent in writing to any operation;

(b) Plaintiff admitted the due execution and genuineness of the written consent to operate;

(c) By the term "genuineness" is merely meant that the written consent is the identical instrument which it purports to be;

(d) The term "due execution" means only that the written consent was knowingly signed and delivered by plaintiff in the form in which it now appears but that plaintiff had the right to challenge its effect by evidence that she did not know what she was signing because she was under the effects of sedatives, and that if the jury found she was under the effects of sedatives at the time she signed the consent and did not know what she was signing, then the written consent was to be disregarded;

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[2] Sec. 449: "But the execution of the instrument mentioned in the two preceding sections, is not deemed admitted by a failure to deny the same under oath, if the party desiring to controvert the same is, upon demand, refused an inspection of the original. Such demand must be in writing, served by copy, upon the adverse party or his attorney, and filed with the papers in the case."

[3] Sec. 2021: "The testimony of a witness in this State may be taken by deposition in an action at any time after the service of the summons or the appearance of the defendant. * * * 6. When the witness is the only one who can establish facts or a fact material to the issue; * * *."

(e) Whether plaintiff consented to the operation and to the removal of her uterus as a part of the operation is a question of fact to be determined by the jury from all evidence in the case;

(f) Such consent need not necessarily be in writing but may be oral and may be expressly given or may be implied from the circumstances of the case;

(g) If the words or conduct of plaintiff during the time she was a patient of defendant and prior to the operation were such as would warrant a doctor of ordinary prudence to understand that under the circumstances she did consent to the particular operation which defendant performed, then he was justified in relying upon such words and conduct on the part of plaintiff as constituting her consent to the performance of that particular operation;

(h) Defendant alleged in his answer that before the performance of the operation she signed and acknowledged to defendant and the hospital a document (the consent in question which was read to the jury);

(i) Plaintiff as a matter of law admitted the document to be genuine and to have been executed by plaintiff and in the jury's consideration of the evidence they must accept it to be an established fact that the document is genuine and was duly executed by plaintiff;

(j) That a document is genuine and has been duly executed means that the party who appears to have made it has attached his signature thereto knowingly and caused it to be delivered.

[8] We find no error in these instructions. They fully cover the issues relating to plaintiff's consent. The statement that she admitted the genuineness and due execution of the consent is established by the facts that she did not file a denial within ten days after the filing of the answer and that her failure so to do was not excused in any manner provided by law. The jury was told that genuineness and due execution meant only that plaintiff had attached her signature thereto knowingly, but if the jury found she was under the effects of sedatives or narcotics and did not know what she was doing when she signed the document then the jury should disregard it and find that she did not consent in writing to the operation.

[9] The instructions requested by plaintiff and refused by the court are sufficiently covered by those which were given. This opinion will not be protracted by quoting the instructions given and those refused.

[10] A reviewing court will not take into account one instruction separate from the others, but all will be considered together, each in relation to and in connection with the others. If they harmonize as a whole and fairly and correctly state the law pertinent to the case a reversal of the judgment will not result because one instruction does not contain all the applicable elements and conditions. Shapiro v. Equitable Life Assur. Soc., 76 Cal.App.2d 75, 95-96, 172 P.2d 725, and cases cited.

[11, 12] By the signed consent plaintiff agreed to "whatever * * * operation which may be decided to be necessary or advisable." This instrument furnished the basis for the admission of evidence that a necessity existed for the removal of two thirds of plaintiff's uterus, and that it was necessary for defendant and his assisting surgeon to make an emergent decision upon discovery of its condition. The court did not err in admitting such evidence nor was there error in the instruction to the effect that if a doctor is confronted with an emergency and uses his best judgment he is justified in proceeding with the operation. The terms "emergency," "necessary" and "necessity" recur throughout the evidence. Plaintiff contends that although an emergency may have existed the removal of her uterus was not necessary at that time. This argument is without force. Each of such terms is affinitive to the other. An "emergency" is an unforeseen combination of circumstances which calls for immediate ac-

tion; a "necessity" is that which is unavoidable, inevitable or indispensable. When an emergency occurs there is an immediate necessity to cope with it. The condition of plaintiff's internal organs was not ascertainable with certainty until an incision had been made. The existence of a large fibroid tumor on the uterus and multiple tumors and nodules on the inner walls constituted an emergency which required the surgeons, in the light of their experience, to determine at once whether the removal of the diseased portion was necessary for the preservation of plaintiff's health. The growth of the mass within a few months from the size of defendant's thumb to that of a lemon indicated a serious condition which was recognized by the Santa Barbara surgeon who told plaintiff the growth "would become as large as a baby if not removed." Plaintiff had communicated that statement to defendant. He therefore had not only his own years of experience and the advice of his assisting surgeon but the opinion of the Santa Barbara doctor. The latter had advised plaintiff that the preservation of her health depended upon the removal of the foreign growth, together with that portion of the uterus to which it was attached. Defendant would have been subject to grave censure had he closed the incision and awaited plaintiff's recovery from the effects of the anesthetic in order to have further consultation with her concerning the removal of the alien material.

Defendant and his assistant both testified that the removal of a portion of the uterus was necessary to preserve plaintiff's health which would have been endangered if the uterus had been left in the condition in which they found it. A physician practicing in Ventura, who had previously practiced in Los Angeles County, called by plaintiff, testified in response to a hypothetical question that no emergency existed and that the incision might have been closed and the uterus subsequently treated by X-ray or radium. (Early in 1946, when defendant first diagnosed plaintiff's symptom as a fibroid uterus, she declined to have either an operation or X-ray treatment.) On cross-examination the witness was asked if, when confronted with the condition found as described in the hypothetical question, it would have been necessary for the operating surgeon to make a decision promptly as to whether he should or should not remove the uterus. The witness replied, "Yes, it was necessary for the surgeon to make that decision." The jury accepted the evidence of the surgeons who personally observed plaintiff's condition rather than the opinion of one whose knowledge was acquired from a hypothetical question.

[13] The argument made to the jury by defendant's counsel was not objectionable. It was confined to a discussion of the evidence concerning the emergent situation, the necessity for making an immediate decision as to what should be done, and the following up of such decision by completing the operation.

[14] Upon a hypothetical question which stated the facts relating to defendant's examination of plaintiff, his findings, his treatment, and the operation, a Los Angeles physician was asked to give his opinion as to whether an emergency existed requiring the removal of two thirds of plaintiff's uterus. An objection on the ground that the witness had not been shown to have been practicing under the same standards of practice as prevailed in Ventura was sustained, whereupon plaintiff offered to prove that the witness would state that it was unnecessary to remove a portion of the uterus at the time the operation was performed; that medical knowledge is disseminated throughout the state and the standard of medical science and medical care in Los Angeles County and Ventura County are the same due to the facts (1) that the sources of information are the same and (2) the cities of Los Angeles and Ventura are in close proximity to each other and the two counties adjoin each other. Defendant's objection to the offer of proof was sustained.

The situation existing in the instant case is entirely different from that found in the cases relied on by plaintiff—Sales v. Bacigalupi, 47 Cal.App.2d 82, 117 P.2d 399, Lewis v. Johnson, 12 Cal.2d 558, 86 P.2d 99, and Warnock v. Kraft, 30 Cal.App.2d 1, 85 P.2d 505. In each case the physician testifying practiced in a locality similar and immediately adjacent to that in which the operation was performed or the treatment given. While Los Angeles and Ventura Counties are adjacent to each other, the cities are some 60 miles apart and Ventura, in comparison with Los Angeles and its surrounding area, is a rural community not having the advantages afforded by a city with a population of more than 2,000,000 persons and containing many large, modern hospitals. The court did not err in refusing to permit the Los Angeles physician to express his opinion on the subject involved.

[15, 16] Another physician who had practiced in New York City and in Los Angeles was offered as a witness as to the existence of the emergency. His evidence was excluded, and properly so, for the reasons above noted. For the purpose of laying the foundation for the admission of his evidence the physician above mentioned who had practiced in both counties was asked whether the standard of practice of medicine is similar in the two counties. An objection by defendant was sustained and the ruling is assigned as error. The witness should have been permitted to answer the question. While the ruling of the court was error it is not prejudicial. A Ventura physician had expressed his opinion that an emergency did not exist and that the immediate removal of plaintiff's uterus was unnecessary. There was already a conflict in the expert testimony. If the witness had been allowed to testify and had answered that the standard of practice in the two counties is the same the result would have been the introduction of the testimony of another physician who might have said that an emergency did not exist. Such evidence would have been merely cumulative. The error in rejecting the evidence is not prejudicial and does not require a reversal of the judgment. Const., Art. VI, sec. 4½.

Judgment affirmed. The attempted appeals from the verdict and from the order denying plaintiff's motion for new trial are dismissed.

MOORE, P. J., and McCOMB, J., concur.

Hearing denied; CARTER, J., dissenting.

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92 Cal.App.2d 819

GOLDBERG et al. v. SOUTHWESTERN METALS CORPORATION.

Civ. 17014.

District Court of Appeal, Second District, Division 1, California.
July 12, 1949.

1. Appeal and error ⚷1010(1)

A reviewing court will not disturb finding of trial court where such finding has support in evidence.

2. Sales ⚷197, 218½

In determining when title to goods passes to buyer actual intention of parties must govern where it can be ascertained, and no statutory presumption as to passing of title can arise except in those cases where parties' intention is not manifest. Civ. Code, §§ 1738, 1739.

3. Sales ⚷218½

Evidence supported finding that seller of carload of aluminum sheets agreed to deliver merchandise to buyers in city and county of Denver, and that seller, in selecting carrier to haul merchandise, appointed carrier as its agent, so that seller would be liable for damage to merchandise which occurred through carrier's improperly loading the car. Civ. Code, §§ 1738, 1739.

◆

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action by Harry Goldberg and another against Southwestern Metals Corporation, to recover back purchase price of a carload of aluminum sheets on ground that sheets were damaged and not fit for plaintiffs' use. From judgment for plaintiff, the defendant appeals.

Affirmed.

J. George Bragin, Hollywood, for appellant.

Cummins, Goodstein & Paltun, by Maurice Mac Goodstein, Los Angeles, for respondents.

DORAN, Justice.

The action herein arose out of a contract of sale whereunder appellant corporation located in Los Angeles undertook to sell and deliver to respondents whose plant was in Denver, one carload of 280 aluminum sheets. The aluminum was shipped with order bill of lading consigned to appellant with arrival draft attached. Respondents, upon notification by the railway company, paid the arrival draft in the sum of $14,577.35, together with a freight bill of $707.92. Upon inspection of the shipment it was found that the aluminum sheets were damaged and not fit for respondents' use whereupon respondents declined to accept the shipment. Appellants refused to return the money paid, and the present action resulted. The trial court found that the damage was caused by appellant's negligent loading of the car and gave judgment for the respondents.

The record discloses that on October 8, 1946, the defendant Lee Elder, partner with the defendant Harry Goldberg, telephoned from Denver to the Southwestern Metals Corporation in Los Angeles, and placed the order in question with a Mr. Shonberg, appellant's sales manager. The order was later confirmed by a letter from Mr. Elder, containing a description of the aluminum ordered and stating: "Please let us know when we may expect shipment and whether you are sending it with a sight draft or some other method. Please send the draft through the Central Bank & Trust Company if this method is used".

There is evidence that no method of shipment was specified by the buyers; that the price was F. O. B. appellant's warehouse in Los Angeles; that the appellant seller selected the Progressive Transportation Company to do the hauling and loading of the aluminum, and that the car was sealed by the transportation company. The trial court's finding that appellant was negligent in not properly blocking and bracing the carload of aluminum resulting in the damage complained of, finds support in the evidence.

It is the appellant's contention that "Title to or property in the goods passed under the facts in issue regardless of whether or not the goods were properly loaded by the intermediary carrier"; that title passed before delivery at Denver; and that the appellant court "is not bound by the determination of the passing of title by the trial court if there are no facts or evidence in the record to support such a finding".

Respondents' position is that "Title to or property in the goods could not pass under the facts in any event until the goods were properly loaded"; that title did not pass until delivery in Denver; that since there is evidence supporting the trial court's findings that delivery was to be made by appellant in Denver; that appellant had warranted the quality of the merchandise and by reason of improper loading, the aluminum was damaged and not fit for respondents' purpose, the judgment should be affirmed.

[1] Under the well established rule that a reviewing court will not disturb a finding of a trial court where such finding has support in the evidence, the judgment in the instant case must be affirmed. It is conceded that appellant selected the Progressive Transportation Company to haul and load the aluminum shipment here in question, and that the merchandise was improperly blocked and braced in the car. Appellant, however, seeks to escape liability by denominating with Progressive Transportation Company as an "intermediary carrier", rather than as appellant's agent. The contention is that title to the shipment passed "prior to the aluminum being placed in transit"; that the risk of loss then "became fixed", and that whatever happened thereafter cannot be blamed on the appellant seller. Although various cases are cited by appellant, none has been pointed out which bears any resemblance to the present controversy or which would justify a reversal under the record here presented.

In the language of respondents' brief, "the whole question as to when title or property in the goods passes is one of intention of the parties, * * * and the question is one of fact". Section 1738 of the Civil Code provides that "Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. (2)

For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case". Section 1739 of the Civil Code, prescribing various "Rules for ascertaining intention", and relied upon by appellant, is called into operation "Unless a different intention appears", and then only. Consequently, the provision of Section 1739 that "Where, in pursuance of a contract to sell, the seller delivers the goods to a buyer, or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to or holding for the buyer, he is presumed to have unconditionally appropriated the goods to the contract," etc., can have no application in a case where the intention of the parties is otherwise disclosed.

In the instant case the record discloses substantial evidence and reasonable inferences arising from the facts to the effect that, as the trial court found, "said defendant agreed to sell and deliver to plaintiffs in the City and County of Denver", the merchandise in question; and that appellant, through its agent, improperly loaded the car, by reason of which act the damages occurred. As respondents' brief points out, "In order * * * to concur with appellant's argument * * *, the contract of sale, * * * the circumstances of the case, and the facts as found by the trial court * * * would have to be entirely disregarded". To relieve appellant from liability for damage resulting from its act in improperly packing the shipment would, under the facts in this case, establish a precedent at odds with previous decisions, leaving a buyer without the protection to which he is entitled.

The facts in reference to the sale of the aluminum are without material conflict and have heretofore been recited. There is nothing in the record to indicate that the parties to the sale intended to relieve the seller from the usual duties in reference to packing the shipment. Apropos thereto is the statement in Williston on Sales, Revised Edition, page 81, where the author says: "The seller must not only observe the express terms of the order or contract, but must also fulfill such obligations as the law imposes, irrespective of express bargain. *Goods, therefore, must be packed in a reasonably careful manner, having in view the nature of the goods and the transit, or the property will not pass*". (Respondents' italics.)

It is to be observed that the arrangements, orally made by telephone, were quite ordinary both as to substance and form. Respondents, as prospective buyers, were in need of a particular type of aluminum sheets for use in the building of trailers at Denver, Colorado. A telephone conversation with appellant seller, located in Los Angeles, elicited the information that the appellant had the necessary stock, whereupon respondents ordered a carload to be shipped to respondents' plant in Denver. The telephone negotiations were, as is often the case, fragmentary and informal, as for that matter, was the confirmatory letter which followed. The intent, however, seemed clear enough to the trial court, namely that delivery in Denver was contemplated and that the buyers expected the shipment would be properly packed for the journey. Had the intention been to relieve the seller from the usual duty of attending to the packing of the car, or that title with all risk should pass before the aluminum was packed and shipped, it is reasonable to suppose that such an important condition would have been expressly evidenced in one way or another. It was not.

[2] Appellant, however, does not claim that there was any express stipulation relieving it from liability, and certainly the evidence shows no such arrangement. The position of appellant is rather that by reason of the presumption specified in Section 1739 of the Civil Code, hereinbefore referred to, the moment it turned over the goods to the trucking company, the seller was "presumed to have unconditionally appropriated the goods to the contract," title passed to the buyers and all liability on the seller's part ceased to exist. But, as before stated, no such presumption can arise except in those cases where the parties' intention is not manifest. It is fundamental that actual intention of the parties must govern in all cases where the same can be

ascertained. Any other use of a presumption would in effect amount to a disregard of actual intention and the judicial manufacture of a contract which the parties never intended to make. And its use in the instant case would also assume that the arrangement between the parties was an unusual one rather than the quite ordinary agreement evidenced by the record.

[3] The language used in Williston on Contracts, page 2678, Section 960, is clearly applicable to the instant case: "It is evident that there can be no possibility of throwing risk of loss or deterioration upon the buyer where goods are shipped to him unless the goods are sent in conformity with an order or contract and by a proper method of shipment. The property will not otherwise pass to him, and no reason can be suggested for imposing the risk upon him of goods which he did not order or which for any reason were improperly sent". Since the judgment of the trial court finds support in the record, and reasonably applies the law to the facts, no interference is justified.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

93 Cal.App.2d 17

GROVES v. CITY OF LOS ANGELES et al.

Civ. 16774.

District Court of Appeal, Second District,
Division 3, California.

July 18, 1949.

Hearing Denied Sept. 15, 1949.

1. Insurance ⚷7, 12

A revenue ordinance purporting to impose a tax upon insurance companies or their agents is invalid.

2. Evidence ⚷20(1)

Judicial notice would not be taken of alleged fact that in bail bond business, bail agent is at liberty to charge any premium he sees fit for bond and retain for himself amount he receives over and above amount fixed as premium by insurer.

3. Insurance ⚷7, 12

Ordinance requiring payment of a license tax for engaging in business of soliciting or effecting undertakings of bail violated constitutional provision prohibiting imposition of municipal taxes upon insurers and was invalid as applied to agent of an insurer who held a bail agent's license issued by insurance commissioner and was engaged in effecting undertakings of bail. Insurance Code, §§ 1800, 1802; Const. art. 13, § 14⅘.

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Appeal from Superior Court, Los Angeles County; Stanley N. Barnes, Judge.

Action by Ralph H. Groves to enjoin the City of Los Angeles, a municipal corporation, C. B. Horrall, Chief of Police of the City of Los Angeles, and Walter C. Peterson, City Clerk of the City of Los Angeles from enforcing an ordinance making it unlawful to engage in the bail bond business without first procuring a license from defendant city. From a judgment sustaining a demurrer to the petition, plaintiff appeals.

Reversed.

G. Revelle Harrison, Thomas B. Sawyer, Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Bourke Jones, Asst. City Atty., Lester L. Lev, Deputy City Atty., Los Angeles, for respondents.

WOOD, Justice.

Demurrer of defendant City of Los Angeles to the complaint was sustained without leave to amend. Plaintiff appeals from the judgment thereupon entered in favor of said defendant.

Plaintiff sought to enjoin said defendant, and the police chief and city clerk of said city, from enforcing against plaintiff two ordinances of the City of Los Angeles, upon the ground that the ordinances are in violation of Article XIII, section 14-⅘ of the Constitution of California. Those ordinances require, among other things, the payment of a license tax from engaging in the business of soliciting and effecting undertakings of bail. One of the ordinances is No. 77,000, and the other one, an amendment thereto, is No. 92,414.

Plaintiff alleged in his complaint that he is and was engaged in the business of soliciting, negotiating and effecting undertakings of bail, both within and without the city of Los Angeles, and while engaged in said business he was and is an agent of a certain insurance company, a California corporation; he is and was a holder of a bail agent's license issued by the insurance commissioner; the insurance company is and was the holder of a certificate issued by the insurance commissioner authorizing it to conduct an insurance business in California, including the business of executing undertakings of bail by and through persons holding bail licenses issued by the insurance commissioner; said insurance company has paid all taxes due the State of California under Article XIII, section 14-⅘ of the Constitution; the defendants are threatening to and will cause such ordinances to be enforced against the plaintiff, unless enjoined by order of court; by said ordinances it is made unlawful to engage in any business specified in said ordinance without first having procured a license from said city so to do. The complaint also contained necessary and formal allegations regarding the adoption, existence, provisions and asserted unconstitutionality of the ordinances, and regarding no adequate or speedy remedy at law. It was also alleged therein that the attempted enforcement of the ordinances would result in arrests and charges against plaintiff and his employees, in a multiplicity of suits, and serious interference with his business. A copy of ordinance No. 92,414 is attached to the complaint. That ordinance provides as follows: "Every person engaged in the business of soliciting, negotiating, effecting, issuing, delivering, or furnishing bail bonds or of the posting of undertakings of bail for the release of persons charged with public offenses shall pay for each calendar year, or fractional part thereof, a license tax in the sum of $50.00 for the first $5,000 or less of gross receipts, and in addition thereto, the sum of $5.00 per year for each additional $1,000 of gross receipts, or fractional part thereof, in excess of $5,000. The term 'gross receipts' as used herein shall not include any insurance premiums received on behalf of any insurance company qualified to do business in the State of California, nor any commissions paid out of such premiums."

[1] Appellant (plaintiff) asserts that ordinance No. 92,414 imposes a license tax upon him as an agent of an insurance company and that such a tax is prohibited by section 14⅘ of Article XIII of the Constitution of California. That section provides: (1) that "'Insurer,' as used in this section, includes insurance companies * * *"; (2) that "An annual tax is hereby imposed on each insurer doing business in this State * * * on the bases, at the rates * * * hereinafter specified"; (3) that "the 'basis of the annual tax' is, in respect to each year, the amount of gross premiums, less return premiums, received in such year by such insurer upon its business done in this State * * *"; and (4) that "The tax imposed on insurers by this section is in lieu of all other taxes and licenses, State, county, and municipal, upon such insurers and their property, except: (1) Taxes upon their real estate. * * *" A revenue ordinance purporting to impose a tax upon insurance companies is invalid. See Southern Trust Co. v. City of Los Angeles, 168 Cal. 762, 145 P. 94. Also, a revenue ordinance which imposes a tax upon an agent of an insurance company is invalid. Hughes v. City of Los Angeles, 168 Cal. 764, 765, 145 P. 94.

As above stated, appellant asserts that he is an agent of an insurance company. Section 1800 of the Insurance Code provides: "An insurer shall not execute an undertaking of bail except by and through a person holding a bail license * * *. A person shall not in this State solicit or negotiate in respect to execution or delivery of an undertaking of bail or bail bond by an insurer, or execute or deliver such an undertaking of bail or bail bond unless licensed * * *." Section 1802 of the Insurance Code provides: "A bail agent's license by its terms permits the licensee to solicit, negotiate, and effect undertakings of bail on behalf of the insurer therein designated while there is in effect an unrevoked document filed pursuant to subdivision (b). Such license shall not be issued unless and until there is filed with the commissioner: (a) A document executed by the insurer, stating that upon the issue of the license the licensee therein named is authorized to execute undertakings of bail in the county therein designated, and to solicit, and negotiate such undertakings on its behalf, until it files with the commissioner a notice of revocation of the agent's authority. (b) A bond having an admitted surety insurer as surety thereon in the penal sum of $1,000, conditioned upon the proper application and disposal of all moneys collected or received by the bail agent, his solicitors licensed pursuant to his appointment, and his employees, in favor of the people of the State of California."

[2, 3] Respondent asserts that appellant's business upon which the tax is laid is an independent enterprise and not that of an agent of an insurance company. It argues that since appellant is a licensed bail agent and since the insurance company's undertakings are executed by such bail agents, the conclusion must be that appellant is an independent statutory agent authorized by law to so act rather than an agent under the direction and control of the insurance company; that the execution of an undertaking of bail by a licensed

bail agent for an insurer is not the act of the insurer by means of its agent but is the act of an independent contractor rendering a service to the insurer, which service the insurer is prohibited by law from performing; that since the insurance company is not a principal it cannot have an agent, and therefore it follows of necessity that the act of a licensed bail agent in executing a bail undertaking for an insurance company "cannot be simply that of an agent," but such act "involves something entirely independent and personal to himself as principal." The Insurance Code provisions, above mentioned, state that an insurance company shall not execute an undertaking of bail except through a person holding a bail license, and those provisions refer to such a person as a bail agent permitted or authorized to act on behalf of the insurance company. The complaint alleges that plaintiff is an agent of the insurance company. Respondent points out that by special provisions in ordinance No. 92,414, the tax does not apply to insurance premiums received on behalf of an insurance company, nor to commissions paid out on such premiums. It argues that by reason of such exception in the ordinance the business of an insurance company is in no way affected by the ordinance; that the tax is required only by reason of the independent activities of the bail agent which result in compensation to him over and above any commissions from insurance premiums. Respondent asserts that judicial notice may be taken of the fact that in the bail bond business the bail agent is at liberty to charge any premium he sees fit for the bond and retain for himself the amount he receives over and above the amount fixed as the premium by the insurance company. Judicial notice cannot be taken of such fact, if that be a fact. It appears from the memorandum of decision of the trial judge that he considered that plaintiff was a bail bond broker, and that there were receipts "after the exclusion of insurance premiums or the broker's commissions thereon." He stated therein: "This suit questions the validity of a tax on that portion of a bail bond broker's 'gross receipts' after the exclusion of insurance premiums or the broker's commissions thereon. As such the tax * * * does not purport to tax employees but only the non-insurance portion of the business they create for the broker." That memorandum indicates that the trial judge assumed that there was a "non-insurance portion of the business." The judgment from which the appeal has been taken is based, as above stated, upon a ruling sustaining a demurrer to the complaint. The complaint shows that plaintiff was an agent of an insurance company, and it does not show that he was engaged in the business of soliciting, negotiating or effecting undertakings of bail other than as agent of an insurance company, and it does not show that there was a "non-insurance portion" of his business.

The judgment is reversed.

SHINN, P. J., and VALLÉE, J., concur.

Hearing denied; SHENK and TRAYNOR, JJ., dissenting.

LITTLE et al. v. MOUNTAIN VIEW DAIRIES, Inc.

L. A. 20462.

Supreme Court of California, in Bank.
July 5, 1949.

Rehearing Granted Aug. 4, 1949.*

1. Mines and minerals 🔑55(5)

Where defendant was granted eight and one-third percent of all oil, gas, etc., in, under, or which might thereafter be produced and saved from certain land, and subsequently the land with the exception of such percentage was conveyed to plaintiffs who gave to third person an oil and gas lease which provided for a landowner's royalty of sixteen and two thirds percent and protection for lessee against claims of defendant, the defendant was entitled to receive eight and one third percent of the total oil and gas produced and saved, or 50 percent of the landowner's royalty.

2. Mines and minerals 🔑55(4)

The transferee of fractional oil rights in land receives a royalty interest which is defined as a "profit a prendre," or an interest in real property in the nature of an incorporeal hereditament which he holds as a cotenant with the other owners of oil rights in the same land.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Profit A Prendre".

3. Deeds 🔑90
Mines and minerals 🔑55(2)

The language of a grant must be construed most strongly against the grantor and where co-tenancy interests have been sold with the understanding and agreement that they shall not be subject to a charge for a proportion of drilling and operation expenses but that other units shall bear the full expense of production such agreement of the parties express or necessarily implied, is controlling.

4. Mines and minerals 🔑55(4)

Where the defendant was granted eight and one third percent of all oil, gas, etc., which might be thereafter produced and saved from certain land and there was no requirement that the defendant pay or be charged with a share of the cost of production or provision for any other debit against his interest under a lease for oil development which might subsequently be executed by the grantor or his successors in title, the grantee took a royalty interest rather than a fee interest in minerals.

5. Mines and minerals 🔑73

Where grantors of oil and gas lease expressly agreed to fully satisfy and discharge obligation to pay the defendant the latter's share in the oil and gas produced and saved the defendant's ratification of the lease constituted no more than a consent that the lessee named therein might proceed with oil development upon the condition explicitly set forth in the lease that the defendant's rights be fully set aside and discharged.

6. Appeal and error 🔑78(3)

An order granting a motion for judgment on the pleadings is not final or appealable and an appeal will lie only from the judgment subsequently entered.

7. Pleading 🔑350(3)

Where both parties are appearing and moving for judgment on the pleadings the prayers of defendant in its pleadings are not conclusive as to the relief to which it is entitled.

8. Appeal and error 🔑1073(1)

Where the pleadings warrant the relief granted by the final judgment, technical inconsistencies, if any, between the prayers of the pleadings and the relief granted by such judgment, furnish no ground for reversal on appeal.

9. Appeal and error 🔑782

An attempted appeal from an order granting a motion for judgment on the pleadings would be dismissed.

TRAYNOR and EDMONDS, JJ., dissenting.

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Appeal from Superior Court, Orange County; Franklin G. West, Judge.

Action by R. C. Little and Blanche L. Little against Mountain View Dairies, Inc.,

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* Subsequent opinion 217 P.2d 416.

for a declaratory judgment, wherein the defendant filed a cross-complaint and asked for a declaratory judgment and for other relief. From a judgment for defendant on the pleadings and from a minute order stating that plaintiffs' motion for judgment on the pleadings is denied, the plaintiffs appeal.

Attempted appeal from order dismissed and judgment affirmed.

Prior opinion, 200 P.2d 576.

Dolley, Knight, Woods & Hightower and Arthur B. Knight, Los Angeles, for appellants.

Joseph A. Ball and E. P. Mulholland, Long Beach, for respondent.

SCHAUER, Justice.

The controversy here concerns the respective proportions in which plaintiffs and defendant shall share the 1/6 (16⅔%) landowner's royalty payable by the lessee under an oil and gas lease which covers certain land in the County of Orange. Plaintiffs by their complaint claimed to be entitled to 91⅔% of such royalty and sought a declaratory judgment to that effect. Defendant answered and cross-complained, asserting that it was entitled to receive 8⅓% of all oil and gas produced and saved from the land (i. e., 50% of the 1/6 landowner's royalty), and asked judgment determining the respective rights of the parties as well as an accounting from plaintiffs for defendant's share of the royalty. Each party moved for judgment on the pleadings, the court decided in favor of defendant and rendered judgment accordingly, and plaintiffs appeal. We have concluded that the trial court was correct in its decision and that the judgment should be affirmed. Plaintiffs have also attempted to appeal from a minute order which states that their motion for judgment on the pleadings is denied and that the motion of defendant is granted. As hereinafter shown, such order is not an appealable one and the appeal therefrom must be dismissed.

In December, 1935, the then owners of the involved land executed and delivered to defendant an instrument entitled "Grant Deed," in which it is declared that such owners "do hereby grant to [defendant] * * * Eight and one-third per cent (8⅓%) of all oil, gas and other hydrocarbon substances, and minerals, in, under/or which may be hereafter produced and saved from" such land. In August, 1936, the land was conveyed to plaintiffs, with the express exception of the percentage interest in the oil, gas, and other minerals which had theretofore been transferred to defendant.

In February, 1945, plaintiffs entered into an oil lease covering the property. The lease provides for a 1/6 (16⅔%) landowner's royalty. It further provides, among other things, that:

"10. In case said Lessor [plaintiff] owns a less interest in the * * * lands than the entire and undivided fee simple estate therein, then the royalties and rentals herein provided for shall be paid the said Lessor only in the proportion which his interest bears to the whole undivided fee.

"10-a. Lessor agrees that in no event shall Lessee be required to pay greater rents or royalties than provided in this lease and Lessor further agrees that Lessor will fully satisfy and discharge any and all of the obligations and requirements under that certain Deed [to defendant, of its percentage interest in the oil, gas and other minerals] * * * insofar as the above described land and the production therefrom is concerned."

Defendant did not sign the lease as a lessor, but under the date of March 1, 1945, executed a writing attached thereto, which reads: "The within Oil and Gas Lessee is hereby ratified, approved and confirmed."

The lessee has produced and saved oil and gas from the demised premises, and the respective parties to this suit, at the time (April, 1946) they sought judgment on the pleadings, stipulated that the lessee had paid to plaintiffs some $3,425 as the 1/6 landowner's royalty for production through February, 1946. As stated hereinabove, the trial court adjudged that defendant owns 8⅓% of all "oil, gas and other hydrocarbon substances and minerals in, under and/or which have heretofore or may hereafter be produced and saved" from the land; that defendant is entitled to receive that percentage of the total production under the lease; and that plaintiffs "shall account to and pay over to the defendants * * * the proceeds from the sale of 8⅓% of 100% of" the total production. Plaintiffs urge that defendant is entitled to only 8⅓% of the ⅙ landowner's royalty under the lease, and that they themselves should retain 91⅔% of such royalty.

[1, 2] In support of their position plaintiffs argue that the language of the conveyance to defendant creates a fee interest in minerals, rather than a royalty interest; that, therefore, under the holdings of certain cases from other states, construing various contracts and conveyances, defendant should be held entitled to no more than 8⅓% of the ⅙ lease royalty; and, further, that as a cotenant holder of a "fee interest" in the oil and gas rights to the land, as well as by reason of defendant's ratification of the lease, defendant should pay its "proportion of drilling and operation expenses" (see Dabney-Johnston Oil Corp. v. Walden (1935), 4 Cal.2d 637, 657, 52 P.2d 237, 247) and should share in royalties under the lease on the property in the same proportion that its "fee interest bears to the total fee interest." Nowithstanding the diligence and earnestness with which plaintiffs' counsel seek to support their position we are satisfied that upon established law such position is untenable. This court has definitely rejected the theory that the transfer of fractional oil rights in land constitutes a transfer of a fee interest in the oil, and has established that in this state the transferee of such rights received a royalty interest, which is defined as a profit à prendre, an interest in real property in the nature of an incorporeal hereditament, which he holds as a cotenant with the other owners of oil rights in the same land. (See Callahan v. Martin (1935), 3 Cal.2d 110, 125, 126, 43 P.2d 788, 101 A.L.R. 871; Dabney-Johnston Oil Corp. v. Walden, (1935), supra, 4 Cal.2d 637, 649, 650, 654, 52 P.2d 237; Schiffman v. Richfield Oil Co. (1937), 8 Cal.2d 211, 223–224, 64 P.2d 1081; La Laguna Ranch Co. v. Dodge (1941), 18 Cal.2d 132, 135, 114 P.2d 351, 135 A.L.R. 546; Tanner v. Title Ins. & Trust Co. (1942), 20 Cal.2d 814, 819–820, 129 P.2d 383; Tanner v. Olds (1946), 29 Cal.2d 110, 116, 173 P.2d 6, 167 A.L.R. 1219; Barnard v. Jamison (1947), 78 Cal.App.2d 136, 138, 177 P.2d 341.

[3, 4] Plaintiffs concede that if the parties to a conveyance "intended the conveyance to be of a royalty interest, it is generally held that the grantee takes what may be termed a non-expense bearing interest, or a net interest in the royalty reserved in any lease on the land." As pointed out in the Dabney-Johnston case, 4 Cal.2d at page 653, 52 P.2d at page 245, the "language of a grant is to be construed most strongly against the grantor," (see also Beam v. Dugan (1933), 132 Cal.App. 546, 550) and (page 657, of 4 Cal.2d, page 247 of 52 P.2d), "where contenancy interests have been sold with the understanding and agreement that they shall not be subject to such charge [for a proportion of drilling and operation expenses], but that other units shall bear the full expense of production * * * such agreement of the parties, express or necessarily implied [is controlling]." Here the grant to defendant unequivocally specifies that defendant is to receive 8⅓% of "all oil, gas * * * which may be hereafter produced and saved from" the land involved, and no mention or provision is made of a requirement that defendant pay, or be charged with, a share of the cost of production, or any other debit against his interest, under a lease for oil development which might subsequently be executed by the grantor or his successors in title. It would seem that, as commented by the court in Barnard v. Jamison (1947), supra, 78 Cal.App.2d 136, 141, 177 P.2d 341, 345, "the words of conveyance * * * could not be plainer."

[5] Moreover, it does not appear that by "ratifying, approving and confirming" the lease, defendant agreed to be charged with any part of the lessee's share in the production. By paragraph 10-a of the lease, quoted hereinabove, plaintiffs expressly agreed to fully satisfy and discharge the obligation to pay over to defendant the latter's share in the oil and gas produced.

Consequently, it seems only reasonable to conclude that, as impliedly found by the trial court, defendant's ratification of the lease constituted no more than a consent that the lessee named therein should proceed with oil development upon the condition, explicitly set forth in the lease, that defendant's rights be fully satisfied and discharged.

Plaintiffs rely upon cases from other states[1] in which it was held that the landowner's royalty to be paid under an oil and gas lease should be divided between cotenants in proportion to their interests in the land or the minerals. However, those cases differ from ours in language of the conveyances involved, in circumstances under which the leases were made, and in the accepted legal theories of oil and gas rights which were applied, and consequently they are of doubtful assistance here.

Plaintiffs contend, further, that by reason of certain alleged inconsistencies[2] between the prayer of defendant's answer and that of its cross-complaint, the granting of defendant's motion for judgment on the pleadings was improper. Defendant, in such motion, asked that it be granted "judgment on the complaint and cross-complaint in accordance with the prayer of the Answer and Cross-Complaint on file herein." In a minute order of the court, dated July 7, 1947, it is recited that "Motion of defendant and cross-complainant for judgment on pleadings granted. Motion of plaintiffs and cross-defendants for judgment on pleadings denied." The formal written judgment of the court, awarding defendant relief as described hereinabove, was filed on September 3, 1947, and entered the following day. Plaintiffs suggest that if the minute order "be considered final and the formal judgment itself is a nullity (see Pessarra v. Pessarra (1947), 80 Cal.App.2d 965, 183 P.2d 279), the final order, from which the appeal is taken, would thus contain wholly inconsistent provisions. If the formal judgment is not a nullity, it is, nevertheless, based upon an order which does have conflicting provisions and would therefore be analogous to a judgment based upon inconsistent findings," and should be reversed.

[6-8] It is settled that an order granting a motion for judgment on the pleadings is not final or appealable, and that it is only from the subsequently entered judgment that an appeal will lie. (See Code of Civ. Proc., § 963; Holton v. Noble (1890), 83 Cal. 7, 9, 23 P. 58; Montgomery Ward & Co. v. Welch (1936), 17 Cal.App.2d 127, 129, 61 P.2d 790; Overton v. White (1937), 18 Cal.App.2d 567, 568–569, 64 P.2d 758, 65 P.2d 99; 2 Cal.Jur. 157.) Moreover, where both parties are appearing, the prayers of defendant in its pleadings are not conclusive as to the relief to which it is entitled (see 21 Cal.Jur. 69, § 43), and where, as here, the pleadings warrant the relief granted by the final judgment, technical inconsistencies, if any, between the prayers of the pleadings and the relief provided by such judgment, furnish no ground for reversal on appeal.

[9] For the reasons above stated, the judgment appealed from is affirmed and the attempted appeal from the minute order denying plaintiffs' motion for judgment on the pleadings and granting that of defendant, is dismissed.

SHENK, CARTER and SPENCE, JJ., concur.

TRAYNOR, Justice.

I dissent.

In my opinion the grant deed from plaintiffs' grantors to defendant was intended to convey no more than an eight and one-third percent or one-twelfth interest in the grantors' mineral rights in the land. Thereafter the grantors and grantee were tenants in common in the exclusive right to drill for and produce oil from the land. Their interests were in the ratio of eleven to one. Plaintiffs have since succeeded to the grantors' rights in the land. It is settled in this state that if one cotenant produces oil, he is entitled to charge the interests of nonproducing cotenants for their proportionate share of drilling and operating expenses. Dabney-Johnston Oil Corp. v. Walden, 4 Cal.2d 637, 657, 52 P.2d 237. In this case the expense to the owners of the mineral rights in producing the oil from the land is represented by the five-sixths of the oil that the lessee retains from the total produced. By consenting to the lease defendant agreed that this is a fair charge for the expense of bringing the oil to the surface. Defendant is, therefore, entitled to only one-twelfth of the one-sixth royalty that represents the total profits of the cotenants.

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[1] See Manley v. Boling, 1939, 186 Okl. 59, 96 P.2d 30, 31-32; Swearingen v. Oldham, 1945, 195 Okl. 532, 159 P.2d 247, 250; Murphy v. Dilworth, 1941, 137 Tex. 32, 151 S.W.2d 1004, 1006; Richardson v. Hart, 1945, 143 Tex. 392, 185 S.W.2d 563, 564-565; Shinn v. Buxton, 1946, 10 Cir., 154 F.2d 629, 632-633.

[2] In the answer defendant asks that plaintiffs account to defendant for 8⅓% of all the oil and gas produced; and in the cross-complaint the prayer is that plaintiffs account for 8⅓% of the market value of all such production.

The majority opinion holds, however, that the grant deed to defendant conveyed more than one-twelfth of the grantors' mineral rights. It holds that the deed must be interpreted as conveying an expense free interest and that therefore defendant is entitled to one-twelfth of the oil produced free of any cost of production. By the terms of the deed defendant was granted "Eight and one-third per cent (8⅓%) of all oil, gas and other hydrocarbon substances, and minerals, in, under and/or which may be hereafter produced and saved from that certain parcel of real property. * * *" The majority opinion holds that the words "which may hereafter be produced and saved" clearly evidence an intent that the interest granted should be expense free, and points out that "no mention or provision is made of a requirement that defendant pay, or be charged with, a share of the cost of production, or any other debit against his interest * * *." If, however, the effect of the deed was to convey an expense bearing or mineral fee interest rather than an expense free or royalty interest, no mention of costs or expenses would be necessary to charge defendant's interest with its proportionate share of the costs of the production of the oil. Defendant, as owner of one-twelfth of the mineral rights, would no more be entitled to realize his share cost free, than plaintiffs would to realize their eleven-twelfths share cost free. "There can be no question but that under the line of cases which sustain the right of a single cotenant to produce oil, with the duty to account to the nonproducing cotenants for their fractional interests, it is held that the interests of the nonproducing cotenants are generally subject to a charge or deduction for their proportion of drilling and operation expenses. * * * But where cotenancy interests have been sold with the understanding and agreement that they shall not be subject to such charge, but that other units shall bear the full expense of production, the general rule is controlled by such agreement of the parties, express or necessarily implied." Dabney-Johnston Oil Corp. v. Walden, 4 Cal.2d 637, 657, 52 P.2d 237, 247. Accordingly, it is necessary to decide whether the words "which may be hereafter produced and saved" were inserted in the deed for the purpose of indicating that defendant's interest was to be expense free or merely to conform to California's theory of oil and gas rights or to indicate that defendant's interest was not limited to minerals that it itself brought to the surface.

In other jurisdictions a grant of a fraction of all "of the oil, gas and other minerals in and under, and that may be produced" from the land is ordinarily interpreted as creating an expense bearing mineral fee interest rather than an expense free royalty interest. Richardson v. Hart, 143 Tex. 392, 185 S.W.2d 563, 564-565; Watkins v. Slaughter, 144 Tex. 179, 189 S.W.2d 699, 700; Jones v. Bedford, Tex.Civ.App., 56 S.W.2d 305; Gill v. Bennett, Tex.Civ.App., 59 S.W.2d 473, 475; Manley v. Boling, 186 Okl. 59, 96 P.2d 30, 31-32; Shinn v. Buxton, 10 Cir., 154 F.2d 629, 631–635; see also, Brooks v. Mull, 147 Kan. 740, 78 P.2d 879, 883. In cases where there is an oil lease in existence at the time the lessor executes a mineral deed, it is not uncommon for the deed to grant not only a given fraction of all the oil in, under, and that may be produced from the land, but also the same fractional interest in the royalties payable under the lease. See, 3 Summers, Oil and Gas, Perm.Ed., § 606, p. 502. If the first clause of such a deed were construed as creating an expense free royalty interest it would be effective to grant the stated fraction of the total production rather than the stated fraction of the landowner's royalty reserved under the lease, and would therefore be inconsistent with the second clause. It has been specifically held, however, that such deeds are not internally inconsistent and that the grant of the stated fraction of the royalties under the existing lease is merely a statement of the legal effect of granting the same fraction of all the oil in, under, and that may be produced from the land. Shinn v. Buxton, 10 Cir., 154 F.2d 629, 631–635; Richardson v. Hart, 143 Tex. 392, 185 S.W.2d 563, 564-565.

There is nothing in the California theory of oil and gas rights that should cause this court to reject the interpretation that has been adopted by the courts of other states in construing language similar to that in the deed in this case. California has rejected the theory of ownership of oil and gas in place, and language in a grant referring to oil to be produced would therefore have less significance in determining the expense free or expense bearing nature of the interest created than similar language in a deed dealing with land in a state, such as Texas, where the theory of title to oil and gas in place has been retained. In California the parties might well doubt the effectiveness of a conveyance limited to a fraction of all of the oil and gas in and under the land and therefore add a reference to oil to be produced without in any way intending to convey more than the stated fraction of all the oil rights appurtenant to the land.

Furthermore, the decision in Dabney-Johnston Oil Corp. v. Walden, 4 Cal.2d 637, 52 P.2d 237, indicates that the addition of the words "which may be hereafter produced and saved" after a grant of a fraction of all of the oil in and under the land does not have the effect of creating an expense free interest. In that case there was a grant of "a two per cent. in said land owners royalty of all gas, oil and other hydrocarbon substances to be produced and saved and sold from said described land * * *." The interest was described as a royalty interest, and in holding that it was expense free, the court reasoned that since the two per cent interest had been carved from the land owner's 27½ per cent expense free royalty under an existing lease, it could be necessarily implied that after the termination of the lease, the two per cent interest remained expense free. In reaching its conclusion on this point the court placed no reliance on the words "to be produced and saved and sold from said described land." In fact the court pointed out that the quoted language was inserted for another purpose than to indicate how the expenses were to be allocated. It was contended that under the grant deed the grantee was entitled to royalties only if a lessee was producing oil and not when the production was being carried on by another cotenant himself. In answering this contention the court said, "That the parties in the instant case did not contemplate that a single producing tenant should retain the entire output is indicated by the stipulation of facts and the reforming clause added to the assignments, which expressly provide that the rights of the assignees extend not only to oil within and beneath the land, but to all oil and other hydrocarbon substances produced and saved from said land, however said substances should be produced." 4 Cal.2d at page 657, 52 P.2d at page 247. It is clear, therefore, that in California as in other jurisdictions, in the absence of parol evidence or other controlling language in the deed, a grant of a fraction of all the oil in, under and that may be produced and saved from the land creates an expense bearing mineral fee interest.

Barnard v. Jamison, 78 Cal.App.2d 136, 177 P.2d 341 does not support a contrary result. In that case the grant deed contained a clause that specifically provided what expenses the fractional interests conveyed should bear, and the court properly held that this clause was determinative of the issue.

The injustice of the result reached by the majority would be immediately apparent if plaintiffs had conveyed a sixth of their oil rights to defendant or had executed a similar deed to another for another twelfth of their oil rights. In either situation, although they would appear to be the owners of five-sixths of the oil rights, they would be entitled to no royalties unless they could find a lessee who would produce the oil for less than five-sixths of the total production. The injustice is no less real because some interest in the royalties is left to plaintiffs. By selling a twelfth of their oil rights the majority in effect holds that they have parted with half of them. Instead of sharing in the profits in the ratio of their respective interests they share equally. There is nothing on the face of the deed or in the record to indicate that this result was intended. If at the time the deed was executed, there had been a lease in existence reserving a one-sixth land owner's royalty it might be contended that by a grant of one-twelfth of the land owner's oil rights it was intended that half the royalty should be conveyed. See, 3 Summers, Oil and Gas, Perm. Ed., § 599, p. 482. Even the existence of a lease providing for a royalty of exactly twice the percentage provided in a deed to a fraction of the mineral fee is not enough, however, to support a holding that the fractional interest in the mineral fee is to be expense free. Manley v. Boling, 186 Okl. 59, 96 P.2d 30, 32; see, 3 Summers, Oil and Gas Perm. Ed., § 606, p. 504. Moreover, in the present case there was no lease in existence at the time the deed was executed, and there is no evidence that a lease was then contemplated or that one-sixth (twice one-twelfth) was the usual royalty specified in oil and gas leases. The effect of the deed was, therefore, to do no more than convey to defendant one-twelfth of the grantors' mineral rights in the land. The parties then became tenants in common in the mineral rights, and they should share in the royalty reserved in the lease in the proportion of their interests of eleven to one.

EDMONDS, J., concurs.

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34 Cal.2d 116

BARKIS v. SCOTT et ux.

S. F. 17719.

Supreme Court of California, in Bank.

July 1, 1949.

1. Contracts 🔑318

Statute respecting relief from forfeitures presupposes that party seeking relief is in default, and for him to secure relief under its terms, he must plead and prove facts that will justify its application. Civ. Code, § 3275.

2. Vendor and purchaser 🔑335

In absence of proof by a purchaser of realty seeking to avoid a forfeiture of contract for purchase of realty, that his breach of duty was not a grossly, willful, fraudulent breach of duty within meaning of statute, he cannot recover back part payments he has made. Civ.Code, § 3275.

3. Quieting title 🔑14

Though a quiet title action is equitable in nature and equity cannot enforce a penalty or forfeiture, a vendor is entitled to quiet his title to realty without refunding any part of the purchase price paid by the purchaser, when purchaser incurs a forfeiture, in absence of a showing that vendor will realize more than the benefit of his bargain. Civ.Code, § 3275.

4. Vendor and purchaser 🔑185

Where default by purchaser in payment of instalments to vendor has not been serious, and purchaser is willing and able to continue with performance of contract, and purchaser has made substantial part performance or substantial improvements in reliance on the contract, vendor will not be permitted to forfeit purchaser's rights under the contract. Civ.Code, § 3275.

5. Vendor and purchaser 🔑185

Where purchasers made down payment of $700 for house and lot and agreed to pay balance of $5,450 with interest at rate of $42.50 a month, and purchasers made 57 monthly payments and permanent improvements of $3,114.47, and thereafter purchasers inadvertently paid two monthly instalments with checks dishonored because of insufficient funds, and purchasers were willing and able to pay entire balance due under contract, vendor was not entitled to a forfeiture. Civ.Code, § 3275.

6. Vendor and purchaser ⚷185

Purchasers inadvertently making two payments of monthly instalments due under land contract, by checks dishonored for insufficient funds, were not guilty of gross negligence or willful breach of duty within meaning of statute respecting relief from forfeitures. Civ.Code, § 3275.

SCHAUER, J., dissenting.

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Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action to quiet title to realty by William E. Barkis against Verner B. Scott and Laura T. Scott, his wife. From a judgment quieting title, the defendants appeal.

Judgment reversed.

Prior opinion, 201 P.2d 830.

Eugene Elerding, San Francisco, and Albert M. Hardie, Oakland, for appellants.

Marshall Rutherford and Ralph Nathanson, Oakland, for respondent.

TRAYNOR, Justice.

Defendants have appealed from a judgment quieting plaintiff's title to a parcel of real property. In 1941 plaintiff and defendants executed a contract whereby defendants agreed to purchase plaintiff's house and lot in Oakland. $700 was paid down and the balance of $5,450 with six percent interest was to be paid at the rate of $42.50 per month. The contract provided that payments were to be made on the fifteenth day of each month and that "If Default should be made in the payment of any of the said sums of principal, interest or installments at maturity thereof, all moneys theretofore paid in the premises by said parties of the second part shall, at the option of said party of the first part, become absolutely forfeited to and be retained by said party of the first part, as and for liquidated and agreed damages for breach of this agreement; and this agreement shall then become and be absolutely void and of no effect. * * * It Being Expressly Agreed that time is the essence of this contract. * * *" Defendants went into possession and made fifty-seven monthly payments up to and including the payment due May 15, 1946. They also made permanent improvements on the property of the value of $3,114.47. The checks sent to plaintiff for the June and August payments were returned by the bank marked "Refer to Maker." The July check was honored. On August 26, 1946 plaintiff notified defendants that he had elected to declare a forfeiture of their interest under the contract for the defaults in the June and August payments. Plaintiff was not aware that the June check had been dishonored when he accepted the July payment, and defendants were not aware that either check had been dishonored until they received plaintiff's notice of forfeiture. After the notice of forfeiture was received, defendants immediately tendered certified checks for the amounts due, but plaintiff refused to accept them. Defendants then opened an account under the provisions of section 1500 of the Civil Code and have deposited to plaintiff's credit all amounts that have become due under the contract.

Defendants contend that the retention of the July payment by plaintiff amounted to a waiver of the provisions making time of the essence and providing for a forfeiture in case of default, and that regardless of whether there was any waiver, the trial court should have relieved them from default under the provisions of section 3275 of the Civil Code. Since it is clear that defendants are entitled to relief under section 3275, it is unnecessary to decide whether there was a waiver of the defaults in making either the June or August payments.

Section 3275 provides: "Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty." Although by its terms this section authorizes relief in this case, plaintiff contends that it is the settled law of this state that such relief is unavailable to a defaulting vendee under a contract where time has been made of the essence.

The decisions that have considered section 3275, however, have been careful to point out in granting or denying relief that the party in default has or has not brought himself within the terms of the statute, and whenever its conditions have been satisfied relief has been granted whether or not time had been made of the essence by the contract involved. Gonzalez v. Hirose, 33 Cal.2d 213, 200 P.2d 793; Leslie v. Federal Finance Co., Inc., 14 Cal.2d 73, 82, 92 P.2d 906; Henck v. Lake Hemet Water Co., 9 Cal.2d 136, 143–145, 69 P.2d 849; Hopkins v. Woodward, 216 Cal. 619, 621-622, 15 P.2d 499; Ebbert v. Mercantile Trust Co., 213 Cal. 496, 499-500, 2 P.2d 776; Breitman v. Gattman, 88 Cal.App.2d 124, 198 P.2d 311; Gattian v. Coleman, 86 Cal.App.2d 266, 270, 194 P.2d 728; Flanery v. Mudd, 86 Cal.App.2d 250, 254-255, 194 P.2d 806; Bedell v. Barber, 80 Cal.App.2d 806, 807-808, 182 P.2d 591; Miller v. Modern Motor Co., 107 Cal.App. 38, 44-45, 290 P. 122; Fickbohm v. Knaust, 103 Cal.App. 443, 446, 284 P. 692; Knight v. Black, 19 Cal.App. 518, 526, 126 P. 512; McDonald v. Kingsbury, 16 Cal.App. 244, 247-248, 116 P. 380; see, O'Morrow v. Borad, 27 Cal.2d 794, 800-801, 167 P.2d 483, 163 A.L.R. 894; Clifford v. Fleshman, 65 Cal.App. 762, 770, 225 P. 45; Troughton v. Eakle, 58 Cal.App. 161, 173, 208 P. 161; Leak v. Colburn, 55 Cal.App. 784, 788, 204 P. 249. Plaintiff contends, however, that in cases where relief has been granted although time was made of the essence, there had either been a waiver of the time provision or an estoppel against the vendor to assert it. See, Gonzalez v. Hirose, 33 Cal.2d 213, 200 P.2d 793; Flanery v. Mudd, 86 Cal.App.2d 250, 254, 194 P.2d 806; Bedell v. Barber, 80 Cal.App.2d 806, 807, 182 P.2d 591; Miller v. Modern Motor Co., 107 Cal.App. 38, 44, 290 P. 122; Fickbohm v. Knaust, 103 Cal.App. 443, 446, 284 P. 692; Collins v. Eksookian, 61 Cal.App. 184, 197, 214 P. 670; McDonald v. Kingsbury, 16 Cal.App. 244, 248, 116 P. 380. It is settled, however, that if waiver or estoppel is found, resort to relief under section 3275 is not necessary. McCartney v. Campbell, 216 Cal. 715, 720, 16 P.2d 729; Laffoon v. Collins, 212 Cal. 750, 755, 300 P. 808; Butte Creek Consolidated Dredging Co. v. Olney, 173 Cal. 697, 708, 161 P. 260; City of Los Angeles v. Krutz, 170 Cal. 344, 347, 149 P. 580; Stevinson v. Joy, 164 Cal. 279, 285, 128 P. 751; Hayt v. Bentel, 164 Cal. 680, 685, 130 P. 432; Boone v. Templeman, 158 Cal. 290, 295, 297, 110 P. 947, 139 Am.St. Rep. 126; Leballister v. Morris, 59 Cal. App. 699, 702-703, 211 P. 851. Accordingly, the waiver or estoppel found in those cases that also relied on section 3275 must be considered as an alternate ground of decision rather than a condition required before relief under that section may be had, and some of those cases have expressly so held. Miller v. Modern Motor Co., 107 Cal.App. 38, 45, 290 P. 122; Fickbohm v. Knaust, 103 Cal.App. 443, 446, 284 P. 692; see also, O'Morrow v. Borad, 27 Cal. 2d 794, 800, 167 P.2d 483, 163 A.L.R. 894; Leslie v. Federal Finance Co., Inc., 14 Cal. 2d 73, 80, 92 P.2d 906; Breitman v. Gattman, 88 Cal.App.2d 124, 198 P.2d 311; Gattian v. Coleman, 86 Cal.App.2d 266, 270, 194 P.2d 728.

[1-3] It is contended, however, that such an interpretation of the cases granting relief under section 3275 is not permissible in view of the rule laid down in Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 55 P. 713, 43 L.R.A. 199, 69 Am. St.Rep. 17, and the statement in Henck v. Lake Hemet Water Co., 9 Cal.2d 136, 69 P.2d 849, that "The provisions of section 3275 are necessarily qualified by the language of section 1492, so that generally in a case where time is made the essence of the agreement a party may not obtain relief under that section." 9 Cal.2d at page 143, 69 P.2d at page 852. Neither of these cases is controlling here. In the Glock case the vendee, after being in default for over three years, tendered the balance of the contract price and demanded a deed. The vendor rejected the tender and refused to convey. The vendee then sought to rescind the contract and recover back the total amount that he had paid. The court held that where time was of the essence the vendee could not by a late tender put the vendor in default so as to found a

cause of action for rescission and restitution. The court recognized, however, that under certain circumstances a default, even when time was of the essence, could be relieved against but noted that in the case before it no excuse was [123 Cal. 1, 55 P. 719] "even attempted to be made." Section 3275 presupposes that the party seeking relief is in default, and in order to secure relief under its terms it is necessary for him to plead and prove facts that will justify its application. Patten v. Pepper Hotel Co., 153 Cal. 460, 471, 96 P. 296; Palo and Dodini v. City of Oakland, 79 Cal.App.2d 739, 749, 180 P.2d 764; Taylor v. United States Fidelity & Guaranty Co., 86 Cal.App. 382, 390, 260 P. 898; Clifford v. Fleshman, 65 Cal.App. 762, 769, 225 P. 45; Troughton v. Eakle, 58 Cal.App. 161, 173, 208 P. 161. It has therefore consistently been held in the absence of proof of such facts, that once his default is established the vendee cannot recover back the part payments he has made. Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 11, 55 P. 713, 43 L.R.A. 199, 69 Am.St.Rep. 17; Hoppin v. Munsey, 185 Cal. 678, 686-687, 198 P. 398; Landfield v. Cohen, 89 Cal. App.2d 177, 200 P.2d 149; Wilson v. Security-First Nat. Bank, 84 Cal.App.2d 427, 430, 190 P. 975; Poheim v. Meyers, 9 Cal. App. 31, 37, 98 P. 65. Similarly, although a quiet title action is equitable in nature, Gonzalez v. Hirose, 33 Cal.2d 213, 200 P.2d 793; O'Brien v. O'Brien, 197 Cal. 577, 584-585, 241 P. 861; Ohanian v. Kazarian, 123 Cal.App. 196, 202, 11 P.2d 42, and equity cannot "enforce a penalty or forfeiture in any case", Civ.Code, § 3369; Leslie v. Federal Finance Co., Inc., 14 Cal.2d 73, 79, 92 P.2d 906; Ebbert v. Mercantile Trust Co., 213 Cal. 496, 499-500, 2 P.2d 776; Plante v. Gray, 68 Cal.App.2d 582, 589, 157 P.2d 421; see 20 Cal.L.Rev. 194, it is generally held in the absence of a showing that the vendor will realize more than the benefit of his bargain that he may quiet his title to the property without refunding any part of the price paid. Myers v. Williams, 173 Cal. 301, 304, 159 P. 982; Schwerin Estate Realty Co. v. Slye, 173 Cal. 170, 172-173, 159 P. 420; Ross v. Gentry, 94 Cal. App. 742, 746, 271 P. 1098; Darter v. Schuyler, 47 Cal.App. 457, 460, 190 P. 827.

The facts in the Glock and similar cases suggest that the reason no attempt was made to rely upon section 3275 was that the defaulting vendee could not qualify for relief under that section and that therefore his only hope of recovering any of the money he had paid or keeping the contract alive was in proving that it was the vendor who was in default. In many cases the amount forfeited was a small fraction of the total price and there was no indication that it exceeded in amount the damage caused the vendor by the vendee's breach. Tuso v. Green, 194 Cal. 574, 229 P. 327; Hoppin v. Munsey, 185 Cal. 678, 198 P. 398; Landfield v. Cohen, 89 Cal.App.2d 177, 200 P.2d 149; Keelan v. Belmont Co., 73 Cal.App.2d 6, 165 P.2d 930; Kelso v. Ulrich, 67 Cal.App.2d 698, 155 P.2d 407; Poheim v. Meyers, 9 Cal. App. 31, 98 P. 65. On the other hand, when relief has been sought and denied under section 3275 the courts have frequently pointed out that the damages sustained by the vendor were no less in amount than the vendee had already paid, Buckey v. McGraw, 206 Cal. 541, 543, 275 P. 221; Sawyer v. Sterling Realty Co., 41 Cal.App.2d 715, 725, 107 P.2d 449; see also, Weatherbee v. Sinn, 73 Cal.App. 98, 104, 238 P. 134, or that the nature of the condition that was breached was such that it was impossible to compute the actual damages involved. Parsons v. Smilie, 97 Cal. 647, 654, 656, 32 P. 702; Palo and Dodini v. City of Oakland, 79 Cal.App.2d 739, 750, 180 P.2d 764. In other cases the vendee has been unable to continue with performance of the contract, and although such inability prevents his default from being wilful, Ebbert v. Mercantile Trust Co., 213 Cal. 496, 500, 2 P.2d 776; see, Rest., Contracts, § 357, Comment e, it also defeats his right to have the contract kept in force, since he is unable to make full compensation for the default. Neher v. Kauffman, 197 Cal. 674, 684, 242 P. 713; Grimes v. Steele, 56 Cal.App.2d 786, 789-790, 133 P.2d 874; Deevy v. Lewis, 54 Cal.App.2d 24, 28, 128 P.2d 577; Christin v. Story, 119 Cal.App. 326, 333-334, 6 P.2d 301.

[4] A vendee in default who is seeking to keep the contract alive, however, is

in a better position to secure relief than one who is seeking to recover back the excess of what he has paid over the amount necessary to give the vendor the benefit of his bargain after performance under the contract has terminated. In the latter situation it may be so difficult to compute the vendor's damages that the vendee will be unable to prove that the vendor will be unjustly enriched by allowing him to keep all the money that has been paid. See, Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 7-8, 55 P. 713, 43 L.R.A. 199, 69 Am.St.Rep. 17; 3 Williston on Contracts [Rev. Ed.] § 791, p. 2230; Corbin, The Right of a Defaulting Vendee to the Restitution of Installments Paid, 40 Yale L.J. 1013, 1026. On the other hand, when the default has not been serious and the vendee is willing and able to continue with his performance of the contract, the vendor suffers no damage by allowing the vendee to do so. In this situation, if there has been substantial part performance or if the vendee has made substantial improvements in reliance on his contract, permitting the vendor to terminate the vendee's rights under the contract and keep the installments that have been paid can result only in the harshest sort of forfeitures. Accordingly, relief will be granted whether or not time has been made of the essence. Gonzalez v. Hirose, 33 Cal.2d 213, 200 P.2d 793; Leslie v. Federal Finance Co., Inc., 14 Cal. 2d 73, 80-81, 92 P.2d 906; Hopkins v. Woodward, 216 Cal. 619, 622, 15 P.2d 499; Ebbert v. Mercantile Trust Co., 213 Cal. 496, 499-500, 2 P.2d 776; Breitman v. Gattman, 88 Cal.App.2d 124, 198 P.2d 311; Gattian v. Coleman, 86 Cal.App.2d 266, 269, 194 P.2d 728; Bedell v. Barber, 80 Cal.App.2d 806, 807, 182 P.2d 591; Miller v. Modern Motor Co., 107 Cal.App. 38, 44-45, 290 P. 122; Collins v. Eksookian, 61 Cal.App. 184, 198, 214 P. 670; McDonald v. Kingsbury, 16 Cal.App. 244, 246-247, 116 P. 380; see, 3 Williston on Contracts [Rev. Ed.] § 791, p. 2229; Rest., Contracts, § 374, illus. 5-6.

[5] In Henck v. Lake Hemet Water Co., 9 Cal.2d 136, 69 P.2d 849, the only forfeiture that was involved was a loss of the benefit of the bargain, and the situation was therefore analogous to that where the contract is still wholly executory and no substantial expenditures have been made in reliance on it. It is settled that in such situations relief from default cannot be granted, when time has been made of the essence of the contract and there has been no waiver of or estoppel to assert the time provision. Martin v. Morgan, 87 Cal. 203, 208-209, 25 P. 350, 22 Am.St.Rep. 240; Grey v. Tubbs, 43 Cal. 359, 364; Pitt v. Mallalieu, 85 Cal. App.2d 77, 80-81, 192 P.2d 24; Thorne v. Gordon, 105 Cal.App. 369, 371, 287 P. 542; Urban v. Yoakum, 89 Cal.App. 202, 204, 208-209, 264 P. 493; Civ.Code, § 1492; see, 3 Williston on Contracts [Rev. Ed.] § 852, p. 2388; Rest., Contracts, § 374, illus. 1-2. Since in the present case there has been substantial part performance of the contract and defendants have properly raised the question of their right to relief under section 3275, there is nothing in either the Glock or the Henck cases that prevents the granting of relief for the breach of the provision requiring that payments be made strictly on time.

[6] Plaintiff contends, however, that relief must be denied because of the finding of the trial court "That defendants' failure to meet said obligation by issuing checks drawn upon a Bank in which he had not sufficient funds was grossly negligent and a wilful breach of duty." The evidence does not sustain this finding. Both defendants testified that they did not know the checks had been dishonored until they received plaintiff's notice of forfeiture and that they both believed they had sufficient funds in the bank to cover them. At most the overdrafts appear to have been the result of an error in computation coupled with delays in making the usual deposits caused by defendant husband's illness. Plaintiff contends, however, that the finding of a wilful default must be sustained because defendant husband voluntarily failed to make inquiry when the June check was not returned marked "paid" with his June bank statement, particularly when that statement contained a charge for one unidentified overdraft. The issue is not, however, whether defendants voluntarily failed to

investigate whether the June check had been honored but whether they willfully or as a result of gross negligence breached their contract. Parsons v. Smilie, 97 Cal. 647, 655, 32 P. 702. That defendants in good faith believed they had sufficient funds to cover the checks prevents their breach from being wilful, and their failure fully to investigate the implications of their June bank statement at most amounts to simple negligence. It does not evidence that "entire want of care which would raise a presumption of a conscious indifference to consequences" necessary to constitute gross negligence. Redington v. Pacific Postal Telegraph Cable Co., 107 Cal. 317, 324, 40 P. 432, 434, 48 Am.St.Rep. 132; Coit v. Western Union Tel. Co., 130 Cal. 657, 664, 63 P. 83, 53 L.R.A. 678, 80 Am.St.Rep., 153; Krause v. Rarity, 210 Cal. 644, 655, 293 P. 62, 77 A.L.R. 1327.

The judgment is reversed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, and SPENCE, JJ., concur.

SCHAUER, Justice.

I dissent. Although, on its face, this case may seem in some of its aspects to be a hard one for affirmance, I think that we should either follow the law on the record as it actually exists, or frankly declare that the law is changed. Glock v. Howard & Wilson Colony Co. (1898), 123 Cal. 1, 55 P. 713, 43 L.R.A. 199, 69 Am.St.Rep. 17, and Henck v. Lake Hemet Water Co. (1937), 9 Cal.2d 136, 69 P.2d 849, contain statements which are inconsistent with the majority opinion; I think that they should be followed or squarely overruled insofar as they are inconsistent.

As to the finding of gross negligence and wilful breach of contract the majority, in the face of substantial evidence, substitute their conclusion of fact for that of the trial court; the majority hold that as a matter of law the use by defendants, in making payments on the time-essence contract on two occasions within three months, of checks drawn on an account without sufficient funds to cover such checks, does not support the specific finding of the trial court that such conduct was either wilful or grossly negligent. If using bad checks two times in three months does not support a finding of wilfulness or gross negligence would three times in three months be sufficient? If not, would 12 times in 12 months perhaps suffice? And, if there be implications of negligence or wilfulness in the conduct related, what excuses shall the trial court be required, as a matter of law, to accept as overweighing the conflicting implications? How far are we going in the trend toward de novo consideration on appeal of conflicts in evidence?

I would prefer to leave with trial judges and juries the fact finding function which once was exclusively theirs. (For illustration of the trend toward appellate supervision of fact finding on the weight of evidence see Isenberg v. California Employment Stabilization Comm. (1947), 30 Cal.2d 34, 45-46, 180 P.2d 11; Union Oil Co. of California v. Union Sugar Co. (1948), 31 Cal.2d 300, 319 et seq., 188 P.2d 470.)

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93 Cal.App.2d 220

KAMMERER et al. v. WOODSON et al.

Civ. 7577.

Sac. 5967.

District Court of Appeal, Third District, California.

Aug. 1, 1949.

1. Appeal and error 🔑907(3)

Where appeal was heard on judgment roll only, and evidence adduced was not before District Court of Appeal, it was required to assume that findings of trial court were adequately supported by the evidence.

2. Vendor and purchaser 🔑185

Purchasers were properly relieved from forfeiture of land contract containing provision that time was of the essence, because of their default in payment of three installments of $100 each and for failure to pay taxes and insurance in sum of $96, where purchasers had paid $2,700 of the purchase price of $15,000, purchasers were not guilty of gross negligence or of willful or fraudulent breach of duty under the contract, and purchasers had no knowledge of amount of taxes and insurance premiums owed, and no demand for payment thereof had been made on them, and purchasers had repeatedly tendered to vendors entire amounts which vendors claimed were due and unpaid. Civ.Code, § 3275.

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Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Suit to quiet title to realty by Fred Kammerer and Auguste Sophie Kammerer against Charles Orval Woodson and Isabel Woodson. From a judgment for defendants, the plaintiffs appeal.

Judgment affirmed.

Busick & Busick, Sacramento, for appellants.

W. P. Dwyer, Jr., Sacramento, for respondents.

THOMPSON, Justice.

The plaintiffs have appealed from a judgment relieving the defendants, under Section 3275 of the Civil Code, from their alleged default of payments due upon a contract for the purchase of real property. Plaintiffs brought suit to quiet title to the land. Defendants answered the complaint, setting up their written contract with plaintiffs to purchase the property for the sum of $15,000, upon which they had paid the sum of $2,700 pursuant to the terms thereof, and alleged equitable grounds upon which they asked to be relieved of default and forfeiture for nonpayment of certain installments. The court adopted findings favorable to the defendants on the subject of default and forfeiture, relieving them therefrom. Judgment was rendered accordingly. From that judgment this appeal was perfected. The appeal is presented to this court on the judgment roll only.

The appellants assert in their opening brief that the only point in issue is whether the court may relieve parties to a contract for the purchase of real property from their default in payment of stipulated installments, under Section 3275 of the Civil Code, where time is made the essence of the contract. It reads: "Only one point is involved in this Appeal, that is: Can the trial Court in an action to quiet title to real property, under Section 738 of the Code of Civil Procedure, relieve defendants of their default, under Section 3275 of the Civil Code, where the Court finds that time was made the essence of the Contract, and that defendants were in default in their payments as provided and required in the agreement to purchase, at the time the forfeiture was declared?"

The contract contains the following clause:

"* * * In case of a default in the payment of any of said sums or any installment, or interest due thereon, *for a period of two months after the same becomes due,* that all money previously paid by the Purchasers shall, at the option of the Sellers, become forfeited to the Sellers, and retained as settled and liquidated damages; the parties hereto agreeing that it is impossible to estimate the actual damages, and thereupon the Sellers shall be released from any obligation in law and equity to convey said real property to the Purchasers, and the Purchasers shall forfeit all right thereto, and shall immediately deliver the possession of the same to the Sellers; and herein *it is agreed that time is the essence of this contract.*" (Italics added.)

The court adopted findings to the effect that on January 2, 1946, plaintiffs and defendants executed a written contract. Under the contract the former agreed to sell and the latter agreed to buy real property in Sacramento County for the sum of $15,000, on the following terms: $1,000 cash, and the balance to be paid in installments of $100 per month until $5,000 had been paid, at which time plaintiffs agreed to execute their deed of conveyance upon delivery to them of defendants' note for $10,000 and interest at 5% per annum, secured by a trust deed. The court found that defendants agreed to keep the improvements thereon insured for three-fourths of their value and to pay taxes assessed against the property; that defendants paid plaintiffs the total sum of $2,700 on said contract; that defendants defaulted in their payments of three installments of $100 each, for the months of July, August and September, 1947, and also failed to pay taxes and insurance in the sum of $96; that on September 6, 1947, plaintiffs served noticed on the defendants of said default and of the exercise of their option to declare forfeited the payments made under the contract. The court further found that the land in question was assessed, together with a larger tract, without apportioning the taxes due on defendants' land and that it was impossible to determine what portion of taxes was due from plaintiffs, and that the value of the improvements was not stated in the contract, and that the contract provided that if the taxes and insurance were paid by plaintiffs, the defendants would repay to plaintiffs said sums *on demand,* and that no such demand was made upon them; that defendants had no knowledge of the amount of taxes and insurance premiums which they owed, prior to the service of said notice of default on September 6th; that defendants tendered to plaintiffs on September 10, 1947, the full amount of unpaid installments, together with all taxes and insurance claimed to be due, which was refused; that "defendants' failure to comply with the provisions of said contract as to payment was not a grossly negligent, wilful or fraudulent breach of the provisions of said contract;" that defendants had paid plaintiffs pursuant to the contract the sum of $2,700, and had an equity in the property to that extent, and that, upon paying to plaintiffs the sum of $1,198.54, which included deferred payments of installments to the time of rendering judgment and taxes, insurance and accrued interest, defendants would be relieved of their said default and forfeiture of money paid, and that they would thereupon be restored to their full rights under the contract. Judgment was rendered accordingly. From that judgment this appeal was perfected.

It will be observed from the fourth paragraph of the complaint that the monthly payments of $100 became *due* on the first of each month of July, August and September, and that notice of failure to pay the same was served on defendants on September 6th. But, under the provision of the contract, "at the option of the Sellers", the money previously paid could not be declared *forfeited* "for a period of two months after the same becomes due." Therefore, it appears that the only unpaid installment of $100, for which forfeiture could be declared on September 6th, was the July payment. The total sum of the delayed payments was tendered to plaintiffs and refused four days later, on September 10th. Moreover, in paragraph II of the answer, defendants alleged that they were entitled to possession of the real property under the contract, on February 15, 1946, but that plaintiffs' lessees, A. M. and Sena Sheiry, were then in possession under a lease for an agreed rental of $125 per month, with a conditional option to purchase the property, and that plaintiffs were unable to oust said tenants and deliver possession to the defendants until July 6, 1946, during which time plaintiffs collected from the tenants the total sum of $625, which sum, it was agreed, should be credited to defendants. The answer alleged waiver of payments of installments at the times specified and denied that defendants were in default of payments, and asserted that they did not wilfully or negligently withhold any of said alleged deferred payments, but prayed that, in the event the court should determine they were in default of any such payments that the court then relieve them of such default and alleged forfeiture, and restore them to the full enjoyment of their said contract of purchase.

[1] On the authority of the recent case of Barkis v. Scott, 34 Cal.2d 116, 208 P.2d 367, and the California cases therein cited, we are convinced the trial court was authorized, under Section 3275 of the Civil Code, to relieve the defendants in this case of the default and forfeiture of money previously paid on their contract to purchase the real property, on condition that they pay to plaintiffs the sum of $1,198.54, as specified. This appeal was heard on the judgment roll only. The evidence adduced is not before us. We must assume the findings are adequately supported by the evi-

dence, and that the defendants were not guilty of gross negligence, or of wilful or fraudulent breach of duty under the contract. Certainly the judgment is supported by the findings. The facts of the Barkis case are almost exactly like those of the present case. In both cases substantial sums were paid by the vendees of the properties, and in both cases the contracts provided that "time is of the essence of the contract." Both contracts also provided that in the event of default in any installment or interest, at the option of the vendors, all previous payments of money should be retained by the vendors as "liquidated damages."

In reversing the judgment quieting title in the plaintiff in the Barkis case, the Supreme Court said, after reviewing numerous California cases, that:

"Whenever its [Sec. 3275, Civil Code] conditions have been satisfied relief has been granted whether or not time had been made of the essence by the contract involved."

[2] Numerous authorities are cited in support of that statement. The Supreme Court recognizes the fact that under circumstances where the vendee has wilfully, deliberately or fraudulently breached the contract or deliberately withheld substantial sums of money due, or is unable to perform his contract, relief from default or forfeiture and restoration to the full benefits of a contract may be properly denied. But, in the present case, the court found that defendants promptly and repeatedly tendered to plaintiffs the entire amounts which they claimed were due and unpaid, which were refused, and that defendants, at all times, were willing to do equity. Moreover, the sums, for nonpayment of which the defendants were in actual default, are small compared with the substantial amount of $2,700 which has been paid on the contract, and the court relieved defendants of their default and forfeiture conditioned upon their fully compensating plaintiffs by payment of the sum of $1,198.54 before they may be restored to the enjoyment of their contract. Any other judgment, under the circumstances of this case, would appear to be inequitable.

In commenting on the cases of Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 55 P. 713, 43 L.R.A. 199, 69 Am.St.Rep. 17, and Henck v. Lake Hemet Water Co., 9 Cal.2d 136, 69 P.2d 849, upon which the respondent in the Barkis case relied, the Supreme Court said:

"* * * There is nothing in either the Glock or the Henck cases that prevents the granting of relief for the breach of the provision requiring that payments be made strictly on time."

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

92 Cal.App.2d 853

OLIVER v. BENTON et al.

Civ. 16770.

District Court of Appeal, Second District,
Division 3, California.
July 15, 1949.

1. Fraud 🔑59(1)

The statute fixing the measure of damages in case of fraud in the purchase, sale or exchange of real estate, is exclusive. Civ.Code, § 3343.

2. Fraud 🔑60

Under statute providing that one defrauded in purchase, sale or exchange of property is entitled to recover difference between actual value of that with which defrauded person parted and actual value of that which he received "together with any additional damage arising from the particular transaction" quoted words include such items as actual expenditures made by the plaintiff, damage to other property and personal injuries provided they are the proximate result of the misrepresentation. Civ. Code, § 3343.

3. Fraud 🔑60

Anticipated revenue from realty is not "additional damage" within the statute providing that one defrauded in the purchase, sale or exchange of property is entitled to recover difference between actual value of that with which defrauded person parted and actual value of that which he received together with any additional damage arising from the particular transaction. Civ. Code, § 3343.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Additional Damage".

4. Fraud 🔑25

Where actual value of the purchase price paid for realty did not exceed actual value of realty the purchaser was not entitled to recover damages because the vendors represented that the rental was $125 a month whereas the actual rental was only $77.50 a month. Civ.Code, § 3343.

5. Fraud 🔑66

Finding that vendors misrepresented amount of rent received was merely finding of the facts constituting the fraud and was not inconsistent with findings that the actual value of the purchase price paid for the property did not exceed its actual value and that the purchaser was not damaged by such misrepresentation.

◆

Appeal from Superior Court, Los Angeles County; Wilbur C. Curtis, Judge.

Action by Maria Oliver against Berneice M. Benton also known as Bernice M. Promis, and others for damages for fraud in the sale of real property. From a judgment for defendants, the plaintiff appeals.

Judgment affirmed.

McBain & Morgan, Los Angeles, and L. W. Pitman, Burney, for appellant.

Marvin A. Freeman, Beverly Hills, for respondent Berneice M. Benton, also known as Bernice M. Promis.

Robert E. Benton, Los Angeles, for respondents H. F. Marlow and J. Baldwin.

VALLEE, Justice.

Appeal by plaintiff from a judgment for defendants in an action for damages for fraud in the sale of real property.

The facts as found by the trial court are these. On August 26, 1946, defendants Benton and Marlow, with intent to deceive plaintff and to induce her to purchase the real property which was improved, falsely represented to her that one of the dwelling units on the property was leased for a period of one year at a rental of $125 a month furnished, and that the rent was being paid. The actual rent provided by the lease was $77.50 a month, which was known by said defendants. Defendant Benton had granted the lessee an option to renew the lease for an additional period of six months. Plaintiff relied upon the representations and was induced thereby to purchase the property. Plaintiff was not damaged. The "actual value of the purchase price paid for the property did not exceed its actual value."

Appellant contends that the finding of the difference between the represented and the actual rental income established damage suffered by her as a direct result of the fraud; that this finding is irreconcilable with the finding that plaintiff suffered no damage and, therefore, the judgment is unsupported by the findings.

[1] The measure of damages in an action based on fraud in the sale of real property is prescribed by Civil Code section 3343 enacted in 1935. So far as pertinent it reads: "One defrauded in the purchase, sale or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received, together with any additional damage arising from the particular transaction." This rule is known as the "out-of-pocket" loss rule, sometimes "the tort" rule. It was enacted to provide a uniform rule in all cases of fraud and it is the exclusive measure of damages. Bagdasarian v. Gragnon, 31 Cal.2d 744, 192 P.2d 935. The majority rule is the "benefit-of-the-bargain" rule which allows recovery of the difference between the actual value of what is received and the value it would have had if it had been as represented. It is generally referred to as the "loss-of-the-bargain" rule, sometimes as "the warranty" rule. (The Supreme Court of California refers to this rule as the "benefit-of-the-bargain" rule.) Prior to Civil Code section 3343 some of the cases

in this state applied the "benefit-of-the-bargain" rule; others the "out-of-pocket" rule.

Appellant argues that the clause "together with any additional damage arising from a particular transaction" compels a judgment under the findings of the difference in rental income. To do so would be but an invocation of the "benefit-of-the-bargain" rule.

[2] The additional damages that may be recovered include such items as actual expenditures made by the plaintiff, damage to other property, and personal injuries, provided they are the proximate result of the misrepresentation. Bagdasarian v. Gragnon, 31 Cal.2d 744, 762, 192 P.2d 935; Jacobs v. Levin, 58 Cal.App.2d Supp. 913, 917, 137 P.2d 500; Prosser on Torts, 774, sec. 90. One of the misrepresentations inducing the purchase in Feckenscher v. Gamble, 12 Cal.2d 482, 85 P.2d 885, was that the net income from the property was $231 a month. In fact it was practically nil. The trial court applied the "benefit-of-the-bargain" rule. The Supreme Court reduced the amount of the judgment to conform to the "out-of-pocket" rule and did not include in the award the rental differential. Nelson v. Gjestrum, 118 Minn. 284, 136 N.W. 858, is directly in point. Minnesota follows the "out-of-pocket" rule. In that case the representations were, 136 N.W. 858, "that the defendant, with intent to deceive and defraud plaintiff, and inducing her to trade her farm, fraudulently represented that the defendant's house and lot were actually of the market value of $12,000, that it was rented for $83 per month to a bona fide tenant, that he had been offered $100 per month rent, and that he had been offered $7,500 in cash for the lot alone. It is further alleged that the lease was not bona fide, but that defendant had conspired with the tenant to deceive plaintiff into making the trade, and no rent whatever was to be paid; that the rental value was no more than $50, and the premises were of no greater value than $7,500." Recovery was limited to the difference between what the plaintiff parted with and what she received. No recovery was allowed for difference in rent.

[3, 4] Anticipated revenue from the property is not "additional damage" within the meaning of section 3343. The differential in rent is inherent in the nature of the transaction itself. It is an element to be considered in determining the actual value of the property, as the trial judge considered it in this case. It is not an "out-of-pocket" loss for no loss is suffered where a person gets the worth of his money although not all he was promised. The fact that he may anticipate more and be falsely led to expect it, or that he would have made a profit if the representation had been true, does not entitle him to recover for his disappointment in not receiving that which he was led to expect. Sigafus v. Porter, 179 U.S. 116, 21 S.Ct. 34, 45 L.Ed. 113, 117; Pittsburgh Life & Trust Co. v. Northern Cent. Life Ins. Co., C.C., 140 F. 888, 897, 898; Restatement, Torts, sec. 549, Comment b, p. 110; McCormick on Damages, secs. 121, 122, pp. 449, 454, 459; Sutherland on Damages, 4th Ed. Vol. 4, secs. 1173, 1176, pp. 4412, 4426; Harper on Torts, sec. 226, p. 469.

Cases cited by appellant do not support her contention. Heller v. Melliday, 60 Cal.App.2d 689, 141 P.2d 447, was not concerned with the measure of damages under section 3343. The additional damage awarded in Williams v. Graham, 83 Cal.App.2d 649, 189 P.2d 324, was rent the defrauded party was compelled to pay as a result of the fraud to carry on his business, an "out-of-pocket" loss.

[5] We may also observe that the finding as to the amount of rent received as represented and the actual amount received is not one that appellant was damaged in the amount of the difference. It is merely a finding of the facts constituting the fraud. The findings are neither inconsistent nor irreconcilable. There is evidence that on the assumption that the rental income was $60 a month per unit, the actual value of the property was $19,500 (the purchase price) or $20,000 at the time of purchase. The finding that appellant was not damaged is supported by the evidence.

Judgment affirmed.

SHINN, P. J., and WOOD, J., concur.

92 Cal.App.2d 857

In re XYDIAS' ESTATE.

XYDIAS v. ADAMSON.

Civ. 16933.

District Court of Appeal, Second District,
Division 3, California.
July 15, 1949.

1. Appeal and error 🔑1011(1)

Resolution of conflict in evidence is for trial court.

2. Deeds 🔑208(4)

Recording of a deed at request of grantor is prima facie proof of delivery with intent on part of grantor presently to convey title.

3. Deeds 🔑208(4)

Evidence that deed was recorded by husband-grantor to wife-grantee with her knowledge and assent and that husband as executor included the realty in inventories in administration of wife's estate warranted finding of delivery of deed.

4. Fraudulent conveyances 🔑174(3)

One who has conveyed his property in order to defraud his creditors cannot thereafter recover from his grantee that which he has conveyed.

5. Divorce 🔑311

Where husband transferred property to wife in order to put it beyond reach of former wife who had judgment for child support against him, all relief to husband seeking to recover realty from wife's estate should have been withheld as soon as fraud was disclosed.

Appeal from Probate Court, Los Angeles County; James H. Pope, Judge.

Proceeding in the matter of the estate of Marina A. Xydias, deceased. From an order quieting title to a parcel of realty in Sophia G. Adamson, Anthony J. Xydias appeals.

Affirmed.

Jerry Giesler, Ward Sullivan, Los Angeles, and Walter H. Robinson, Beverly Hills, for appellant.

Henry Merton, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by Anthony J. Xydias, executor of the will of Marina A. Xydias, from an order of the probate court quieting title to a parcel of real property in her devisees and against his claims in his individual capacity.

Marina A. Xydias, a resident of Los Angeles, died testate on September 26, 1943, in Manila, Philippine Islands. Her will was admitted to probate in the superior court of the County of Los Angeles and letters testamentary issued to Anthony. The will bequeathed and devised all of her property to Anthony for life, remainder to Sofia G. Adamson, her daughter by a prior marriage.

In his petition for probate of the will Anthony referred to the property as an asset of the estate of Marina. On March 12, 1946, he listed the property, referred to as lot 10, in the inventory in the estate of Marina as property belonging to her estate. He filed the inventory on October 29, 1946. On December 31, 1946, he again listed lot 10 as an asset of her estate in an amended inventory which he filed January 25, 1947. On July 28, 1946, Anthony filed an amended first and final account and report and a petition for distribution. In the report he stated that he had conveyed lot 10 to Marina "and to other relatives" without consideration and in trust for himself for the purpose of convenience and in anticipation of his predeceasing his wife; that upon the conveyance "it was always agreed" it should, except upon his death, be considered his separate estate; that it did not belong to her estate for the reason it never belonged to decedent in her lifetime. Objections were filed by Sofia G. Adamson upon the ground that Anthony failed to charge himself with and account for lot 10 and the rents collected therefrom.

The probate court found that at her death Marina was the owner of lot 10 in fee as her sole and separate property and that she did not hold it in trust for Anthony or in trust at all. The order quieted title in the devisees of Marina, decreed that title was vested in, and distribution should be made to, Anthony for life with remainder to Sofia G. Adamson, and directed Anthony to account for all monies received from the property. Anthony appeals.

Appellant contends that the findings are "contrary to the evidence and the law." He argues that there was no evidence of delivery of the deed from himself to Marina with intent to convey title.

[1] The facts, stated in the light most favorable to respondent, are these. On March 8, 1935, the property, referred to as lot 10, was acquired by Anthony J. Xydias. On July 26, 1936, Anthony married Marina A. Xydias. On August 26, 1936, Anthony conveyed lot 10 to Marina. This deed was recorded in the County of Los Angeles on September 28, 1936. On November 13, 1939, Marina conveyed lot 10 to Alex A. Adamson, a single man. On November 22, 1939, Alex conveyed it back to Marina. This deed was recorded in the County of Los Angeles on September 29, 1941. The deed from Anthony to Marina was signed in Houston, Texas. At the time Anthony stated that he wanted to turn his property over to Marina because she had assisted him in a motion picture venture and to protect her. They lived in Houston for about a month thereafter and then moved to Los Angeles where they lived until March 20, 1940, when they went to Manila. The Recorder's stamp on the deed from Anthony to Marina says that it was recorded at the request of the grantee. Marina did not understand English well, consequently her daughter Sofia was her constant companion. Between 1936 and sometime in 1939, Sofia, at Marina's request, collected the rent from lot 10, made payments to a bank on an encumbrance thereon, paid the taxes and assessments on the property, paid for repairs, all with money supplied by her mother. Before leaving for Manila, Anthony instructed a bank in Los Angeles to collect the rent and deposit it in Marina's account. The deed was destroyed in the burning of Manila. Appellant testified that he retained possession of the deed from the time it was signed until it was destroyed. There was much conflicting evidence. Resolution of the conflict was for the trial court. Khoury v. Barham, 85 Cal.App.2d 202, 210, 192 P.2d 823; Beadle v. Northrup, 90 Cal.App.2d 510, 203 P.2d 552.

[2, 3] The evidence supports the implied finding that the deed from Anthony was delivered to Marina with intent that it convey to her an estate in fee simple. Appellant testified, although the Recorder's stamp indicates otherwise, that he recorded the deed and cites authority to the effect that the recordation of a deed by a grantor, without the assent of the grantee, does not constitute delivery. The authority is not applicable. The recording of a deed at the request of the grantor is prima facie proof of delivery with intent on the part of the grantor presently to convey title. Osterberg v. Osterberg, 68 Cal.App.2d 254, 262, 156 P.2d 46. It is a fair inference from the evidence that the deed was recorded with the knowledge and assent of Marina. Appellant's inclusion of lot 10 in the inventories in the administration of Marina's estate alone was sufficient evidence to support a finding of delivery.

[4, 5] There is another reason why appellant cannot prevail. At the time of the conveyance from Anthony to Marina, Anthony was indebted to a former wife for the support of his minor children by that marriage. His former wife had secured a decree of divorce which ordered him to pay monthly sums for the support of the children. Several orders had been issued directing Anthony to show cause why he should not provide for the children. An action was brought in the municipal court of Los Angeles in which the former wife sought to recover for the support of the children. A judgment was rendered therein in her favor on February 4, 1937, for $435. Anthony testified in the present action that his primary object in transferring lot 10 to Marina was to put it beyond the reach of his former wife. No rule of law is more strictly adhered to than the rule that one who has conveyed his property in order to defraud his creditors, under circumstances such as are present here, cannot thereafter recover from his grantee that which he has conveyed. The failure of the court to find specifically with respect to the fraudulent nature of the con-

veyance cannot avail appellant. The evidence as to the fraud is uncontradicted. The facts were admitted by appellant in his testimony and are admitted in his brief. It was the duty of the court as soon as the fraud was disclosed to sua sponte withhold all relief and leave the parties where it found them. Saint v. Saint, 120 Cal.App. 15, 22, 7 P.2d 374; Taylor v. Bank of America, 67 Cal.App.2d 59, 67, 153 P.2d 617; Tognazzi v. Wilhelm, 6 Cal. 2d 123, 125, 56 P.2d 1227; 12 Cal.Jur. 1026, sec. 66; see, 6 Cal.Jur. 150, secs. 106, et seq.

Judgment affirmed.

SHINN, P. J., and WOOD, J., concur.

PIKE v. PIKE.

Civ. 16937.

District Court of Appeal, Second District,
Division 2, California.

Aug. 4, 1949.

Rehearing Denied Aug. 25, 1949.

See 209 P.2d 154.

1. Appeal and error 🔑989

Where a finding of fact is attacked on ground that there is not any substantial evidence to sustain it, power of appellate court begins and ends with determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding.

2. Husband and wife 🔑279(1)

Separate maintenance agreement to pay wife $135 per month, and providing that in event wife remarried, husband should no longer be bound to pay such sum, was not an agreement to pay wife the sum of $135 per month for as long as wife lived and did not remarry.

3. Divorce 🔑254
Husband and wife 🔑279(1)

Provision in property settlement agreement for payment of $135 monthly to wife for her maintenance and support was not a part of property settlement, but was a provision for monthly payments in the nature of alimony, as was likewise a parallel provision in interlocutory divorce decree thereafter entered.

4. Appeal and error 🔑1008(1)

Meaning of property settlement agreement was question of fact for trial court, and interpretation of trial court being reasonable and supported by evidence, was binding upon reviewing court.

5. Divorce 🔑247

Provision in interlocutory divorce decree for payment of $135 monthly for separate maintenance and support of wife as long as she should live and remain unmarried was an award of alimony and right to such payments terminated with death of husband.

6. Husband and wife 🔑279(1)

Under property settlement agreement giving wife right to possession of dwelling house until such time as husband was able to sell the house for at least $10,000, husband and wife each owned an undivided one-half interest subject to terms of the agreement, and agreement terminated the joint tenancy under which they had previously held the property.

7. Joint tenancy 🔑1

Unity of interest, of title, of time, and of possession, are essential to existence of a joint tenancy. Civ.Code, § 683.

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Action by Eugenie H. Pike against Ruth Wooley Pike, as executrix of the estate of Warren A. Pike, deceased, on a claim against the estate, wherein defendant filed a cross-complaint. Judgment for defendant and plaintiff appeals.

Affirmed.

Wood, Crump, Rogers & Arndt, by Stanley M. Arndt, Los Angeles, for appellant.

Irving M. Walker, John L. Martin, Mark Mullin, by Irving M. Walker, Los Angeles, for respondent.

McCOMB, Justice.

Plaintiff appeals from a judgment after trial before the court without a jury to the effect: (1) that the covenants of an agreement for the support and maintenance of plaintiff are provisions for the payment of alimony to terminate upon the death of her former husband; (2) that such agreement relative to a residence terminated the joint tenancy under which they had previously held the property and converted their title to one of tenants in common; (3) that plaintiff's interest in such property was held by her subject to the rights of her former husband specified in the agreement.

Facts

Plaintiff was the first wife of Warren A. Pike, now deceased. On January 2, 1934, they entered into an agreement denominated "separate maintenance agreement." The writing dealt separately with the following matters: (1) Property settlement and maintenance of the wife;* (2) Cus-

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* "The agreement read:

"Separate Maintenance Agreement

"This agreement, made at Los Angeles, California, this 2nd day of January, 1934, by and between Warren A. Pike, party of the first part (hereinafter sometimes referred to as the husband), and Eugenie H. Pike, party of the second part, hereinafter sometimes referred to as the wife),

"Witnesseth:

"Whereas, the husband and wife were duly married on or about the 12th day of June, 1913, in the City of Philadelphia, State of Pennsylvania, and the issue of said marriage is one daughter, Elizabeth Jane Pike, now of the age of nineteen years; and

"Whereas, marital difficulties have arisen and exist between the husband and the wife, by reason of which they have separated and are now living separate and apart; and

"Whereas, it is the desire of the parties hereto that the property of each shall be separately owned by each and that there shall be no community property whatsoever owned by the two together, and that fair and reasonable provisions shall be made for the separate maintenance of the wife and for the custody, maintenance and education of said daughter and as to the respective property rights and obligations of the husband and wife, all as hereinafter more particularly set forth;

"Now, therefore, in consideration of the premises and the mutual covenants and agreements hereinafter set forth, said parties do hereby mutually covenant and agree as follows:

"I

Property Settlement and Maintenance Of The Wife

"It is the intention of the parties hereto by this Indenture specifically to settle for all time their and each of their property rights in respect to the property which they or either of them now have, or which they or either of them may hereafter acquire, and it is a fact that this indenture is made and entered into freely and voluntarily by both parties, free from any duress, constraint or influence of any kind or nature on the part of either, and that each party has had independent advice and counsel and has entered into this indenture fairly and freely, acting absolutely upon the independent judgment of each and upon such independent advice and counsel.

"The wife hereby releases and confirms to the husband as his separate property and estate all of his articles of personal use and adornment and all cash in hand possessed by him and all money in bank to his credit, and any and all securities now owned or possessed by him and/or standing in his name, and any and all choses in action or in possession and any and all property and interests in property, real and personal, which he may now have or hereafter acquire (except as hereinafter provided for), and any and all property and claim to any property whatsoever (except as hereinafter provided for) in or to which the wife may have had or claimed any community interest, and any rights of inheritance, to be held by him as his separate property and estate.

"The husband hereby releases and confirms to the wife as her separate property and estate all her articles of personal use and adornment and all cash in hand possessed by her and all money in bank to her credit.

"The Packard Sedan owned by the husband, or by the parties hereto, shall become and remain the separate property of the husband, and the wife hereby releases and quitclaims to the husband said Packard Sedan. The husband hereby covenants and agrees that the wife may live in the furnished dwelling house located at No. 715 La Mirada Avenue, San Marino, California, until such time as he may be able to sell said dwelling house for at least the sum of Ten Thousand Dollars ($10,000.00). In the event of the sale of said dwelling house, the husband and wife hereby expressly agree tody, support and maintenance of their daughter; (3) General provisions. Mr. Pike was "to pay to the wife the sum of One Hundred and Thirty-five Dollars ($135.00) per month for her maintenance and support. In the event the wife remarries the husband shall be no longer bound to pay said sum of One Hundred Thirty-five Dollars ($135.00) to the wife. The husband covenants and agrees to pay to the wife for the maintenance and support of said daughter, a monthly sum of Twenty-five Dollars ($25.00)." Another clause dealt with the residence of the parties, which, when the agreement was executed, stood in the names of plaintiff and Mr. Pike as joint tenants. The agreement provided in substance that plaintiff might live in the residence "until such time as he (Pike) may be able to sell the said dwell-

that the net proceeds derived therefrom after deducting principal and interest on any mortgages or trust deeds outstanding on said property, shall be divided equally between husband and wife, except, however, that in the event the husband makes any principal payments on any mortgages or trust deeds which may exist on said property, he shall be entitled to recover the amount of said principal payments made by him from the sale price of said property before the net proceeds shall be divided equally between husband and wife. The wife covenants and agrees that during the time she shall have the right to the use and occupancy of said premises and equipment, to maintain the same and the grounds and landscaping thereof in as good order and condition as they may be at the time of the commencement of her occupancy, reasonable wear and tear and damage by the elements excepted. The husband covenants and agrees promptly to pay and discharge before delinquency, all taxes and assessments against said property (excepting taxes assessed and levied against the personal property of the wife) and all interest and any installments of principal on any note or notes secured by mortgage or deed of trust covering said property. The wife shall have the right to rent said property and shall be entitled to keep for herself all rents received therefrom. The husband covenants and agrees that he will not make any further loans encumbering the above dwelling house and property for a greater amount than the present encumbrance, which is in the amount of $5500.00, without first obtaining the written consent of the wife to do so.

"It is hereby agreed with respect to the motor boat 'Restless', that the parties own a one-half interest in said motor boat, and that either party may have the use of the same upon giving reasonable notice to the other party, and that in the event of the sale or trade of the one-half interest of the parties in said motor boat, then and in that event the proceeds of said sale or trade will be divided equally between them.

"The husband hereby releases, confirms and quitclaims to the wife as her separate property and estate the furniture, household effects, decorations, bric-a-brac and equipment of every kind and description contained in said dwelling house and/or in, about or belonging to or used in connection with said premises.

"The husband represents that he is the owner of a United States Government Insurance Policy Number K-347251 in the amount of Ten Thousand Dollars ($10,000.00), in which said policy the wife is the beneficiary. The husband covenants and agrees that he will not (except as hereinafter stated) change the name of said beneficiary, and that during his life he will pay the premiums on said policy so that should he predecease his wife she will be entitled to the proceeds of said policy. The husband also represents that he is the owner of Pacific Mutual Life Insurance Policy No. 289018, in the amount of Three Thousand Dollars (3,000), in which said policy the wife is beneficiary. The husband covenants and agrees that he will not (except as hereinafter stated) change the name of said beneficiary, and that during his life he will pay the premiums on said policy so that should he predecease his wife she will be entitled to the proceeds of said policy. Should the wife remarry, however, the husband shall have the option to change the beneficiary under said above two policies of life insurance. The husband further represents that he is the owner of Pacific Mutual Life Insurance Policy No. 654608, in the amount of Ten Thousand Dollars ($10,000.00), in which said policy his wife is beneficiary, and the husband covenants and agrees that he will in the immediate future change the beneficiary under said policy and cause the daughter, Elizabeth Jane Pike, to be made beneficiary thereunder, and that during his life he will pay the premiums on said policy so that should he predecease his said daughter she will be entitled to the proceeds of said policy. The husband further represents that he has made policy loans on one or more of the above three policies of life insurance, and ing house for the sum of $10,000"; that plaintiff should have the right to rent the property to another for her own benefit and would maintain the residence and the grounds thereof in good order at her own expense; that her husband should pay all taxes and assessments and all interest on any installment of principal or any obligation secured by a lien upon the property; and should not without plaintiff's consent encumber the property in an amount in excess of $5,500. In the event of a sale it was provided that the net proceeds were to be divided between plaintiff and her former husband after he had been repaid the amount of any principal payments made by him on any note secured by a lien on the property. At the time of the trial it was stipulated that the residence could be sold for more than $10,000.

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that said loans total approximately $2700.00. The husband covenants and agrees that he will not request or make any further loans increasing the total amount of the present life insurance policy loans without first obtaining the written consent of the wife to do so.

"The husband covenants and agrees to pay to the wife the sum of One Hundred and Thirty-five Dollars ($135.00) per month for her maintenance and support. In the event the wife remarries the husband shall be no longer bound to pay said sum of One Hundred Thirty-five Dollars ($135.00) to the wife. The husband covenants and agrees to pay to the wife for the maintenance and support of said daughter, a monthly sum of Twenty-five Dollars ($25.00). The husband agrees that the monthly payments for the maintenance and support of the wife and daughter shall be paid to the wife in two equal installments on the 1st and 15th days of each and every month, commencing on the 1st day of January, 1934. Receipt of the sum of Eighty Dollars ($80.00), being the payment due January 1st, 1934, is hereby acknowledged by the wife.

"II

"Custody, Support And Maintenance Of Daughter

"It is agreed that the best interests of said minor daughter will be subserved by allowing the wife to have full custody and control of said minor daughter, but it is mutually agreed that the husband shall have the right freely to visit said daughter at any and all reasonable hours and occasions.

"It is mutually agreed that in the event the wife shall die before said daughter attains the age of majority, then and in that event the entire and exclusive custody and control of said daughter shall go to the husband.

"The husband shall have the exclusive right to decide the education of said daughter and the school or schools, and college or colleges which she shall attend, and whether or not said daughter shall board and live at the school or college which she shall attend. The husband shall pay the cost of educating said daughter, including tuition and books, and during such time as the said daughter shall board and live at the school or college she shall attend, the husband during such period shall pay all maintenance and educational expenses for said daughter, and the amount which is hereinbefore provided to be given to the wife for the support of said daughter shall be eliminated while said daughter is living and boarding at school or college.

"In the event of the serious illness of said daughter the husband covenants and agrees that he will in any case, and regardless of whether the marriage between the parties hereto shall have been dissolved by divorce and the wife shall have remarried, pay all doctors' and nurses' charges and all medical and hospital bills, if any, insofar as it shall be reasonably possible for him to do so.

"Except as hereinabove provided, the wife shall provide for the support and maintenance of the daughter out of the funds to be paid to her as provided for under paragraph I hereof.

"The wife shall not be required to account to the husband, or otherwise, for any sums paid to her on account of her support and/or maintenance, or on account of the support and maintenance of the daughter.

"III

"General Provisions

"First and second parties shall at any time or times make, execute and deliver any and all further and other instruments as the other of said parties shall reasonably require for the purpose of giving full force and effect to this agreement and for the performance of the covenants and provisions hereof.

"The wife accepts the provisions herein made in lieu of any and all other claims and provisions for her support and maintenance, and of the support, maintenance and education of said daughter during her minority, and the wife hereby covenants that she will not at any time hereafter contract in the name of the husband, or otherwise, any debt or debts for which the husband as such might be

Plaintiff obtained an interlocutory decree of divorce from Mr. Pike which contained among others the following decrees:

"It is further ordered, adjudged and decreed that the property and property rights of the parties be settled and determined as set forth in their separate maintenance agreement heretofore made and entered into on the 2nd day of January, 1934, and filed herein on the 5th day of January, 1934, which separate maintenance agreement is hereby approved and made a part hereof as though set forth in full herein.

"It is further ordered * * * that until the further order of this court defendant pay plaintiff the sum of One Hundred and Thirty-five Dollars ($135.00) per month for her separate maintenance and support so long as she shall live and remain unmarried * * *."

Subsequently a final decree of divorce was entered in which the foregoing provisions of the interlocutory decree of divorce were approved. After the final decree had been entered Mr. Pike married defendant. On December 23, 1945, he died leaving a will in which defendant was named executrix of his estate.

Plaintiff filed a claim against decedent's estate for monthly payments of $135.00 from the date of his death until the date of her remarriage or death, whichever event should first occur. The claim not having been approved by the executrix, plaintiff filed suit thereon. Defendant filed a cross-complaint requesting that it be decreed that the residential property be sold in accordance with the terms of the agreement.

The trial court found:

(1) That it was not true that in the separate maintenance agreement decedent agreed to pay plaintiff the sum of $135.00 per month for her separate maintenance and support, such payments to continue so long as plaintiff lived and did not remarry;

(2) That the provision in the separate maintenance agreement for the payment of monthly sums of $135.00 to plaintiff was not part of a property settlement, but that it was the intention of plaintiff and decedent that said monthly payments should be for the support of plaintiff and were in the nature of alimony; likewise that the provision in the interlocutory decree for the payment of a monthly sum to plaintiff by decedent was a provision for the payment of alimony;

(3) That in making the agreement it was the intention of decedent and plaintiff that the dwelling house mentioned therein should not be owned by them in joint ten-

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come liable, and the wife, hereby further covenants that she will at all times hereafter keep the husband indemnified against any and all claims, damages and liabilities whatsoever that she may hereafter contract or incur, and of all actions, claims and demands on account thereof. The husband covenants that he will at all times hereafter keep the wife indemnified against any and all claims, debts and liabilities whatsoever that he may hereafter contract or incur, and of all actions, claims and demands on account thereof.

"From and after the date of this instrument the earnings and all other acquisitions of property of either of the parties shall be his or her separate property and estate and not community property. Each party may, except as herein otherwise provided, freely acquire, convey and dispose of his or her property and enter into contracts and do all other acts and things in respect to his or her property as freely as though unmarried and without the joinder of the other party.

"In the event that the marriage between the parties should be dissolved by divorce, the wife agrees that she will ask that this agreement be recognized by the Court granting the decree of divorce dissolving said marriage.

"It is further mutually understood and agreed, in the event the marriage between the parties should be dissolved by divorce, that the provisions hereinbefore expressed in paragraph I respecting payment of moneys for the maintenance and support of the wife are accepted and agreed to without prejudice to a subsequent application to said court for modification of said provisions in the event of changed financial conditions of the parties.

"The rights of the wife hereunder shall not be assignable.

"In witness whereof, the parties hereto have signed their names the day and year first above written.

"Warren A. Pike,
"Party of the First Part (husband).
"Eugenie H. Pike,
"Party of the Second Part (wife)."

ancy, but that each of them should thenceforth own an undivided one-half interest therein subject to the terms of the agreement.

The sole question necessary for us to determine is:

Was there substantial evidence to sustain the foregoing findings of fact of the trial court?

[1] This question must be answered in the affirmative and is governed by this rule: When a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with a determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding. In re Estate of Isenberg, 63 Cal.App.2d 214, 217, 146 P.2d 424.

[2] The first finding set forth above is supported by the terms of the agreement whereby decedent promised "to pay to the wife the sum of One Hundred and Thirty-five Dollars ($135.00) per month for her maintenance and support. In the event the wife remarries the husband shall be no longer bound to pay said sum of One Hundred Thirty-five Dollars ($135.00) to the wife."

There is nothing in the agreement by which decedent bound himself to pay plaintiff "so long as she shall live and remain unmarried" the sum of $135.00 per month. This latter provision was inserted by the court in the interlocutory decree of divorce and is the usual form awarding alimony to a wife.

[3] The second finding was likewise supported by substantial evidence. A reading of the agreement shows that the monthly payments were not in lieu of any assignment to the wife of community property, which she would have otherwise received, but were exactly what they were denominated in the agreement: a provision for her maintenance and support. This is evidenced among other things by the fact that in the second paragraph of Part III of the agreement it was provided: "The wife accepts the provisions herein made in lieu of any and all other claims and provisions *for her support and maintenance* * * *" (Italics added.)

[4] The meaning of the agreement was a question of fact for the determination of the trial court whose interpretation being reasonable and supported by the evidence, is binding upon a reviewing court. In re Estate of Rule, 25 Cal.2d 1, 11, 152 P.2d 1003, 155 A.L.R. 1319; Davis v. Stulman, 72 Cal.App.2d 255, 269, 164 P.2d 787.

[5] As the trial court found, supported by substantial evidence, that the provision in the interlocutory decree of divorce awarding a monthly sum to plaintiff was an award of alimony, the right to such payments terminated with the death of her former husband, Warren Pike. (Miller v. Superior Court, 9 Cal.2d 733, 737, 72 P.2d 868; Parker v. Parker, 193 Cal. 478, 481, 225 P. 447; Roberts v. Higgins, 122 Cal.App. 170, 171, 9 P.2d 517.)

This provision of the separate maintenance agreement fell within the first category of contracts between spouses mentioned in Adams v. Adams, 29 Cal.2d 621, 624, 177 P.2d 265.

[6] The third finding was clearly supported by the evidence. By the terms of the agreement plaintiff, after the date of the agreement, was entitled to have possession of the dwelling house of the parties until such time as decedent was able to sell the house for the sum of at least $10,000. It was further agreed that the rights of plaintiff were not assignable.

[7] For a joint tenancy to exist four unities are required, namely: (1) unity of interest, (2) unity of title, (3) unity of time (as to the creation of the tenancy), and (4) unity of possession. (Section 683, Civil Code. See also Denigan v. San Francisco Savings Union, 127 Cal. 142, 149, 59 P. 390, 78 Am.St.Rep. 35.) In view of the provisions of the separate maintenance agreement two of the above mentioned unities, to wit, unity of interest and unity of possession, were destroyed by the agreement.

(1) The agreement prevented the sale of the property until it could be disposed of for at least $10,000; it gave decedent the right to sell the property when he could

obtain at least $10,000 for it; it gave the right to the wife to rent the property which decedent did not have; and it prevented plaintiff from assigning her interest in the property. Clearly plaintiff's interest and rights in the property were entirely different from those of decedent.

(2) The wife was given the possession of the property to the exclusion of decedent, which destroyed the unity of possession. Hence the trial court was correct in finding that after the agreement had been executed the dwelling house was no longer held in joint tenancy, but that each of the parties owned a one-half interest therein subject to the terms of the agreement.

In view of the foregoing findings the trial court properly held:

(1) That plaintiff was not entitled to monthly payments of alimony after her former husband's death;

(2) That the separate maintenance agreement dissolved the joint tenancy pursuant to which they had formerly held and created a tenancy in common subject to the provisions of the separate maintenance agreement, and that such provisions survived the death of Warren Pike and bound the respective heirs, executors, administrators, and assigns of the parties.

Authorities Relied On By Plaintiff

The portions of the opinion in Parker v. Parker, 193 Cal. 478, 225 P. 447 relied on by plaintiff, are not applicable to the facts of the present case for the reason that in the cited case it was stipulated that, "If a decree for divorce should be awarded to either party, the court *instead of dividing the property of said parties between them,* might provide for the separate maintenance of defendant by awarding to her certain property for life, and that plaintiff pay defendant such monthly allowance and secure the same by a lien upon such property of plaintiff *as in the discretion of the court should seem proper.*" (Italics added.) This stipulation conferred upon the court the right to make a property settlement for the parties and the award of monthly payments to the wife constituted an award of a portion of her share in their property. The court very properly held that under such circumstances she had a claim against her ex-husband's estate. The facts are clearly distinguishable from those at bar.

In re Estate of Mesmer, 94 Cal.App. 97, 270 P. 732, is likewise not in point. There an agreement was entered into between the parties under which all of the community property was conveyed to the husband and he promised to pay his wife $75.00 per month payment to be guaranteed by one Smith during the husband's lifetime. The court made an order awarding her the sum of $75.00 per month during her life and a claim was allowed against the estate for such sum subsequent to his death upon the theory that the monthly payments were in lieu of the wife's receiving any property and that it was the intention of the parties that the payments should continue during her life even though her former husband should die. This intention was evidenced among other things by the fact that the guarantor Smith limited his guarantee of the payments to the period during which the husband should be alive. Clearly the situation in the cited case and that involved herein are factually distinguishable.

Hammond v. McArthur, 30 Cal.2d 512, 183 P.2d 1, is likewise inapplicable for the reason that in the cited case only one of the cotenants joined in transferring his interest in the joint tenancy to his cotenant and the evidence disclosed that it was the intention of the parties, as pointed out by the Supreme Court, not to terminate the joint tenancy and that the rights of survivorship should remain. In the instant case both of the joint tenants executed the agreement which resulted in a termination of the joint tenancy, and the evidence demonstrates that both parties to the agreement intended to terminate the joint tenancy and intended that after the execution of the agreement the right of survivorship should cease.

In view of the conclusions derived no useful purpose would be served by discussing other points argued by counsel because irrespective of their determination they would not change the result we have reached.

The judgment is affirmed.

MOORE, P. J., and WILSON, J., concur.

SMITH v. LAGERSTROM et al.

Civ. 16658.

District Court of Appeal, Second District, Division 2, California.

July 18, 1949.

Hearing Granted Sept. 15, 1949.*

1. Alteration of Instruments 🔑27(1)

Under negotiable instruments law, when an instrument is delivered which contains a blank, the person in possession of instrument has prima facie authority to complete it by filling in the blank, but such authority is merely prima facie and gives rise to a rebuttable presumption. Civ. Code, § 3095.

2. Alteration of instruments 🔑28

In action on a note, which plaintiff completed by filling in a blank so as to make note payable on demand, defendants were entitled under negotiable instruments law to introduce evidence in support of their affirmative defense tending to prove that plaintiff's authority to fill in blank was limited to making note payable only out of net proceeds of a business, and that plaintiff did not have authority to fill in blank so as to make note payable on demand. Civ.Code, § 3095.

3. Evidence 🔑428

In action on a note, which plaintiff completed by filling in a blank so as to make note payable on demand, parol evidence rule did not preclude defendants from introducing evidence in support of their affirmative defense tending to prove that plaintiff's authority to fill in blank was limited to making note payable out of net proceeds of a business, and that plaintiff did not have authority to fill in blank so as to make note payable on demand. Civ. Code, § 3095.

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Appeal from Superior Court, Santa Barbara County; Ernest D. Wagner, Judge.

Action on a promissory note by Allen Dale Smith against Russ Lagerstrom and Marjorie Lagerstrom. From an adverse judgment, defendants appeal.

Judgment reversed.

J. Vincent Wood, Santa Barbara, and Gordon M. Snyder, Los Angeles, for appellants.

T. H. Canfield and John A. Westwick, Santa Barbara, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff predicated upon the granting of his motion for a directed verdict after trial before a jury in an action to recover on a promissory note, defendants appeal.

Undisputed Facts: The complaint as amended alleged a cause of action for failure to pay the amount due on a promissory note. Among other allegations of the complaint was the following: "That on the 3rd day of January, 1947, the Defendants and each of them, made, executed and delivered to Plaintiff their certain Promissory Note, in words and figures as follows:

$6,000.00 January 3, 1947

——— after date we promise to pay to the order of Allen Dale Smith Six Thousand no/100 Dollars at ———. Value received with interest at the rate of ——— per annum.

/s/ Russ Lagerstrom
/s/ Marjorie Lagerstrom"

In addition to a general denial of the foregoing allegation of the complaint defendant alleged among others the affirmative defense that plaintiff was not authorized to fill in the blank spaces in the promissory note to make it an "on demand" note, but that plaintiff's authority was limited to making the note payable only from the profits of a certain business located in Santa Barbara known as the "Seven Seas Restaurant."

At the trial plaintiff testified that when he received the note it contained the blanks which appear in the note as alleged in the complaint as amended, and that he filled in the words "On demand; Santa Barbara, California", and "seven percent." After plaintiff had rested, his counsel objected to the introduction by defendants of any evidence in support of the affirmative defenses heretofore mentioned. This objection was sustained by the trial judge.

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* Subsequent opinion 215 P.2d 450.

Question: Was it prejudicial error for the trial judge to sustain an objection to the introduction of evidence by defendants in support of their affirmative defense that plaintiff's authority to fill in the blank as to the time of payment of the note was limited to making the note payable from profits realized from the operation of a business in Santa Barbara known as the "Seven Seas Restaurant"?

This question must be answered in the affirmative. Section 3095 of the Civil Code, Section 14 of the Uniform Negotiable Instruments Law, reads in part as follows: "Section 3095. Blanks; when may be filled. Where the instrument is wanting in any material particular, the person in possession thereof has a *prima facie* authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a *prima facie* authority to fill it up as such for any amount. *In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time.* * * *" (Italics added.)

[1] Pursuant to the provisions of the foregoing section of the Civil Code, the law is settled that when an instrument is delivered which contains a blank, the person in possession thereof has prima facie authority to complete it by filling in the blank. White v. White, 39 Cal.App.2d 57, 60, 102 P.2d 432; In re Estate of Gillett, 73 Cal.App.2d 588, 596, 166 P.2d 870.

However, such authority is merely prima facie and gives rise to a rebuttable presumption that may be overcome by the adverse party's introducing the proper quantum of competent evidence. In re Estate of Gillett, supra, 73 Cal.App.2d at page 597, 166 P.2d 870; Cassetta v. Baima, 106 Cal.App. 196, 200, 288 P. 830; Pacific Automobile Exchange v. Stansfield, 62 Cal. App. 577, 580, 217 P. 566.

[2, 3] Therefore, applying the above rule to the facts of the present case, plaintiff had prima facie authority to fill in the blanks in the note, which authority was based on a rebuttable presumption and placed on defendants the burden of overcoming the authority to fill in the blanks. Since the burden was on defendants to overcome the prima facie case made by plaintiff, defendants were entitled to introduce, in support of their affirmative defense, evidence tending to prove that plaintiff was without authority to fill in one of the blanks in the note to make it an "on demand" note, and that his authority was limited to making the note payable only out of the net proceeds of a business in Santa Barbara known as the "Seven Seas Restaurant." The court by sustaining plaintiff's objection to the introduction of evidence in support of such defense precluded defendants from introducing evidence tending to sustain a substantial defense to the action, and the ruling was thus prejudicially erroneous.

There is no merit in plaintiff's contention that the evidence which defendants were proffering violated the parol evidence rule. The authorities relied on by plaintiff are inapplicable since the evidence was not offered for the purpose of adding to, varying or contradicting the terms of a written instrument, but on the contrary, was offered for the purpose of establishing the *very terms* of the written instrument. Akopoff v. Mesropian, 96 Cal.App. 128, 129, 273 P. 604; P. A. Smith Co. v. Muller, 201 Cal. 219, 222, 256 P. 441; Verzan v. McGregor, 23 Cal. 339, 343.

In view of our conclusion it is unnecessary to consider other alleged errors urged by defendants.

The judgment is reversed.

MOORE, P. J., concurs.

WILSON, Justice.

I concur. However, in view of the reversal of the judgment and the possibility of a new trial of the action, other alleged errors complained of by appellant should be determined for the guidance of the trial court and counsel to the end that the same errors may not be made the subject of another appeal. See Canon 19, Canons of Judicial Ethics, 49 Rep.Am.Bar Assn. (1924) 760, 767. Since the majority have deemed it unnecessary to consider such errors it would serve no purpose for me to discuss them. This concurrence is not to be construed as an expression of an opinion concerning the validity of the other matters discussed in appellants' brief, nor should the failure of the majority to decide all questions raised by the appeal be taken by the trial court to mean that any of them are regarded as unsound.

MARTIN SHIP SERVICE CO. v. CITY OF LOS ANGELES et al.

HUTCHINSON v. CITY OF LOS ANGELES et al.

Nos. 16739, 16740.

District Court of Appeal, Second District, Division 3, California.

July 14, 1949.

Hearing Granted Sept. 8, 1949.*

1. Commerce 🔑21

A ship in a harbor, even though docked, is engaged in "commerce" within commerce clause of federal constitution if ship remains in readiness for another voyage. U.S.C.A.Const. art. 1, § 8, cl. 3.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Commerce".

2. Commerce 🔑21

The doctrine that loading and unloading of interstate or foreign shipment is so closely related to interstate transportation as to be practically a part of it is not limited to loading and unloading done by employees of interstate carrier, but the work of keeping the instrumentalities used in interstate and foreign commerce in a proper state of repair while thus used is also so closely related to such commerce as to be a part of it. U.S.C.A.Const. art. 1, § 8, cl. 3.

3. Commerce 🔑63

The business of furnishing maintenance and repair service to ships engaged exclusively in interstate and foreign commerce while ships are in harbor is an integral part of interstate and foreign commerce, and hence ordinance imposing license tax on gross receipts derived by plaintiffs as independent contractors in furnishing such service is invalid as imposing direct and immediate burden on interstate and foreign commerce in violation of commerce clause of federal constitution. U.S.C.A.Const. art. 1, § 8, cl. 3.

Appeals from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Actions to enjoin collection of business license tax by Martin Ship Service Company, a California corporation, and by William H. Hutchinson, doing business as California Ship Service, against the City of Los Angeles, a municipal corporation, and others. From the judgments, the defendants appeal.

Affirmed.

Ray L. Chesebro, City Attorney, Bourke Jones, Assistant City Attorney, and Lester L. Lev, Deputy City Attorney, Los Angeles, for appellants.

Ball, Hunt and Hart and Joseph A. Ball, Long Beach, for respondents.

VALLÉE, Justice.

Appeals by defendants from judgments adjudging that Ordinance 91,411 of Los Angeles insofar as it attempts to impose a license tax upon gross receipts derived by plaintiffs as independent contractors in the rendering of services and in the making of repairs to ships which are engaged solely and exclusively in interstate and foreign commerce is invalid and unconstitutional, and permanently enjoining defendants from collecting the tax. The cases were tried upon written stipulations of facts and are submitted here on agreed statements. Rules on Appeal, Rule 6, 22 Cal.2d 6.

Each plaintiff is engaged wholly and exclusively in the business of contracting for and rendering services to ships which are employed only in interstate and foreign commerce at a time while said ships are upon the waters of the Pacific Ocean and within the harbors of Los Angeles, Long Beach, San Diego, Newport-Balboa and Port Hueneme. These harbors are within the municipal boundaries of the respective cities. The services are rendered under contract with the owners of the ships and while they are tied to docks or anchored in the harbors. The services are rendered by employees of plaintiffs under their direction and control either at the dock or on board ship. The services consist of painting the sides and other parts of ships, removing scale, cleaning tanks, chain lockers, boilers, furnaces, condensers, engine rooms, airducts, removing ballast, cleaning oil spilled by ships from the harbor waters, sandblasting ships' sides, scaling decks, handling ships' stores by taking them from trucks of provision merchants at the dock, trucking them from the dock onto the ships, and placing them in storerooms on board. All of the services are done only by employees of each plaintiff who are members of Painters' and Scalers' Union, a subsidiary of International Longshoremen's and Warehousemen's Union. All of the employees are under the direction and control of supervisors or foremen employed by plaintiffs. The contracts of plaintiffs provide for specific work to be done under the direction and control of plaintiffs to the satisfaction of the shore side representative, either port manager, port captain or agent for the shipowners. No ship's officer or employee has supervision over, or the right to direct or control, the work of the employees of plaintiffs.

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* Subsequent opinion 215 P.2d 24.

Ordinance 91,411 of Los Angeles in section 21,190 provides that every person engaged in any means of livelihood as an independent contractor and not as an employee of another shall pay a license fee of $12.00 per year for the first $12,000.00 or less of gross receipts and in addition $1.00 per year for each additional $1000.00 or fractional part thereof, and that "As used in this section, the term 'gross receipts' does not include: 1. Receipts from [any] means of livelihood, which this city is prohibited from taxing under the Constitution or laws of the United States. * * *"

Findings of fact were waived. As we have stated, the judgment in each case adjudges that the ordinance insofar as it attempts to impose a license tax upon the gross receipts of plaintiffs in the rendition of the services described is invalid and unconstitutional, in that it purports to impose a license tax upon the gross receipts of an occupation or business which is wholly and integrally a part of interstate and foreign commerce, and in that it unduly burdens interstate and foreign commerce.

Appellants' assignments of error are: 1. that the business of furnishing maintenance and repair services to ships engaged exclusively in interstate and foreign commerce is not such an integral part of interstate and foreign commerce as to exclude such business from local taxation; 2. The imposition of a business license tax based upon the gross receipts of the business of furnishing maintenance and repair services to ships engaged solely in interstate and foreign commerce does not constitute an undue burden on interstate or foreign commerce. Appellants concede that the business of furnishing maintenance and repair services to ships engaged exclusively in interstate and foreign commerce is related to such commerce. They argue that the business is not itself interstate or foreign commerce and that it has a definite local aspect and character which is subject to state jurisdiction and control. Respondents say that Los Angeles is prohibited from taxing gross receipts from services rendered by plaintiffs to ships in navigation between the various states and foreign nations by Article I, section 8, clause 3 of the Constitution of the United States, the "Commerce Clause", and Article I, section 10, clause 2, the "Import-Export Clause." The apportionment of gross receipts between business conducted inside and outside of Los Angeles is not in issue.

The tax imposed is for the privilege of carrying on an occupation. The gross receipts furnish the basis for measuring the amount of the tax. Union Pac. R. Co. v. City of Los Angeles, 53 Cal.App.2d 825, 830, 128 P.2d 408.

Article I, section 8, clause 3 of the Constitution of the United States provides that the Congress shall have power "To regulate Commerce with foreign Nations, and among the several States, * * *."

[1] A ship in a harbor, even though docked, is engaged in commerce if it remains in readiness for another voyage. Carumbo v. Cape Cod S. S. Co., 1 Cir., 123 F.2d 991, 995.

The force of the commerce clause was stated in the late case of Freeman v. Hewit, 329 U.S. 249, 67 S.Ct. 274, 276, 91 L.Ed. 265: "Our starting point is clear. In two recent cases we applied the principle that the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States. In short, the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States. Southern Pacific Co. v. Arizona, 325 U.S. 761, 65 S.Ct. 1515, 89 L.Ed. 1915; Morgan v. Virginia, 328 U.S. 373, 66 S.Ct. 1050, [90 L.Ed. 1317, 165 A.L.R. 574]. In so deciding we reaffirmed, upon fullest consideration, the course of adjudication unbroken through the Nation's history. This limitation on State power, as the Morgan case so well illustrates, does not merely forbid a State to single out interstate commerce for hostile action. A State is also precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between States. It is immaterial that local commerce is subjected to a similar encumbrance. It may commend itself to a State to encourage a pastoral instead of an industrial society. That is its concern and its privilege. But to compare a State's treatment of its local trade with the exertion of its authority against commerce in the national domain is to compare incomparables." See, also, Richfield Oil Corp. v. State Board of Equalization, 329 U.S. 69, 67 S.Ct. 156, 91 L.Ed. 80.

We think appellants' contentions are fully and completely answered, and our decision controlled, by the decisions of the Supreme Court of the United States in Puget Sound Stevedoring Co. v. Tax Commission, 1937, 302 U.S. 90, 58 S.Ct. 72, 82 L.Ed. 68, and Joseph v. Carter & Weekes Stevedoring Co., 1947, 330 U.S. 422, 67 S.Ct. 815, 91 L.Ed. 993. The Puget Sound case determined the constitutional validity of a statute of Washington which laid a tax upon the business of a stevedoring company, the amount of which was measured by a percentage of the gross receipts. The statute imposed the tax upon all business activities within the state for the privilege of engaging in business therein. Wash. Laws 1935, chap. 180. The company was engaged in the general stevedoring business at ports on Puget Sound. At times it contracted with a shipowner or ship master to load or unload a vessel through its own employees, controlling and directing the work itself. At other times under its contract it did not undertake to control, direct, or supervise the work. It merely collected the longshoremen and supplied them to the vessel. There, as here, all vessels served were engaged exclusively in interstate or foreign commerce. The suit was to enjoin collection of the tax. The Supreme Court of Washington upheld the tax upon the ground that the stevedoring company was an independent contractor engaged in a local business. In holding the statute invalid so far as it applied to contracts of the taxpayer by which it undertook to load and unload vessels through its own employees, controlling and directing the work itself, Mr. Justice Cardozo, writing for the court, said, 58 S.Ct. 72, 73: "The business of appellant, in so far as it consists of the loading and discharge of cargoes by longshoremen subject to its own direction and control, is interstate or foreign commerce. Transportation of a cargo by water is impossible or futile unless the thing to be transported is put aboard the ship and taken off at destination. A stevedore who in person or by servants does work so indispensable is as much an agency of commerce as shipowner or master. 'Formerly the work was done by the ship's crew; but, owing to the exigencies of increasing commerce and the demand for rapidity and special skill, it has become a specialized service devolving upon a class "as clearly identified with maritime affairs as are the mariners."' Atlantic Transport Co. of West Virginia v.

Imbrovek, 234 U.S. 52, 62, 34 S.Ct. 733, 735, 58 L.Ed. 1208 [1212], 51 L.R.A.,N.S., 1157. No one would deny that the crew would be engaged in interstate or foreign commerce if busied in loading or unloading an interstate or foreign vessel. Cf. Baltimore & O. S. W. R. Co. v. Burtch, 263 U.S. 540, 44 S. Ct. 165, 68 L.Ed. 433 [24 N.C.C.A. 42]. The longshoreman busied in the same task bears the same relation as the crew to the commerce that he serves. Indeed, for the purposes of the Merchant Marine Act ([June 5, 1920] 41 Stat. at L. 988, 1007 [chap. 250], § 33 [46 U.S.C.A. §§ 688, 861 et seq.]), a stevedore is a 'seaman.' International Stevedoring Co. v. Haverty, 272 U.S. 50, 47 S.Ct. 19, 71 L.Ed. 157, * * * The business of loading and unloading being interstate or foreign commerce, the state of Washington is not at liberty to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts. Decisions to that effect are many and controlling. [Citations.] The fact is not important that appellant does business as an independent contractor as long as the business that it does is commerce immune from regulation by the states. What is decisive is the nature of the act, not the person of the actor."

The Joseph case, 330 U.S. 422, 67 S.Ct. 815, 91 L.Ed. 993, involved an ordinance of the City of New York similar to the statute of Washington considered in the Puget Sound case and to the ordinance of Los Angeles before us. The business of Carter & Weekes was general stevedoring, consisting of taking freight from a convenient place on the pier or lighter within New York City and storing it properly for safety and for handling in or near the outgoing vessels alongside or of similarly unloading a vessel on its arrival. The vessels moved in interstate commerce. In holding that the tax on the stevedoring company constituted an unconstitutional burden on commerce, the Supreme Court of the United States stated, 67 S.Ct. 817: "Petitioners recognize the force of the Puget Sound case as a precedent. Their argument is that subsequent holdings of this Court have indicated that the reasons which underlay the decision are no longer controlling in judicial examination of the constitutionality of state taxation of the gross proceeds derived from commerce, subject to federal regulation." The Court said that the rule that the Commerce Clause forbids undue interference by the states with interstate commerce "applies in full force to an unapportioned tax on the gross proceeds from interstate business, where the taxes were not in lieu of ad valorem taxes on property," and continued: "We do not think that a tax on gross income from stevedoring, obviously a 'continuation of the transportation,' is a tax apportioned to income derived from activities with the taxing state. The transportation in commerce, at the least, begins with loading and ends with unloading. Loading and unloading has effect on transportation outside the taxing state because those activities are not only preliminary to but are an essential part of the safety and convenience of the transportation itself. When we come to weigh the burden or interference of this tax on the gross receipts from interstate commerce, the purposes of that portion of the Commerce Clause—the freeing of business from unneighborly regulations that inhibit the intercourse which supplies reciprocal wants by commerce—is a significant factor for consideration. * * *

"A power in a state to tax interstate commerce or its gross proceeds, unhampered by the Commerce Clause, would permit a multiple burden upon that commerce. This has been noted as ground for their invalidation. Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 255, 58 S.Ct. 546, 548, 82 L.Ed. 823, 115 A.L.R. 944. The selection of an intrastate incident as the taxable event actually carries a similar threat to the commerce but, where the taxable event is considered sufficiently disjoined from the commerce, it is thought to be a permissible state levy. This result generally is reached because the local incident selected is one that is essentially local and is not repeated in each taxing unit. In the present case, the threat of a multiple burden, except in the few instances in the record of interstate, in distinction to foreign, commerce, is absent. The multiple burden on interstate transportation from taxation of the gross receipts from stevedoring arises from the possibility of a similar tax for unloading. The actual effect on the cost of carrying on the commerce does not differ from that imposed by any other tax exaction—ad valorem, net income or excise. Cf. Western Live Stock v. Bureau of Revenue, supra, 303 U.S. at page 254, 58 S.Ct. at page 548, 82 L.Ed. 823, 115 A.L.R. 944. We need consider only whether or not the loading and unloading is distinct enough from the commerce to permit the tax on the gross.

"On precedent, the Puget Sound case is controlling. It was promptly and recently cited with approval. * * * Upon examination this history gives an impression that there has been a doubt as to the continued vitality of Puget Sound. We come now face to face with the problem of overruling or approving the case.

"Since Puget Sound there has been full consideration of how far a state may go in taxing intrastate incidents closely related in time and movement to the interstate commerce. The cases that lend strongest support to petitioners' argument for overruling the Puget Sound decision have been referred to above. We comment further upon them. * * *

"Though all of these cases were closely related to transportation in commerce both in time and movement, it will be noted that in each there can be distinguished a definite separation between the taxable event and the commerce itself. We have no reason to doubt the soundness of their conclusions.

"Stevedoring is more a part of the commerce than any of the instances to which reference has just been made. Although state laws do not discriminate against interstate commerce or in actuality or by possibility subject it to the cumulative burden of multiple levies, those laws may be unconstitutional because they burden or interfere with commerce. See Southern Pacific Co. v. [State of] Arizona ex rel. Sullivan, 325 U.S. 761, 767, 65 S.Ct. 1515, 1519, 89 L.Ed. 1915. Stevedoring, we conclude, is essentially a part of the commerce itself and therefore a tax upon its gross receipts or upon the privilege of conducting the business of stevedoring for interstate and foreign commerce, measured by those gross receipts, is invalid. We reaffirm the rule of Puget Sound Stevedoring Company." Cf. Baltimore & O. S. W. R. Co. v. Burtch, 263 U.S. 540, 44 S.Ct. 165, 68 L.Ed. 433; Union Stock Yard & Transit Co. v. United States, 308 U.S. 213, 219, 60 S.Ct. 193, 84 L.Ed. 198, 206. The Joseph case has not been disapproved, distinguished, modified, or criticized; nor has its force been sapped in any later case arising under the Commerce Clause.

[2] The doctrine that the loading and unloading of an interstate or foreign shipment is so closely related to the interstate transportation as to be practically a part of it is not limited to loading and unloading done by employees of an interstate carrier. Allesandro v. C. F. Smith Co., 6 Cir., 136 F.2d 75, 76, 149 A.L.R. 382. The work of keeping the instrumentalities used in interstate and foreign commerce in a proper state of repair while thus used is so closely related to such commerce as to be a part of it. Southern Pacific Co. v. Pillsbury, 170 Cal. 782, 790, 151 P. 277, L.R.A.1916E, 916.

If loading and unloading vessels engaged in interstate and foreign commerce is an integral part of such commerce and a tax measured by the gross receipts derived therefrom is an unconstitutional burden on such commerce, then unquestionably the services performed by plaintiffs constitute an integral part of that commerce and the tax is an unconstitutional burden thereon. The services are performed only upon interstate and foreign carriers at a time when they are engaged in interstate and foreign commerce. All the work is done on the vessels while they are on navigable waters and only during the course of their short stay in one of their many ports of call. The repairing and reconditioning and other services are rendered by plaintiffs to the end that the vessels may in a day or two resume their journey on the high seas. They are services which were formerly performed by the crew itself. They are traditionally and historically the work of seamen. International Stevedoring Co. v. Haverty, 272 U.S. 50, 47 S.Ct. 19, 71 L.Ed. 157, 160; Vojkovich v. Ursich, 49 Cal.App.2d 268, 121 P.2d 803. Due to the demand for speed and specialized services the work is now done in large part by ships' service companies just as stevedoring formerly done by the crew is now done largely by independent contractors.

The work performed by the plaintiffs bears the same relationship to commerce as does the work of the crew of the vessel. The services are a necessary and essential part of the transportation of the cargo. They not only fit the vessel for further voyage but aid in the shifting and handling of the cargo. They aid and supplement the services of the crew and longshoremen in fitting the vessels and adjusting their cargoes. The services performed necessarily and directly contribute to the more extended use of the vessels in commerce. Without such services, interstate and foreign traffic could not be carried on. The loading of ships' stores and shifting cargo in the holds, which is part of plaintiffs' work, is essentially stevedoring. The repair and maintenance of a vessel carrying cargo between the states and between foreign nations is as closely connected with interstate and foreign commerce as is the loading or unloading of the cargo. It is no answer to say that the services performed by plaintiffs consist in servicing an instrumentality by which commerce is transported and not the handling of the cargo itself which is the actual subject of commerce. Without an efficient instrumentality no cargo would be transported.

The incidents taxed lend themselves to repeated exactions and duplications in other jurisdictions. Such exactions tend to impede the free flow of commerce. A vessel traveling the high seas requires painting and scaling in nearly every port of call. If Los Angeles can tax the gross receipts derived from rendition of the type of services rendered by plaintiffs so can every port in which the vessel anchors or docks. One can readily conceive of the cost of transportation becoming prohibitive. There is a possibility of multiple burdens which was one of the bases for declaring the tax invalid in Joseph v. Carter & Weekes Stevedoring Co., 330 U.S. 422, 67 S.Ct. 815, 91 L.Ed. 993.

We are of the opinion that the incidents taxed are so close to and so inseparably intertwined with interstate and foreign commerce as to be practically a part of it. None of them is a part of intrastate commerce. They are not sufficiently disjoined from interstate and foreign commerce as to open them to state taxation.

In support of the tax, we are referred to Union Brokerage Co. v. Jensen, 322 U.S. 202, 64 S.Ct. 967, 88 L.Ed. 1227, 152 A.L.R. 1072; Eastern Air Transport v. South Carolina Tax Comm., 285 U.S. 147, 52 S.Ct. 340, 76 L.Ed. 673; Department of Treasury v. Ingram-Richardson Mfg. Co., 313 U.S. 252, 61 S.Ct. 866, 85 L.Ed. 1313; Department of Treasury of Indiana v. Wood Preserving Corp., 313 U.S. 62, 61 S.Ct. 885, 85 L.Ed. 1188, and Memphis Natural Gas Co. v. Stone, 335 U.S. 80, 68 S.Ct. 1475, 92 L.Ed. 1832. The factual situations in those cases are not at all parallel with those in the cases at hand. The Union Brokerage case upheld a license tax on foreign corporations doing business in Minnesota paid for the privilege of using the state courts. The South Carolina case upheld a license tax on local intrastate sales. The Ingram-Richardson and Wood Preserving cases upheld a gross income tax on the fruits of an intrastate activity. The Wood Preserving case was distinguished in Joseph v. Carter & Weekes Stevedoring Co., 330 U.S. 422, 91 L.Ed. 993, 67 S.Ct. 815. The Memphis case sustained a corporate franchise tax on a foreign corporation for the privilege of maintaining a pipe line through Mississippi. There was no attempt, as here, to tax gross receipts resulting from interstate activity. These cases do not furnish justification for the present tax. The validity of the Los Angeles ordinance as applied to the plaintiffs is to be determined upon a consideration of cases involving substantially similar factual situations and taxes. As said in Freeman v. Hewit, 329 U.S. 249, 256, 67 S.Ct. 274, 278, 91 L.Ed. 265: "While these permitted taxes may in an ultimate sense, come out of interstate commerce, they are not, as would be a tax on gross receipts, a direct imposition on that very freedom of commercial flow which for more than a hundred and fifty years has been the ward of the Commerce Clause."

It is suggested that the tax is imposed upon events which occur within the taxing jurisdiction and at most upon purely localized incidents in furtherance of interstate and foreign commerce. This suggestion is answered by what was said by the court, speaking through Mr. Justice Rutledge, in Nippert v. Richmond, 327 U.S. 416, 423, 66 S.Ct. 586, 589, 90 L.Ed. 760, 764, 162 A.L.R. 844: "If the only thing necessary to sustain a state tax bearing upon interstate commerce were to discover some local incident which might be regarded as separate and distinct from 'the transportation or intercourse which is' the commerce itself and then to lay the tax on that incident, all interstate commerce could be subjected to state taxation and without regard to the substantial economic effects of the tax upon the commerce. For the situation is difficult to think of in which some incident of an interstate transaction taking place within a state could not be segregated by an act of mental gymnastics and made the fulcrum of the tax. All interstate commerce takes place within the confines of the states and necessarily involves 'incidents' occurring within each state through which it passes or with which is is connected in fact. And there is no known limit to the human mind's capacity to carve out from what is an entire or integral economic process particular phases or incidents, label them as 'separate and distinct' or 'local,' and thus achieve its desired result."

The tax is not made valid because a similar tax is placed on local businesses. If the tax, either in fact or by the very threat of its incidence, imposes a burden on interstate or foreign commerce, it clashes with the Commerce Clause. As said in Freeman v. Hewit, 329 U.S. 249, 254, 91 L.Ed. 265, 67 S.Ct. 274, 275, 277: "It has been suggested that such a tax is valid when a similar tax is placed on local trade, and a specious appearance of fairness is sought to be imparted by the argument that interstate commerce should not be favored at the expense of local trade. So to argue is to disregard the life of the Commerce Clause. Of course a State is not required to give active advantage to interstate trade. But it cannot aim to control that trade even though it desires to control its own. It cannot justify what amounts to a levy upon the very process of commerce across State lines by pointing to a similar hobble on its local trade. It is true that the existence of a tax on its local commerce detracts from the deterrent effect of a tax on interstate commerce to the extent that it removes the temptation to sell the goods locally. But the fact of such a tax, in any event, puts impediments upon the currents of commerce across the State line, while the aim of the Commerce Clause was precisely to prevent States from exacting toll from those engaged in national commerce. The Commerce Clause does not involve an exercise in the logic of empty categories. It operates within the framework of our federal scheme and with due regard to the national experience reflected by the decisions of this Court, even though the terms in which these decisions have been cast may have varied. Language alters, and there is a fashion in judicial writing as in other things."

[3] The tax as applied to plaintiffs imposes a direct and immediate burden on interstate and foreign commerce and for that reason is invalid. The services taxed are not a detached aspect of commerce unrelated to objects of the Commerce Clause. They are an essential and integral part of commerce. It was pointed out in Freeman v. Hewit, 329 U.S. 249, 67 S.Ct. 274, 275, 91 L.Ed. 265, that a tax on gross receipts is not merely a burden incident to effective administration. The net result of a tax on the gross receipts of plaintiff is to tax the privilege of transporting goods in interstate and foreign commerce.

In view of our conclusion, it is not necessary to consider whether the tax as applied to plaintiffs is invalid under the Import-Export Clause of the Constitution of the United States. U.S.Const. Art. I, sec. 10, clause 2; see, Richfield Oil Corp. v. State Board of Equalization, 329 U.S. 69, 67 S.Ct. 156, 91 L.Ed. 80.

Judgments affirmed.

SHINN, P. J., and WOOD, J., concur.

92 Cal.App.2d 741

PEOPLE v. STINCHCOMB.

Cr. 4323.

District Court of Appeal, Second District, Division 1, California.

July 8, 1949.

Hearing Denied Aug. 4, 1949. *

1. Criminal law ⚿997

A motion in the nature of a writ of error coram nobis is a civil proceeding, but for the purpose of furnishing a defendant with the record on appeal at the expense of the county, it is a part of the proceedings in a criminal case.

2. Criminal law ⚿1069(6)

Unless District Court of Appeal could find some theory on which to relieve defendant from failure to file within 10 days appeal from order denying petition for writ in the nature of a writ of error coram nobis, as required by court rule requiring that an appeal in criminal case be taken by filing a written notice of appeal with clerk of superior court within 10 days after rendition of the judgment, then rule was applicable, and appeal was required to be dismissed. Rules on Appeal, rule 31.

3. Criminal law ⚿1069(6)

Where order denying petition for writ in the nature of a writ of error coram nobis was made on October 11, but the first notice that defendant, who was confined in the state penitentiary, had of the ruling on the motion was on October 20, and defendant immediately mailed his notice of appeal, appeal would not be dismissed because of failure of defendant to comply with court rule providing that an appeal in a criminal case may be taken by filing a written notice of appeal with clerk of superior court within 10 days after rendition of the judgment. Rules on Appeal, rule 31.

4. Constitutional law ⚿266

Whether the reading at the trial of the transcript of the testimony of witnesses at preliminary examination, instead of having those witnesses testify at the trial, is due process of law, depends on the circumstances of the case involved. Pen. Code, § 686.

5. Constitutional law ⚿266

Where counsel for defendant stipulated in the presence of the defendant in open court that transcript of the testimony of witnesses at preliminary examination might be read at the trial instead of having the witnesses testify, there was no denial of due process because of the failure of the witnesses to testify at the trial. Pen. Code, § 686.

6. Constitutional law ⚿257

Alleged fact that defendant was incarcerated eight days before trial and was denied counsel during that time, was not a denial of due process of law.

7. Criminal law ⚿997

Writ of error coram nobis does not lie to correct an issue of fact which has been adjudicated, even if wrongly determined.

8. Criminal law ⚿997

Writ of error coram nobis does not lie for alleged false testimony at the trial.

9. Infants ⚿20
Sodomy ⚿6

Evidence sustained convictions of crimes against children and of sex perversion. Pen. Code, §§ 288, 288a.

◆

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Gilbert Joseph Stinchcomb was convicted of violations of sections 288 and 288a of the Penal Code, and from an order denying his petition for a writ in the nature of a writ of error coram nobis, he appeals.

Order affirmed.

Gilbert Joseph Stinchcomb in pro. per.

Fred N. Howser, Attorney General, Frank Richards, Deputy Attorney General, for respondent.

DRAPEAU, Justice.

The defendant was convicted of eight counts of violation of Sections 288 and 288a of the Penal Code. He was also found to have suffered two prior felony convictions, one for stealing an automobile and the other for operating an automobile without the owner's consent. He was sentenced to the state penitentiary for the term prescribed by law as to each count, counts one and two to be served concurrently, the remaining six counts to be served consecutively. No appeal was taken from the judgments, which were dated October 20, 1947.

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* Subsequent opinion 228 P.2d 69.

October 5, 1948, the defendant filed a number of documents in the Superior Court. The court treated these as a motion to set aside the judgments, a proceeding generally described in this state as a petition for a writ of error coram nobis. This petition was heard and denied October 11, 1948. Notice of appeal was filed October 25, 1948.

The documents filed on behalf of the defendant were prepared by him while confined in the state penitentiary and without the aid of counsel. It is evident that they were prepared by a person with little knowledge of the law or legal procedure.

We are first met with the suggestion by the Attorrney General that the appeal must be dismissed because the notice of appeal was not filed within ten days after the date of the order denying the petition. It is argued that because of Rule 31 of the Rules on Appeal this court is without jurisdiction to hear the appeal.

The order was made October 11, 1948, and the notice of appeal was filed October 25, 1948. Defendant states that the first notice he had of the ruling on his motion was October 20 1948, whereupon he immediately mailed his notice of appeal, which was filed October 21, 1948.

[1-3] Regarded as an entity, a motion in the nature of a writ of error coram nobis is a civil proceeding. For the purpose of furnishing a defendant with the record on appeal at the expense of the county, it has been said to be a part of the proceedings in a criminal case. In re Paiva, 31 Cal.2d 503, 190 P.2d 604. Unless the court can find some theory upon which to relieve the defendant from the time element in this case, Rule 31, Rules on Appeal, 22 Cal.2d 1, 22, is applicable, and the appeal must be dismissed. In re Horowitz, 33 Cal.2d 534, 203 P.2d 513. We think this theory is to be found in People v. Slobodion, 30 Cal.2d 362, 181 P.2d 868, where it is held that if a defendant in the state penitentiary has taken every step he possibly could to perfect his appeal he will not be deprived of the right of appeal because of the failure of some one in official position to forward a notice of appeal so that it might have been filed within the time required by the rules. Therefore, we will not dismiss the appeal.

This, then brings us to a review of the entire case.

On August 19, 1947, an information was filed in the Superior Court charging the offenses and the priors already referred to. The defendant appeared with his counsel, the public defender of Los Angeles County, pleaded not guilty and denied the prior convictions. The case was called for trial and the defendant waived a jury.

In his briefs on appeal defendant repeatedly asserts that his right to a jury trial was waived by his attorney "against the request and demand for a jury trial by the defendant." The record does not support these charges, as the following colloquy between court, counsel, and defendant will show:

"Mr. Johnson: One step at a time. I presume we should first waive the jury.

"Mr. Harvey: Defendant desires to waive trial by jury.

"The Court: Is that your desire?

"The Defendant: That's right.

"The Court: All right.

"Mr. Harvey: I join in the waiver.

"Mr. Johnson: People join in that waiver."

Then the case for the people was submitted to the trial judge on the transcript of the testimony taken on the preliminary hearing, with the right of the defendant to testify himself and to present any other evidence relevant and pertinent to the case. In other words, upon stipulation of counsel for the people and the defendant, the trial judge read the transcript of the testimony of the witnesses at the preliminary examination and then continued with the further trial of the case.

The defendant complains of this procedure. But the stipulation was made in his presence and hearing in open court and he voiced no objection to it until he filed his pleadings and briefs in this proceeding.

This galloping administration of our criminal law is not to be commended. It leaves courts of review speculating as to what the decision of the trier of fact in a criminal case might have been had he listened to the testimony of the witnesses. It would have been better if the judge had looked at the witnesses, and observed their demeanor on the stand. Their recollection could then have been tested by proper cross-examination, using their testimony upon the preliminary examination. And there could have been applied to their testimony other well-known rules for determining the credibility of witnesses.

[4] In this case these observations are pertinent in considering the length of time this defendant will serve. Despite the necessity for celerity and dispatch in the trial of cases, it is to be remembered that it is the right of every defendant "to be confronted with the witnesses against him" (Pen. Code, § 686), and that this procedure in criminal trials may not be due process of law depending upon the circumstances of the case involved.

[5] However, if a defendant may enter a plea of guilty to criminal charges, understanding what he is doing and represented by counsel, then surely, he may stipulate and consent to the submission of the people's case against him in this manner. The record in this case establishes that the defendant knew and understood what was going on. His attorney made the stipulation in his presence and he made no objection.

On the following day the case was resumed. The judge stated that he had read the transcript of testimony at the preliminary examination. The people presented evidence of the two prior convictions of the defendant and rested.

Evidently there was serious disagreement between the defendant and the public defender because the following occurred:

"Mr. Harvey: At this time, your Honor, may I make a statement to the Court about this case?

"The Court: Yes.

"Mr. Harvey: The defendant and his representation, meaning me and the investigating department of our office, have come into a very sharp and violent disagreement. The defendant is wholly dissatisfied with the efforts that have been put forth on his behalf by me and by the investigating department; and he has indicated to me he would like to have this case continued and have the Court appoint different counsel to represent him, because he feels he is not being given a fair trial in spite of the evidence I have been able to adduce in his behalf. I don't know whether there is any objection from the District Attorney, but the man is completely and wholly dissatisfied. Under those circumstances I would like that he be given the opportunity he feels may be productive of his own good that he is not receiving from our office.

"Mr. Johnson: Your Honor, the People are opposed to a continuance. I may state —I don't think it is necessary—but I know the Public Defender and the investigator in the Public Defender's office have been putting in some time on this matter. I don't know what the defendant expects in the way of any assistance that he could get from any others. I doubt if he would get any greater assistance, knowing the way the Public Defender's office functions and particularly Mr. Harvey in handling the cases that he handles. I doubt if the defendant would receive any greater or more efficient or capable help from any attorney than he has received from Mr. Harvey and the Public Defender's office.

"There being no legal reason set forth for a continuance, at this time the People are opposed to any continuance.

"The Court: Well, now, Mr. Harvey, have you brought here any evidence—or all the evidence that is indicated to you by the defendant that he has or wants? Have you seen about getting those people here, if there are any?

"Mr. Harvey: Why, yes. The defendant seems to feel someone else could get witnesses which we have been unable to get.

"The Court: You have made an effort to get the witnesses he has indicated?

"Mr. Harvey: Yes, your Honor.

"The Court: And to bring before the Court all the evidence in his defense?

"Mr. Harvey: Yes, your Honor, I am advised by the investigating department they have. I didn't do it personally.

"The Court: The request of defendant is denied for a continuance and for other counsel."

Thereupon the defendant took the stand and categorically denied every offense with which he was charged. Decision was rendered then and there, convicting the defendant; and, upon his waiving time, the judgments were then and there pronounced.

This court has carefully gone over the briefs and the argument presented by the defendant; it has read and considered all of the pleadings and evidence in the case. A fair and impartial review of the entire matter has been made.

[6] The defendant complains of having been incarcerated eight days before the trial and having been denied counsel during that time. This, however, had nothing to do with the facts adduced upon the trial. People v. Lisenba, 14 Cal.2d 403, 94 P.2d 569; 314 U.S. 219, 62 S.Ct. 280, 86 L.Ed. 166.

He complains of having been brought into the Municipal Court handcuffed, dirty, and unshaven, and paraded before the witnesses against him by a police officer who treated him "as some people would treat a dog, only worse." This occurred in the courtroom of the presiding judge of the Municipal Court, not where the preliminary examination was held. The judge promptly ordered the handcuffs off and instructed the police officer as to his duty in that respect. It is difficult to see how this conduct could have influenced the trial judge in the Superior Court.

The defendant asserts that the transcripts of the proceedings in all of the courts which have heard his matters have been rigged and falsified by the reporters and attorneys for the people. These transcripts were made by official reporters, sworn to do their duty, and this court finds no evidence of any changing or falsification of the record.

The defendant complains of leading questions propounded to the witnesses. He says that counsel for the people dictated the testimony by "head nods and head shakes" at the witnesses. He makes the same charges as to the conduct of mothers of the boys as the boys were testifying. No complaint as to any of these matters was made by the defendant at any time until this proceeding was brought. Fortunately for the record in this case, the defendant was represented on the preliminary examination by able counsel. Cross-examination of the witnesses was proper and to the point and demonstrated an understanding by defendant's counsel of the effect of the testimony and the nature of the case. No objections were made to leading questions, and no representations were made to the judge of the Municipal Court respecting the other matters defendant alleges occurred.

Defendant's supplemental brief was evidently prepared after the receipt by him of the reporters' transcripts of the proceedings; for in that brief, he goes into an analysis of the testimony of each of the witnesses against him.

He charges that each witness was in the courtroom on the preliminary examination and heard the others testify, and that the testimony of one influenced the testimony of the others. While this perhaps may be true, no request was made of the court to exclude witnesses, and, as stated, the defendant was represented by able counsel.

[7, 8] The defendant asserts that every witness against him was and is untruthful, that they are all "neurotic liars," and that the officers told every one of them what to say. There are two answers to this major contention of the defendant: First, the weight, value, and effect of the evidence was passed upon by the trial judge who heard it. The writ of error coram nobis does not lie to correct an issue of fact which has been adjudicated, even if wrongly determined. In re Lindley, 29 Cal.2d 709, 177 P.2d 918. Secondly, the above case holds that the writ does not lie for alleged false testimony at the trial.

In view of the severity of the sentences pronounced by the trial court, of the difficulty in presenting his case with which the defendant has had to labor, we have given the entire record a most careful review and consideration. The testimony of the complaining witnesses is convincing, notwithstanding discrepancies and weaknesses brought out on cross-examination. They were all youngsters of tender age, and it will serve no useful purpose here to recite the revolting nature of the conduct of the defendant testified to by each of them.

[9] The finding of the defendant's guilt is supported by ample and substantial testimony. He is guilty to a moral certainty and beyond a reasonable doubt. If there had been an appeal on the merits of the case, the judgments would have been affirmed on the record. Nor do we criticise the severity of the penalties adjudged. In order that youth may be protected from corruption, society requires that men like this defendant be sequestered and kept apart from any possible contact with children for the longest possible time. There is nothing in the record which would warrant the granting of an order in the nature of a writ of coram nobis setting aside the judgments.

The order is affirmed.

WHITE, P. J., and DORAN, J., concur.

PEOPLE v. WALLIN.

Cr. 4350.

District Court of Appeal, Second District,
Division 1, California.

Aug. 4, 1949.

Hearing Granted Sept. 1, 1949. *

1. False pretenses 🔑4

The essential elements of offense of issuing a check without sufficient funds or credit are intent to defraud, drawing of check on a bank, a lack of sufficient funds or credit with drawee at time check is made, and knowledge on part of accused of such lack of funds and credit. Pen. Code, § 476a.

2. False pretenses 🔑51

Whether defendant was guilty of issuing a check without sufficient funds or credit was for trier of fact. Pen. Code, § 476a.

3. Jury 🔑29(6)

The right of trial by jury may be waived with certain express formalities. Const. art. 1, § 7.

4. Criminal law 🔑641(1), 1086(11)

The right of a defendant to be represented by counsel may be waived by a defendant, but the record must show that the defendant understood what he was doing and agreed to the waiver. Pen. Code, §§ 858, 987; Const. art. 1, § 13.

5. Constitutional law 🔑266

The denial of the right of a defendant in a criminal case to be confronted by witnesses against him is a denial of due process of law.

6. Criminal law 🔑541

On certain occasions, testimony taken before other forums, and even by deposition, may be used against a defendant in a criminal case, but only when it has been satisfactorily shown that witnesses are dead or insane, or cannot, with due diligence, be found within the state. Pen. Code, § 686.

7. Criminal law 🔑255, 260(11)

In prosecution for issuing checks without sufficient funds or credit, wherein jury trial was waived, and people's case was submitted on transcript of preliminary hearing, it was reversible error for superior court to adopt ruling of judge of municipal court, sustaining objections to testimony tending to establish that checks were to be held by prosecuting witness and not presented for collection until plywood for which they were given in payment was paid for by a customer of defendant.

8. Criminal law 🔑1159(2)

Where evidence is insufficient to support a conviction, a review of the evidence is not a review of a question of fact, but one purely of law. Const. art. 6, § 4.

9. Criminal law 🔑539(1)

The submission of a prosecution on a transcript of preliminary hearing is error when human rights and personal liberty are at stake.

10. Criminal law 🔑662(1)

Statute providing that a defendant has the right to be confronted with witnesses against him is mandatory, and the only exceptions are those set forth in the statute. Pen. Code, § 686.

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* Subsequent opinion 215 P.2d 1.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

L. O. Wallin was convicted of drawing checks without having sufficient funds in bank, and he appeals.

Judgment reversed, and cause remanded for a new trial.

Robert E. Austin, John N. Helmick and A. K. Phelps, Los Angeles, for appellant.

Fred N. Howser, Attorney General, and William E. James, Deputy Attorney General, for respondent.

DRAPEAU, Justice.

By information containing two counts, defendant was charged with violations of section 476a of the Penal Code, to-wit: that he drew two checks in favor of Robert Schultz for $1955.20 and $3504.32 upon the Huntington Park Bank knowing that he had not sufficient funds in or credit with said bank to meet them.

Defendant waived a jury trial and upon stipulation the People's case was submitted on the transcript of the preliminary hearing. Defendant testified in his own behalf and was found guilty, as charged. The court denied his application for probation, pronounced judgment and sentenced him to State prison, the sentences on the two counts to run consecutively.

Defendant appeals from the judgment of conviction, urging that the evidence is insufficient to support it because of lack of proof of a criminal intent on his part.

The two checks in question were drawn by appellant on March 25 and 26, 1948, respectively, payable to the order of Robert Schultz, the owner and operator of R. S. Engineering Company, in payment for ¾″ plywood which was delivered at the time the checks were given. Neither check was honored.

Appellant and Mr. Schultz had some prior business transactions involving the sale of plywood. One particular sale was paid for by check dated March 15, 1948, for $3213.83, which was dishonored by the bank. In order to make good on this check, on March 22, 1948, appellant withdrew $1800 in cash from the bank and gave it to Mr. Schultz together with a check for the balance of $1413.82. At the time he gave this check appellant did not have sufficient funds in the bank to cover it, and testified that he told Mr. Schultz that he "would need a few days" until a check from some Texas people had cleared.

Mr. Schultz testified he got his money on the $1413.82 check before he received the two checks which form the basis of the instant prosecution. In answer to the question: "Isn't it a fact, Mr. Schultz, that you held those checks up to wait for Mr. Wallin to deliver this merchandise to the Fruehauf Trailer Company and get their check to deposit in his bank to meet these checks as they came?" the witness testified: "No, sir. When those checks were given to me, the man (Mr. Wallin) told me that the checks were absolutely good." He also stated that he later received $2400 in part payment of the two checks.

Appellant testified he had been engaged in the wholesale builders business for 25 years, and started doing business with Mr. Schultz in March of 1948; that on March 22nd his men worked on the plywood getting it ready, and on March 25th it was ready for loading and delivery to the Fruehauf Trailer Company; that there was a delay on the Fruehauf check due to the fact the plywood did not pass their specifications, and the witness had to get rid of it in other quarters.

On cross-examination, appellant testified that when he gave the two checks on March 25 and 26, he knew he did not have money enough in the bank to cover them. When he was asked "Did you have any understanding with Mr. Schultz that the check (of March 25th) was to be held?" he replied: "He asked me where the plywood was sold. I said Fruehauf Trailer Company. He said very well, to make it thirty days. I said, 'No, not in this case. They will give a check right away when the plywood is delivered.' So I said 'By the time that that check is in there, my check will be okay.' He said, 'Okay.' * * *

"Q. You mean that you discussed that with Mr. Schultz and he said he would hold the checks until you got the check from these Texas people to cover? A. That he would hold them, yes, definitely."

The assistant cashier of the bank on which the checks were drawn testified that appellant's balance at the close of business on March 24th was $24.84; on March 25th was $1.44 and on March 26th was 44 cents.

It is appellant's contention that when Mr. Schultz took the two checks here in question, he had in his possession the unpaid check for $1413 dated March 22nd, knowing that there were insufficient funds in the bank to pay it, therefore that no intent to defraud on his part was established.

An examination of the record does not sustain this contention. Mr. Schultz on cross-examination stated he had received the money on the $1413 check before he took the two checks of March 25 and 26; further, that appellant told him these two checks were "absolutely good."

[1] As stated in People v. Wellington, 85 Cal.App.2d 310, 313, 193 P.2d 30, 32:

"As to the essential elements of the offense denounced by section 476a charged in Count I, they are: (1) The intent to defraud, (2) the drawing, (3) of a check, (4) upon a bank, (5) a lack of sufficient funds or credit with the drawee at the time the check is made, and (6) knowledge on the part of the accused of such lack of funds or credit.

"That the prosecution proved the last five of the foregoing elements is conceded. The intent to defraud, which is the gist of the offense, must in most, if not in all cases, be proven by the circumstances surrounding the transaction in question. While in the case at bar the facts concerning the elements of intent to defraud are in sharp conflict, we are persuaded that the record contains sufficient proof thereof, not only to establish the corpus delicti but to support the decision of the court."

[2] Likewise in the case here under review, the testimony as to the circumstances surrounding the issuance of the checks is in direct conflict. Nevertheless, there is present in the record sufficient evidence of intent to defraud to sustain the judgment of conviction.

In answer to the same question it was stated in People v. Payton, 6 Cal.App.2d 198, 199, 44 P.2d 376, as follows:

"Although there is a direct conflict in the evidence, it is ample to justify the inference of guilt. 'The findings of a jury upon disputable questions of fact, if supported by direct evidence or inferences, or both, must be given full faith and credit. It is only where, as a matter of law, there is no legal evidence supporting the charge that a reviewing court may disturb a verdict. The rule, upon an appeal in a criminal case, is that the court must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence and then determine whether or not the guilt of the defendant is deducible therefrom. The question for the court to pass upon is whether there were facts before the jury to justify the inference of guilt.' People v. Deysher, 2 Cal.2d 141, 40 P.2d 259, 262."

The difficulty in this case is similar to that which we considered in People v. Stinchcomb, 92 Cal.App.2d 741, 208 P.2d 396. The "trial" of this defendant was not a trial in the sense in which lawyers and judges understand the word. A jury was waived, and the judge became the final arbiter of the fact. But none of the witnesses for the People were sworn or examined by him or in his presence.

The People's case was submitted upon the reporter's transcript of the testimony taken at the preliminary examination in the Municipal Court. This was pursuant to stipulation by counsel for the People and for the defendant, with the right reserved by the defendant to put on a defense. Thereupon, the trial was continued for eight days.

When the case was resumed, the Court made the following statement:

"I will say for the purpose of the record, gentlemen, I have very carefully read and considered the reporter's transcript of the preliminary examination."

Then the defendant was sworn and examined in the presence of the court, found guilty, denied probation because of a prior record, and given two consecutive sentences in the penitentiary.

The fundamental concept in American jurisprudence of a trial in a criminal case is a proceeding held publicly in a court room. There the case goes forward, presided over by a judge, with dignity, fairness and dispatch. And due process of law is implicit in the proceeding from its beginning to its end.

[3] Formerly in this state it was essential that there should be a jury impaneled to hear the evidence, and to determine the guilt or innocence of the accused. Now, the right of trial by jury may be waived, but with certain express formalities. Cal. Const.Art. I, Sec. 7.

[4] The right of a defendant to be represented by counsel has always been zealously guarded by our courts. Art. I, Sec. 13, Cal.Const.; Secs. 858 and 987, Penal Code. Denial of that right has been held to be denial of due process of law. It may be *waived* by a defendant, but the record must show that the defendant understood what he was doing and consented and agreed to the waiver.

[5, 6] The right of a defendant in a criminal case to be confronted by the witnesses against him is equally as important, and a denial of it is likewise a denial of due process of law. There are occasions when testimony taken before other forums, and even by deposition, may be used against a defendant in a criminal case; but only when it has been satisfactorily shown to the court that such witnesses are dead or insane, or cannot with due diligence be found within the state. Penal Code, sec. 686.

All through the case at bar the defendant has contended that the payee of the checks knew they were to be held and not presented for collection until the plywood for which they were given in payment was paid for by a customer of defendant's. If this were true the essential element of intent in the crime would have been lacking and the defendant not guilty.

This issue, then, was decided upon conflicting testimony of two persons only—the defendant and the prosecuting witness. Upon cross-examination of the prosecuting witness at the preliminary examination, the following occurred:

"Q. By Mr. Austin: Now, did you have any talk with Mr. Wallin about who was buying this plywood from him? A. I was aware of where the material was going, yes.

"Q. And you also knew that he was expecting to pay you from the money he received from the plywood? *A. I didn't ask him.*

"Q. Now, you have received most of the money that these checks call for, have you not, Mr. Schultz? A. No, sir.

"Q. Mr. Schultz, how much have you received on account of these checks? A. I have received two checks for $1,200 directly against these, which comes to $2,400 and some odd dollars, I believe.

"Q. Is that all the money that you have received? A. That is all of the money that I have received from the plywood sales.

"Q. I would like to show you the check here dated April 15th, 1948, drawn on the Citizens National Bank of Bellflower, payable to the California Wholesale Supply Company, for $1,204.31, signed by the Seaboard Lumber Company, and I would like to ask you if that is one of the checks that you say you received? A. That is right; that is one of them.

"Q. On account? A. That is right.

"Mr. Antram: What is the date of that check?

"The Court: April 15th.

"Q. By Mr. Austin: And this is your endorsement here on the back of that, isn't it? A. That is it.

"Mr. Antram: I object to that on the ground that it is immaterial.

"The Court: What difference does it make; it is immaterial as to any payoff that is made after the checks have been issued. It doesn't make any difference whether they came around and made it good or not—*that is at the preliminary hearing, anyway.* It might be material later on for some other reason, but certainly it doesn't have any place here.

"Mr. Austin: We are hoping, your Honor, that the evidence will convince the Court that the transaction here was one in which the California Wholesale Supply Company expected to transfer this property and get the pay for it out of the proceeds of the sale they were making.

"The Court: Objection to this evidence is sustained." (Emphasis added.)

We think if this witness had been sworn and examined in the Superior Court, objections to this testimony would not have been sustained.

[7] The witness' reply that he did not ask, when he was questioned as to whether the defendant was expecting to pay for the plywood from money received from the ultimate purchaser, is evasive. Whether there was a agreement between these two men that the checks should be held until the defendant was paid for the plywood was material and vital to his case. It was error for the Superior Court, pro hac vice to adopt the ruling of the judge of the Municipal Court sustaining objections to this line of testimony.

Who can say that had the judge of the Superior Court personally listened to this witness, observed his appearance and demeanor upon the witness stand, and weighed his testimony along with the other testimony in the case, there might not have been a different result? And who can say that had the judge had the benefit of a personal appraisal of this witness, the penalty of two consecutive sentences in the penitentiary might not have been ameliorated? Or that, possibly, with a different "feel" of the case the judge might have been constrained to temper justice with mercy and mete out a county jail sentence?

[8] We question whether any trier of fact can abstract the proper weight and value to give testimony from a cold, typewritten transcript of it, and without seeing and listening to witnesses themselves. As has oft been repeated, it is for this reason that our Constitution provides that appellate courts are not authorized to weigh evidence, except where, on its face, it may justly be held that it is insufficient to support the ultimate issue involved. In such cases it is not a review of a question of fact, but one purely of law. People v. Haydon, 18 Cal.App. 543, 554, 123 P. 1102, 1114; Cal.Const. Art. VI, Sec. 4.

In consonance with the spirit and intent of this constitutional provision, the legislature has ordained that the jury, or when a jury is waived, the trial judge is the exclusive judge of the credibility of witnesses. Code Civ.Proc. sec. 1847. The cited section provides that while a witness is presumed to speak the truth, this presumption may be repelled in part by the manner in which he testifies, or by the character of his testimony. How can the trier of fact judge of the character of a witness' testimony or of his manner of testifying, his candor or lack of candor, or his demeanor upon the stand when the witness is not before him? And, of more import even, how can a reviewing tribunal apply the substantial evidence rule and affirm a judgment under such circumstances as this?

[9] The argument may be made that submission of cases upon a transcript tends to dispatch the business of the trial courts in criminal cases. But, as we said in the Stinchcomb case, supra, such galloping administration of criminal law is wrong when human rights and personal liberty are at stake.

[10] In the Stinchcomb case we held that the right to be confronted by the witnesses against him may be waived when the record shows that the defendant personally consented and agreed to it. Upon further reflection and consideration, we have come to the conclusion that if there is to be a trial, the language of Sec. 686 of the Penal Code is mandatory, and that the defendant must be confronted with the witnesses against him, the only exceptions to the rule being those set forth in the code section. These are only where it has been satisfactorily shown to the court that such witnesses are dead, or insane, or cannot with due diligence be found within the state.

The judgment is reversed, and cause is remanded for a new trial.

WHITE, P. J., and DORAN, J., concur.

92 Cal.App.2d 826

Ex parte BORAH.

Cr. 2603.

District Court of Appeal, First District,
Division 1, California.
July 13, 1949.

1. Municipal corporations ⚷594(3)

City ordinance making it unlawful to use abusive, profane, or obscene language in a telephonic conversation with any telephone operator, supervisor, chief operator, or with any other person, but prescribing no punishment, was not invalid because it provided no punishment since offense denounced was a "low misdemeanor" as distinguished from a "high misdemeanor" calling for a greater punishment, and since such ordinance was required to be read in connection with another ordinance making any one violating requirements of ordinances, guilty of a misdemeanor, and providing that if the ordinance provides no punishment, one found guilty shall be subject to fine of $500, or imprisonment of six months, or both.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "High Misdemeanor" and "Low Misdemeanor".

2. Criminal law ⚷27

Whether a criminal act is to be classed as a felony or a misdemeanor, usually depends on the character of the punishment provided by the statute defining the crime.

3. Municipal corporations ⚷592(3)

Where penal clause of a municipal ordinance is not in excess of ordinary punishment, such as is provided in section of the penal code providing a maximum of punishment for offense of misdemeanor when a punishment is not otherwise prescribed, a municipality may pass ordinances covering similar offenses and providing for greater punishment than a statute if the offense is not precisely the same offense covered by the statute. Pen.Code, § 19.

4. Municipal corporations ⚷592(3)

City ordinance making it unlawful to use abusive, profane, or obscene language in telephonic conversation with any telephone operator, supervisor, chief operator, or any other person, is not invalid because it provides punishment up to $500 fine, or imprisonment up to six months, or both, while statute making the use of such language within the presence or hearing of women, or children a misdemeanor, provides for a punishment by fine only up to $200, or imprisonment of 90 days, or both, since the ordinance and statute are not in conflict and are not identical. Pen.Code, § 415; Const art. 11, § 11.

5. Municipal corporations ⚷592(2)

A municipality may restrict and make additional qualifications in a field which general laws already cover.

◆

Habeas corpus proceeding by Edward Borah to secure his release from custody.

Writ discharged.

Charles R. Garry, San Francisco, for petitioner.

Fred N. Howser, Atty. Gen., David K. Lener, Deputy Atty. Gen., for respondent.

WARD Justice.

In this habeas corpus proceeding petitioner alleges that he was convicted of violating section 210 of the Police Code, part of chapter VIII, article 2 of the San Francisco Municipal Code. The California Constitution, article XI, section 11 provides: "Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws."

[1] Section 210 provides: "It shall be unlawful for any person engaged in telephonic conversation with any telephone operator, supervisor or chief operator or *with any other person,* to use * * * any abusive, profane, bawdy, lewd or obscene language." (Italics added.) Section 210 has no special penalty clause and petitioner contends the section is therefore invalid. Section 16 of Bill No. 1734, Ordinance No. 1.075, provides: "It shall be unlawful for any person to violate any provision or to fail to comply with any of

the requirements of the Municipal Code. Any person violating any of the provisions or failing to comply with any of the mandatory requirements of the Municipal Code shall be guilty of a misdemeanor. Any person convicted of a misdemeanor under the provisions of the Municipal Code, unless provision is otherwise therein made, shall be punishable by a fine of not more than five hundred ($500) dollars or by imprisonment in the County Jail for a period of not more than six (6) months or by both such fine and imprisonment." Section 16 of the Municipal Code is similar to section 19 of the Penal Code in providing a maximum punishment for the offense of misdemeanor when a punishment is not otherwise prescribed. Municipal Code sections 210 and 16 must be read together. The numbering of sections is only for the purpose of convenience. "Indeed, the cases abound in admonitions to the effect that one or more code sections are to be read in connection with other sections." 23 Cal.Jur. p. 762, sec. 135. The contention that section 210 is invalid because it prescribes no punishment is without merit.

[2] The offense denounced in section 210 is a misdemeanor, which for convenience may be referred to as a low misdemeanor, that is, one punishable by a fine not exceeding five hundred dollars or six months imprisonment in the county jail, or both (sec. 16), to distinguish it from a high misdemeanor, or in some instances an indictable misdemeanor, with a greater punishment, either by fine or confinement, "or both." 7 Cal.Jur. p. 872. "At the present time, whether a criminal act is to be classed as a felony or a misdemeanor usually depends on the character of the punishment provided by the statute defining the crime." 14 Am.Jur. p. 762, sec. 13.

Penal Code, section 415, provides: *"Disturbing the peace.* Every person who maliciously and willfully disturbs the peace or quiet of any neighborhood or person, by loud or unusual noise, or by tumultuous or offensive conduct, or threatening, traducing, quarreling, challenging to fight, or fighting, or * * * use any vulgar, profane, or indecent language within the presence or hearing of *women or children, in a loud and boisterous manner,* is guilty of a misdemeanor, and upon conviction by any court of competent jurisdiction shall be punished by a fine not exceeding two hundred dollars, or by imprisonment in the county jail for not more than ninety days, or by both fine and imprisonment, or either, at the discretion of the court." (Italics added.)

Petitioner relies on In re Ah You, 88 Cal. 99, 25 P. 974, 11 L.R.A. 408, 22 Am.St. Rep. 280, and Ex parte Solomon, 91 Cal. 440, 27 P. 757. In each case a maximum fine of $1000 was provided for under the ordinance, an amount greatly in excess of the maximum fine provided by statute for a similar offense. In the Ah You case the accused was evidently convicted of visiting a house of prostitution and sentenced to pay a fine of $400 or "be imprisoned in the county jail * * * at the rate of one day for each one dollar of fine until said fine is satisfied." Thus a sentence was imposed which was in excess of double the maximum period of six months provided by statute. It was held that the sentence was not in harmony with statutes upon kindred topics and therefore void. Ex parte Solomon, supra, involved "having lottery tickets in his possession." The court stated 91 Cal. at page 441, 27 P. at page 757, that the minimum fine, $250, "may be double that which can be imposed for the more serious offenses named in the general law." The maximum fine fixed in the ordinance was $1000. Upon the authority of In re Ah You, supra, the ordinance was declared unreasonable and void.

The punishment for the offense under the municipal ordinance set forth in the complaint in the present case does not call for punishment for crimes referred to under the common law as indictable or high misdemeanors.

[3] In a case wherein the penal clause of the ordinance is not in excess of the ordinary punishment such as is provided in Penal Code section 19, the rule is that a municipality may pass ordinances covering similar offenses and provide for greater punishment than a statute if the offense is not *precisely* the same offense covered by the statute.

[4] Petitioner contends that profanity and obscene language in the presence or hearing of women or children is a much grosser offense than "mere conversation with telephone operators." It should be added that while the Municipal Code offense is confined to conversations on the telephone, it is broader than the Penal Code section, which refers only to the use of such language in the presence or hearing of women and children, in a loud and boisterous manner. The moral effect may be greater or "grosser" to use vulgar language in the presence of women and children. However, it must be assumed that on account of the densely populated area of San Francisco and the number of telephones in operation, the offense of using indecent language required special treatment by the municipal authorities. The ordinance section and the penal code section are not in conflict, not identical, and not precisely the same. "It would seem that an ordinance must be conflicting with the general law which may operate to prevent a prosecution of the offense under the general law. The constitution provides that no one shall be twice put in jeopardy for the same offense. * * * It will be observed that we only hold that there is a conflict where the ordinance and the general law punish precisely the same acts." In re Sic, 73 Cal. 142, 148, 149, 14 P. 405, 408.

[5] A municipality may restrict and make additional qualifications in a field which general laws already cover. In re Hoffman, 155 Cal. 114, 99 P. 517, 132 Am. St.Rep. 75. In the Hoffman case, 155 Cal. at page 118, 99 P. at page 519, the court stated: "* * * it may often, and does often, happen that the requirements which the state sees fit to impose may not be adequate to meet the demands of densely populated municipalities, so that it becomes proper, and even necessary, for municipalities to add to state regulations provisions adapted to their special requirements." The court also said 155 Cal. at page 119, 99 P. at page 519: "Nor is it any objection to the validity of the ordinance that its regulatory provisions and the penalty for its violation differ from those of the state law. If prosecution is had under the state law, a defendant is entitled to the protection which the state law affords him; if under the ordinance, then his rights and duties are governed by that enactment."

At the time the writ was issued bail was fixed by this court. We have been informed that petitioner was unable to raise bail and is still in custody.

The writ is discharged.

PETERS, P. J., and BRAY, J., concur.

93 Cal.App.2d 1

MAGNUS et al. v. MORRISON et al.

Civ. 17039.

District Court of Appeal, Second District,
Division 1, California.

July 18, 1949.

Hearing Denied Sept. 15, 1949.

Mortgages 🔑**302**

Where beneficiary under trust deed, securing note for purchase price of realty, refused to accept tender of amount of past due monthly instalments and offer to pay future instalments by persons contracting to purchase realty from mortgagor, deposit of money tendered in bank to beneficiary's credit and payment of balance into court to keep tender good were unnecessary. Civ. Code, §§ 1500, 2924c.

Appeal from Superior Court, Los Angeles County; J. F. Moroney, Judge.

Action by Gustave Magnus and another against Amber Morrison, William E. Lady, and another to enjoin a sale of realty under a trust deed and declare the rights of all parties concerned. From the judgment rendered, named defendants appeal.

Affirmed.

William Ellis Lady, Los Angeles, for appellants.

Boltwood E. Dodson, Los Angeles, for respondents.

DRAPEAU, Justice.

Plaintiffs, husband and wife, undertook to purchase real property. It was encumbered with a trust deed given to secure payment of a purchase money promissory note of $8,964.16. The note provided for payments of $90.00 a month.

An escrow agreement was entered into for the purpose of putting the deal through. Then it was discovered that the owners of the property from whom the plaintiffs were purchasing had failed to make five of the monthly payments, and that the beneficiary under the trust deed had directed the trustee to sell it.

The plaintiffs tendered to the beneficiary $500.00, which was sufficient to comply with the requirements of Section 2924c of the Civil Code. Tender was refused. No objection was made to the amount of the tender or to the manner in which it was made. The tender was just refused, with no specification of any reason therefor. The tender was confirmed by a letter, which further offered to pay each of the monthly payments as they came due. This offer was also refused.

The purchasers brought this action, to enjoin the sale under the trust deed, and to declare the rights of all parties concerned.

The trial court found that there was a lawful and sufficient tender, and that in accordance with the provisions of the code section, default under the trust deed was cured. The court also found that monthly payments amounting to $1,080.00 had not been made, but that this was not a default under the deed of trust in view of the tender and offer. Judgment was that the plaintiffs pay the defendant beneficiary $1,580.00, the total amount of monthly payments then due; that the beneficiary accept this amount; and that the parties execute necessary documents to reinstate the trust deed and the obligation thereby secured.

Defendant appeals, and urges that the judgment be reversed for the reason that the money tendered was not deposited to the credit of defendant in a bank and notice given to said defendant, as required by section 1500 of the Civil Code.

On the date of the tender $450.00 in monthly installments was unpaid, and the beneficiary under the terms of the trust deed had elected to declare the entire unpaid balance due. But when tender was made, the default was cured, no balance was due, and the plaintiffs stood ready to pay the monthly installments.

Section 2924c of the Civil Code was first enacted in 1933, during a time of financial stress and depression throughout the United States. The purpose of the legislation was to save equities in homes, in many instances built up through years of monthly payments. Failures of small businesses, loss of jobs, conditions over which borrowers had no control rendered it impossible for them to make monthly payments secured by trust deeds. In some instances creditors wiped out savings of a lifetime by directing sales under trust deeds when it was impossible to refinance even small balances on loans thereby secured. At best, if the home owner could refinance his obligation, he was required to pay trustees fees and costs of sale at a time when he was least able to do so.

While conditions are fortunately different than they were in 1933, the protection given by the section to borrowers is just as important now as it was then. The right to make up payments in default and thus avoid calling the entire loan and sale under a trust deed is good public policy at any time.

Extinguishment of the ultimate obligation is not the purpose of Section 2924c of the Civil Code. Therefore, Section 1500 of the same code is not applicable to the facts in this case. Tender is an offer of performance, not performance itself. The reason payment was not made was because of the refusal of the beneficiary to accept it. The trial court properly determined that it was apparent that the tender would not be accepted. Under such circumstances, it was unnecessary to deposit the money in a bank as provided by Section 1500, Civil Code; and, the tender being futile, it was unnecessary to pay the amount into court to keep the tender good. Wagner v. Shoemaker, 29 Cal.App.2d 654, 85 P.2d 229.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

Hearing denied; SCHAUER, J., dissenting.

PEOPLE v. CENTR-O-MART et al.

Civ. 7566.

District Court of Appeal, Third District, California.

July 21, 1949.

Hearing Granted Sept. 15, 1949.*

1. Appeal and error 🔑1, 428(2)

A reviewing court has jurisdiction to determine an appeal only if it is predicated on an appealable order, and the notice thereof is timely.

2. Appeal and error 🔑428(2)

Where order of dismissal of action was entered by clerk in the minutes of trial court on May 4, and first notice of appeal was filed May 21, notice was filed within time prescribed by court rule, and requisite jurisdiction was conferred on District Court of Appeal to hear the appeal. Rules on Appeal, rule 2(a).

3. Appeal and error 🔑78(4)

Where order dismissing action was entered by clerk in the minutes of the trial court, the order was appealable under statute providing that all dismissals ordered by court shall be entered on minutes thereof, or in justice's docket, and such orders, when so entered, shall constitute judgments and be effective for all purposes. Code Civ. Proc. § 581d.

4. Trade-marks and trade-names and unfair competition 🔑88

The state is not a "person" within provision of the Unfair Practice Act that any "person" may bring an action to enjoin any violation of the act and for recovery of damages. Business and Professions Code, §§ 17000–17101, 17021, 17070.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Person".

5. Trade-marks and trade-names and unfair competition 🔑88

Section of the Civil Code providing that any person performing or proposing to perform an act of unfair competition with the state may be enjoined does not authorize the state to sue for an injunction under provisions of the Unfair Practice Act or any other statute except such section. Business and Professions Code, §§ 17000–17101; Civ.Code, § 3369, subds. 2, 5.

◆

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Civil action by the People, by the District Attorney of San Joaquin County, against Centr-O-Mart, a corporation, and others, to enjoin alleged violations of the Unfair Practices Act. From an order dismissing the action, the State appeals.

Order affirmed.

Forrest E. Macomber, Stockton, for appellant.

Fred N. Howser, Atty. Gen., Clarence A. Linn, Deputy Atty. Gen., for respondents.

PEEK, Justice.

The district attorney of San Joaquin county commenced this civil action in the name of "The People of the State of California" against the Centr-O-Mart, a corporation, and certain individual defendants, seeking to enjoin alleged violations of the Unfair Practices Act, Business and Professions Code, sections 17000–17101. The defendants interposed a demurrer and motion to dismiss the complaint upon the ground that the state was not a proper party plaintiff. The trial court made and entered its order sustaining the demurrer without leave to amend and dismissed the action. Inasmuch as the appealability of such an order was questioned the state caused a nunc pro tunc judgment of dismissal to be entered, and a second timely notice of appeal

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* Subsequent opinion 214 P.2d 378.

was filed therefrom. The sole question presented to this court is whether or not the state is authorized to maintain a civil action to restrain alleged violations of the Unfair Practices Act.

[1, 2] It is elementary that a reviewing court has jurisdiction to determine an appeal only if it is predicated upon an appealable order and the notice thereof is timely. Estate of Hanley, 23 Cal.2d 120, 142 P.2d 423, 149 A.L.R. 1250; Gwinn v. Ryan, 33 Cal.2d 436, 202 P.2d 51. The facts shown by the record herein disclose that the order of dismissal was entered by the clerk in the minutes of the trial court on May 4, 1948, and that the first notice of appeal was filed May 21, 1948. Said notice specified that it was from "the order granting defendants' motion to dismiss". It is thus apparent that the notice was filed within the time prescribed by Rule 2(a) of the Rules on Appeal and thus confers the requisite jurisdiction upon this court to hear the appeal, if the order appealed from was an appealable order. Section 581d of the Code of Civil Procedure provides in part as follows: "* * * All dismissals ordered by the court shall be entered upon the minutes thereof or in the justice's docket, as the case may be, and such orders when so entered shall constitute judgments and be effective for all purposes * * *."

[3] Since by the plain provision of said statute the order of dismissal constituted a judgment effective for all purposes it is appealable. Gwinn v. Ryan, supra. The first notice of appeal conferred jurisdiction upon this court to hear the appeal, therefore it is immaterial to discuss the question as to whether or not the second notice of appeal from the nunc pro tunc judgment conferred such jurisdiction.

The Unfair Practices Act is contained in Division VII, part 2, Chapter 4, sections 17000–17101 of the Business and Professions Code. Section 17070 provides that "Any person or trade association may bring an action to enjoin and restrain any violation of this chapter and, in addition thereto, for the recovery of damages." Violations of the provisions of the act are made a misdemeanor by section 17100. The word "person" is defined by section 17021 as "any person, firm, association, organization, partnership, business trust, company, corporation or municipal or other public corporation." Section 17020 provides that "The definitions in this article shall be used in construing this chapter."

Appellants contend that the word "person" appearing in said section 17070 includes the state and that the state was therefore authorized to maintain this civil action for an injunction. In support thereof, reference is made to People v. Black's Food Store, 16 Cal.2d 59, 105 P.2d 361, and People v. Pay Less Drug Store, 25 Cal.2d 108, 153 P.2d 9, wherein the state successfully maintained actions to enjoin violations of the Unfair Practices Act. However, in none of the cases cited by appellants was the question raised as to the right of the state to maintain the action and hence such cases cannot be construed as upholding such right. We have been referred to no case passing upon the precise question of whether the state is a person as that term is used in section 17021, and our own research has revealed none. The decisions of other state courts upon the question are in conflict, See Words & Phrases, Perm. Ed., Person, p. 243, and are of slight assistance particularly in view of the requirement imposed by section 17020 that "The definitions in this article shall be used in construing this chapter."

[4] Thus the question becomes one of determining whether the state is a "person" within the meaning of the terms as used in said section 17021. In this regard appellants contend that since a municipality is included within the definition of "person" as that term is defined in said section the state therefore must be included therein. Appellant further asserts that to conclude otherwise leads to the result that the state cannot enforce its own law while a political subdivision of the state is empowered to do so. Such contention is without merit. The question is not whether the state can enforce its own law, since, as previously noted, it is given the power to prosecute violations of the act as misdemeanors; rather it is, whether the particular course pursued herein is available, that is, whether the state can enforce the act by the injunctive process in a civil

proceeding. Analyzing the question in the light of the specific statutory provisions it would seem to follow that the absence of the state among the persons designated by section 17021 necessarily leads to the conclusion that such omission was intentional and that the state is not one of the persons entitled to sue for injunctive relief under section 17021.

[5] Appellants further contend that if authority for the state to maintain this action cannot be found in section 17021 of the Business and Professions Code such authority is contained in section 3369 of the Civil Code. Subdivision 2 thereof provides that "Any person performing or proposing to perform an act of unfair competition within this State may be enjoined in any court of competent jurisdiction." Subdivision 5 provides that "Actions for injunction under this section may be prosecuted by the Attorney General or any district attorney in this State in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association or by any person acting for the interests of itself, its members or the general public." Appellants' contention is that violations of the Unfair Practices Act set forth in the complaint come within the category of unfair competition as that phrase is defined in subdivision 2 of section 3369 of the Civil Code, and therefore subdivision 5 thereof authorizes the state to maintain the present action. This contention cannot be sustained. Whether or not violations of the Unfair Practices Act also constitute unfair competition as that phrase is used in section 3369 of the Civil Code is not the question. Section 3369 of the Civil Code merely authorizes actions for injunctions by the state "under this section" and the present case is not an action under section 3369 but is an action to restrain alleged violations of the Unfair Practices Act. Thus, by its very terms, section 3369 does not authorize the state to sue for an injunction under the provisions of the Unfair Practices Act or any other statute except "under this section."

Since we have concluded that the provisions of section 3369 of the Civil Code do not authorize the maintenance of this action by the state, the respondents' contention that said section is unconstitutional is moot and irrelevant to the decision of this case.

The order appealed from is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

93 Cal.App.2d 28

PEOPLE v. GIBBONS.

Cr. 724.

District Court of Appeal, Fourth District, California.

July 18, 1949.

1. Criminal law 🔑559

Any inference which could otherwise be drawn from part of the evidence is not sufficient to overcome other inferences, direct evidence and presumption of innocence.

2. Criminal law 🔑560

Mere surmise and conjecture will not sustain conviction.

3. Robbery 🔑24(1)

Evidence was insufficient to sustain conviction of robbery.

◆

Appeal from Superior Court, San Diego County; William A. Glen, Judge.

James William Gibbons was convicted of robbery and he appeals.

Reversed.

Kahn & Block, San Diego, Henry F. Walker, Los Angeles, for appellant.

Fred N. Howser, Attorney General, James A. Doherty, Deputy Attorney General, for respondent.

BARNARD, Presiding Justice.

The defendant was charged with the crime of robbery, found guilty by a jury, and given a prison sentence. He has appealed from the judgment and from the order denying his motion for a new trial, contending that the evidence is insufficient, with respect to the identity of the robber, to support the verdict and judgment.

A bartender employed at the Eagles Hall in San Diego was the only witness who testified concerning the actual commission of the robbery. He testified that he started to close the bar at 11:45 P.M. on August 28, 1947; that a few minutes later, as he was taking the money from the second of two cash registers, a man came up behind him, poked something in his back and told him it was a "stick-up", and took a money sack containing about $70 from his hand; that the man ran around the bar and out through the front door; that he got just a glimpse of the man's face at the time of the holdup; that he "got a better look at him when he was leaving"; that he did not move until after the man was gone; and that he then went back to the kitchen and called the police. After stating that he believed that he could identify the person who robbed him he testified very positively, and several times, that the appellant was not that man. When asked to describe the man who robbed him he replied: "He wasn't as big as this boy and much more darker complected." He further testified that he did not remember seeing the appellant seated at the bar between 11:10 and closing time that night.

Two janitors, who were moving an icebox from the barroom to the kitchen about 11:15, also testified. One of them testified that while they were thus engaged the bartender came into the kitchen; that he was rather excited; that he told them that a man had gotten all of his money; that the witness tried to figure out what he was saying; that they finally realized that he had been held up; that they came out into the bar and saw a man just ready to open the front door; that they followed him and as they went out the front door and into the street they saw this man just turning the corner at the end of the block; that they followed at first on foot and then in the witness' car; that the man they were following did not run at any time; that a few blocks away the man hailed a taxi and got in; that they followed the taxi for several blocks; that the taxi stopped and the man got out while they were half a block behind; that he was reasonably sure that the man who got out of the taxi was the same man he had seen get into it; and that "We lost him entirely after he got out of that taxi." He also testified that while they were moving the icebox he saw a man sitting at the bar, that this was the same man he saw going out of the front door, and that "I would say" that the appellant is the man whom he had seen on these two occasions.

The other janitor testified that when the bartender told them that he had been robbed "We thought he was fooling, but he convinced us"; that they asked the bartender where the robber went and he replied, "He went out the door"; that they went out on the street and a bystander told them that a man had run out and had gone up the street and turned the corner; that they "didn't see anybody" until they reached the corner when they followed a man that was crossing the street; and that they followed this man, as related by the other witness, until they lost him. He further testified that he was not able to identify the appellant as the man they followed.

A musician who was employed in this barroom testified that she quit work at 11:45; that she left about 11:50, went out in front, and sat in an automobile; that she saw a man running out with one hand holding on to his pocket; that this was the same man she had seen seated at the bar before she left; that he ran up the street and turned the corner; that as he turned the corner the two janitors came out and started running after him; that she was pretty sure the appellant was the man she thus saw; that she was sure of it; and that it was possible she might be wrong in her identification. The other musician testified that after they quit work he put his instruments away in a back room; that when he returned to the barroom he saw a man running toward the front door in a "kind of trot"; that he was about 20 feet away from the man; that he followed the man out and went to his car where the other musician was sitting; that he did not see this man after the witness left the building; and that the appellant is not the man he saw leaving the building.

Another witness testified that he saw the appellant seated at the bar at 11:10 that night; that the appellant was still sitting in the same place when the witness left the room at 11:45; that he returned in about eight minutes at which time the appellant was not there; that the bartender was then "raving" about a holdup; and that when he left the room at 11:45 a third man was at the bar besides himself and the appellant. There was also evidence that the appellant had an apartment about a block from the point where the two witnesses saw some man alight from a taxi, and that he did not stay there that night. Several witnesses testified that he spent that night at a relative's home in Chula Vista. He was arrested about a year later.

The identification of the appellant as the man who was followed from the building by the two janitors is not too satisfactory. One of the janitors was unable to identify him at all. The other said, in effect, that he thought it was the appellant. The one who followed on foot, while the other got his car, had to ask a bystander where the man went. There is a doubt concerning the man he first saw after he turned the corner, and a further doubt as to whether the man who left the taxi near the appellant's home was the same man whom they saw enter it. The musician who was sitting in the car said that the man who came out of the door just ahead of the two janitors was the appellant. However, she qualified this by saying she was "pretty sure" it was the same man and again by admitting that she might be mistaken. The other musician testified that the man he saw running toward the front door was not the appellant. Assuming that the man who was thus followed from the room by the janitors was the appellant, this is far from sufficient to establish, beyond a reasonable doubt, that the appellant was the man who robbed the bartender.

Assuming that the appellant was the man who was thus followed from the building the evidence shows, without dispute, that he left the building after the bartender had convinced the janitors that he had been robbed. The bartender was positive that the appellant was not the man who did it. The uncontradicted evidence is that the man who committed the robbery went out the front door and left the premises while the bartender was still standing at the cash register behind the bar. Thereafter, the bartender went to the kitchen and informed the janitors of what had occurred. From their testimony it took some appreciable time for the bartender to convince them that he had actually been robbed. It was after that that the janitors followed some man, whom one of them believed to be the appellant, from the building. It would not be reasonable to suppose that the man who committed the robbery had immediately left the building and then returned and was again leaving within this short time, and under the circumstances indicated by the evidence. There is also evidence that there was another man sitting at the bar about the time in question, after the crowd had left, who could have committed the robbery.

[1, 2] The appellant testified that he was not in this barroom on that night. Three witnesses supported his claim of alibi. There was ample evidence to support a finding that he was there about closing time. Probably this fact had a controlling influence upon the jury. The fact that he was present, if true, is not sufficient to show beyond a reasonable doubt that he committed the robbery, under the evidence which here appears. Any inference which could otherwise be drawn from part of the evidence, is not sufficient to overcome other inferences, the direct evidence and the presumption of innocence. People v. Flores, 58 Cal.App.2d 764, 137 P.2d 767. That the circumstances were suspicious must be conceded, but mere surmise and conjecture are not enough.

[3] The appellant further contends that the court erred in that the judge denied the motion for a new trial in the erroneous belief that he was without authority to interfere with the jury's verdict, since the evidence was conflicting. While the record lends considerable support to this contention, it is unnecessary to consider the point under our views with respect to the legal sufficiency of the evidence.

The judgment and order appealed from are reversed.

MUSSELL, J., concurs.

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93 Cal.App.2d 13

DAVIS v. FIDELITY & DEPOSIT CO. OF MARYLAND.

Civ. 16736.

District Court of Appeal, Second District,
Division 3, California.
July 18, 1949.

1. Action 🔑71

Judgment from which an appeal has been perfected is not a "final determination" of the action, as such judgment may be affirmed, reversed or modified on the appeal. Code Civ.Proc. §§ 53, 577, 1049.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Final Determination".

2. Limitation of actions 🔑55(8)

Limitations did not commence to run against causes of action for wrongful attachment until judgment recovered by defendant in the attachment action became final and hence where plaintiff in the attachment action appealed, limitations did not commence to run until final determination though attachment plaintiff did not file additional undertaking to continue the attachment in effect pending the appeal. Code Civ.Proc. §§ 53, 539, 553, 577, 946, 1049.

Appeal from Superior Court, Los Angeles County; Allen W. Ashburn, Judge.

Action by Everly M. Davis, Sr. against the Fidelity and Deposit Company of Maryland for damages from wrongful attachment. From judgment of dismissal the plaintiff appeals.

Reversed.

Sims & Wallbert, Los Angeles, for appellant.

Crider, Runkle & Tilson, Los Angeles, for respondent.

WOOD, Justice.

Defendant's demurrer to the complaint, upon the ground that the two causes of action therein were barred by the statute of limitations, was sustained and plaintiff was given 10 days within which to amend. Plaintiff failed to amend the complaint within said time, and upon motion of defendant a judgment of dismissal was entered. Plaintiff appeals from the judgment.

It was alleged in the first cause of action that on January 8, 1936, one Williams commenced an action against the plaintiff herein (Davis), being action No. 397192 in the Superior Court of Los Angeles County; on February 27, 1936, the defendant herein (Fidelity and Deposit Company) executed and filed in said action No. 397192 an undertaking on attachment whereby it promised that if defendant (Davis) recovered judgment in said action the plaintiff (Williams) would pay all damages that the defendant (Davis) might sustain by reason of the attachment; a copy of said undertaking is attached to the complaint herein; on February 28, 1936, "an attachment" was issued by said court; on said day the sheriff of Los Angeles County, by virtue of said writ of attachment and pursuant to direction of said Williams, "levied upon certain personal property belonging to this plaintiff" consisting of $22,493.96 on deposit in a bank; on January 24, 1938, judgment in said action was rendered in favor of the defendant therein (plaintiff herein), and said judgment was entered on said day; thereafter the plaintiff therein filed a notice of appeal from said judgment; the appeal therein was pending thereafter until May 2, 1947, when the appeal was dismissed on stipulation of the parties and the remittitur was filed in said superior court; said sum of money was held under said writ of attachment from February 28, 1936, to February 1, 1938, and on said last mentioned day said sum was released to the defendant therein (Plaintiff herein); by reason of said attachment this plaintiff (Davis) sustained damages in the sum of $3,017.94, being interest on said sum at 7 per cent per annum during the time it was held under said writ; and that no part of said damage has been paid.

It was alleged in the second cause of action that on January 8, 1936, the defendant herein (Fidelity and Deposit Company) executed and filed in the superior court in action No. 397192 an (other) undertaking on attachment whereby it promised that if defendant recovered judgment in said action the plaintiff therein (Williams) would pay all damages that the defendant therein (plaintiff Davis herein) might sustain by reason of the attachment; a copy of said undertaking is attached to the complaint herein; on January 8, 1936, a writ of attachment was issued by said court; on said day the sheriff of the City and County of San Francisco, by virtue of said writ of attachment and pursuant to direction of said Williams, "levied upon certain personal property belonging to this plaintiff" consisting of $4,370.52 due from an insurance company to this plaintiff (Davis) under a claim based upon a fire insurance policy; said sum of money was held under said writ of attachment from February 5, 1936, to March 23, 1938, and on said last mentioned day it was released and paid to this plaintiff; by reason of said attachment plaintiff herein sustained damages in the sum of $652.66, being interest on said sum at 7 per cent per annum during the time it was held under said writ; and that no part of said damages has been paid.

Respondent herein asserts that this appellant's causes of action for unlawful attachments accrued when the appeal was taken and no undertaking to continue the attachment was filed as required by section 553 of the Code of Civil Procedure. That section provides: "If the defendant recovers judgment against the plaintiff, and no appeal is perfected and undertaking executed and filed as provided in section 946 of this code, any undertaking received in the action, all the * * * money collected by the sheriff * * * and all the property attached remaining in such officer's hands, must be delivered to the defendant * * * the order of attachment be discharged, and the property released therefrom." Said section 946, therein, provides in part: "An appeal does not continue in force an attachment, unless an undertaking be executed and filed on the part of the appellant * * * in double the amount of the debt claimed by him, that the appellant will pay all costs and damages which the respondent may sustain by reason of the attachment, in case the order of the court below be sustained * * *." Respondent asserts further that if an unsuccessful attachment plaintiff appeals and files his undertaking to continue the attachment in effect pending the appeal, then his attachment continues pending the appeal and until judgment in the action becomes final, and that, under those circumstances, a defendant's cause of action for unlawful attachment, if any, does not accrue until the judgment becomes final.

In other words, respondent herein asserts that if an unsuccessful plaintiff who has attached property appeals and does not file an additional undertaking on attachment, the statute of limitations as to a defendant's cause of action for unlawful attachment begins to run immediately when the appeal is taken and when no additional undertaking is filed, even though the judgment is not final.

The complaint does not show when the appeal in the former action was taken. It is alleged in the complaint that the judgment in that action was entered on January 24, 1938, and "thereafter" an appeal was taken. It will be assumed, however, in view of the long period of time from the entry of that judgment to the commencement of this action on December 1, 1947, and in view of the requirement that an appeal must be taken within a certain period of time, that the appeal was taken more than four years (the statute of limitations period) prior to the commencement of this action.

Appellant herein asserts that a cause of action for damages for unlawful attachment does not accrue until the judgment in favor of defendant in the former action (the attachment action) has become final. The judgment in the former action, referred to herein, became final on May 12, 1947, and the action herein was commenced about 6-1/2 months thereafter.

[1, 2] Section 539 of the Code of Civil Procedure provides as follows: "Before issuing the writ [of attachment] the clerk * * * must require a written undertaking on the part of the plaintiff * * * to the effect that if the defendant recovers judgment, the plaintiff will pay * * * all damages which he may sustain by reason of the attachment * * *." The word "judgment" is defined in section 577, Code of Civil Procedure as follows: "A judgment is the final determination of the rights of the parties in an action or proceeding." Section 1049, Code of Civil Procedure provides: "An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied." A judgment by a trial court from which an appeal has been perfected is not a final determination of the action. Such a judgment may be affirmed, reversed or modified on appeal. Code Civ.Proc., sec. 53. In Morneault v. National Surety Co., 37 Cal.App. 285, 174 P. 81, the plaintiff had recovered judgment upon an undertaking, given by defendant, in an action in which plaintiff's property had been attached. In the attachment action involved therein the defendant (plaintiff in the cited case) had recovered judgment for costs against the attachment plaintiff and, before the time had expired within which an appeal might be taken, said plaintiff had voluntarily satisfied the judgment. On appeal, in the case just cited, the surety company (appellant) contended that the action on the attachment undertaking could not be maintained because the time allowed within which an appeal might be taken had not expired when the action on the attachment undertaking was filed. The court therein said 37 Cal.App. at page 286, 174 P. at page 81: "We do not think that after voluntarily satisfying the judgment the plaintiff in the attachment suit could have maintained an appeal from that judgment. If he could not, then the judgment was final upon satisfaction being entered." It was held therein that the action upon the undertaking could be maintained, it appearing that the judgment in the attachment action had become final. The contention of respondent in the present case is not sustained. The statute of limitations did not commence to run against plaintiff's causes of action herein until the judgment, which had been recovered by the defendant in the attachment action, had become final.

The judgment is reversed.

SHINN, P. J., and VALLÉE, J., concur.

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92 Cal.App.2d 865

PEOPLE v. MANDELL.

Cr. 804.

District Court of Appeal, Fourth District, California.

July 15, 1949.

1. Criminal law 🔑**1169(3)**

In prosecutions for possession and transportation of narcotics, and for conspiracy, admission of testimony of inspectors of the State Narcotics Enforcement Division, who were experts, that telephone list and address books found in defendant's apartment contained the names and telephone numbers of numerous users and peddlers of narcotics, was not prejudicial error, in view of defendant's admissions. Health and Safety Code, § 11500.

2. Criminal law 🔑**1169(1)**

In prosecutions for possession and transportation of narcotics and for conspiracy, admission of testimony of officers as to the business and occupation of some of the persons shown in photographs found in defendant's apartment, and that some of the persons in the photographs were known narcotic users or peddlers of narcotics, was not reversible error. Health and Safety Code, § 11500.

3. Criminal law ⚷1169(1)

In prosecutions for possession and transportation of narcotics, and for conspiracy, admission of mixing bowl and pestle found in defendant's apartment was not prejudicial error, where inspectors of State Narcotics Enforcement Division testified that narcotics are mixed in mixing bowls and sold in diluted form, and that narcotics found in cigar box thrown from defendant's automobile were more diluted than the narcotics found in back yard at apartment house where defendant lived, and defendant admitted ownership of mixing bowl and pestle. Health and Safety Code, § 11500.

4. Criminal law ⚷1186(4)

Where evidence of guilt of defendant was satisfactory and alleged errors in the admission of evidence did not result in a miscarriage of justice, convictions would be sustained on appeal.

5. Criminal law ⚷29

Where possession of cigar box containing morphine, opium, and cocaine was that which was incident to transportation of the narcotics and was a necessary part of the transportation, defendant could be convicted of three separate charges of possession or of three separate charges of transportation, but could not be convicted of six separate offenses. Health and Safety Code, § 11500.

◆

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

James Mandell was convicted on three counts of possession of morphine, opium and cocaine, of three counts for unlawful transportation of the morphine, opium, and cocaine, and on one count of conspiracy, and he appeals from the judgment of convictions and from order denying a new trial.

Judgment affirmed as to the three counts dealing with possession and reversed as to the three counts dealing with transportation, and order denying new trial affirmed.

Blaine Pettitt, Denver C. Peckinpah, Fresno, for appellant.

Fred N. Howser, Attorney General, Kent C. Rogers, Deputy Attorney General, for respondent.

MUSSELL, Justice.

Prosecution for illegal transportation and possession of narcotics and for conspiracy.

Defendant was charged with illegal possession and transportation of narcotics and with criminal conspiracy to commit a violation of section 11500 of the Health and Safety Code. The information contained seven counts: the first three charged possession of morphine, opium and cocaine in separate counts, in the next three defendant was charged with unlawful transportation of the same drugs, and in the seventh count, containing the conspiracy charge, two overt acts were alleged, one as possession and transportation of narcotics in Fresno County, and the other, possession and transportation in the County of Solano. The information also contained an allegation that defendant had been previously convicted of a violation of section 266a of the Penal Code.

Defendant admitted the prior conviction, was tried before a jury, found guilty on all seven counts and sentenced to imprisonment in State's Prison. The judgments on counts 1, 2 and 3 were ordered to run consecutively, and the judgments on counts 4, 5 and 6 were ordered to run concurrently with the judgments on counts 1, 2 and 3. The judgment on count 7 was ordered to run consecutively with the judgments on counts 1, 2 and 3. Defendant appeals from the judgments and from the order denying his motion for new trial.

Defendant and his wife Laura Mandell, lived in an apartment house in Vallejo, California. During the month of February, 1948, a friend, Roy Hovermale, moved into the apartment with the Mandells and all three were residing there on February 29, 1948. Defendant and his wife owned a Studebaker sedan and on February 29th defendant instructed her to drive to Mendota, California, in the Studebaker, with Roy Hovermale, and to meet defendant at one A.M. on March 1st at one of the two or three card rooms in Mendota. Defendant left the apartment at five or six P.M. on February 29th with Pat Leonard and arrived in Mendota about 11 P.M. and about an hour later he went to see E. B. Lanham who resided in cabin No. 8 in an auto court in Mendota. About February 27th, Lanham had called defendant by telephone asking him to bring some cocaine the next time he came to Mendota. Lanham testified that he had purchased opium from defendant three times during the three weeks preceding March 1, 1948, and when defendant came to cabin No. 8, Lanham asked him if he had the cocaine; that defendant then opened the door, went out, and when he returned he said, "I think there is the law out there" ; that defendant and Lanham then left and went to a hotel where defendant used the telephone to call a man named Valencia.

An officer testified that he had been "spotted" every night for two weeks at the court where Lanham lived "to catch this 1947 Studebaker"; that between midnight and 1:00 A.M. on the morning of March 1st, the Studebaker was driven up to cabin No. 8, occupied by Lanham, a known narcotics user, and a man got out and entered the cabin; that he heard Lanham ask the man if he had any cocaine and the answer was "Yes"; that the cabin door slammed and the Studebaker was driven away to the north. The officer followed in his own car and after the cars had traveled some distance the Studebaker was driven off the road into a driveway, turned around and driven south. The officer then caught up with and stopped it and found that it was being driven by Laura Mandell and that Roy Hovermale was with her. About 150 feet before the Studebaker stopped a cigar box was thrown from it. The box was found to contain bindles of opium, morphine and cocaine valued at approximately $1500.

On March 1st a police officer and an inspector of the State Narcotics Bureau went to the Mandell apartment in Vallejo. At that time they found no narcotics, but picked up several photographs of different persons and a telephone list. They found three address books and a General Petroleum credit card to Jimmy Mandell under the garbage can at the apartment, and a mortar and pestle. Later that morning the officers found a red can in the back yard near the fence at the apartment house. This can contained narcotics in bindles which had been marked "C" and "M", identical with the markings on the bindles of narcotics found in the cigar box thrown out of the Studebaker in Mendota.

Defendant testified in his own behalf and admitted that he had instructed his wife to drive to Mendota with Hovermale and to meet him there; that he went over to see Lanham because Lanham owed him $50; that he saw the Studebaker, with another car behind it with lights on, "standing there"; that he saw his wife there but was afraid to go over to see what was wrong because of previous trouble with the police; that he then went to a hotel and called a man named Valencia; that Valencia came with a car and they went to an eating place; that he then drove Valencia's car to Vallejo; that when he arrived at his apartment a police car was parked out in front and he did not go in; that he procured bail for his wife and was present in the court house during the trial of Roy Hovermale and his wife and was arrested the date that sentences were pronounced against them.

In response to defendant's phone call on March 1st, Valencia picked up defendant and Lanham and drove to Kerman. On the way to Kerman defendant said, "Laura got caught and I am lucky I didn't get caught." Valencia asked defendant if he had anything in Vallejo and defendant replied, "Yes, but they will never find it."

[1] Defendant first contends that two inspectors of the State Narcotics Enforcement Division should not have been permitted to testify as they did that the telephone list and the address books found at the Vallejo apartment contained the names and telephone numbers of numerous known users and peddlers of narcotics. Defendant admitted ownership of the telephone list and that he placed most of the names therein himself and that one of the address books

belonged to him. Both inspectors testified as experts and as to facts within their knowledge. No prejudicial error resulted from the admission of such testimony. People v. Ford, 81 Cal.App. 449, 455, 253 P. 966; People v. Hinkle, 64 Cal.App. 375, 378, 221 P. 693; People v. Newman, 24 Cal.2d 168, 174, 148 P.2d 4, 152 A.L.R. 365; People v. Lewis, 91 Cal.App.2d 346, 204 P.2d 919.

Defendant next complains that the court erred in admitting into evidence photographs found in the Vallejo apartment. One of these was of Laura Mandell, Eddie Murphy, Jackie Jurisch, Mike De Gallo, a girl with light hair, and others. The second was of Jackie Jurisch, and the third was of defendant and Sam Tringali. A police inspector testified as to the business and occupation of some of the persons in the photographs. One of the inspectors for the State Narcotics Enforcement Division testified that Sam Tringali, shown in the third picture, was a known narcotic user, and another inspector testified that Jackie Jurisch was a known user and peddler of narcotics.

[2] We find no reversible error in the admission of such testimony as we cannot say that it does not tend, logically, naturally, and by reasonable inference to establish facts material to the issue. People v. Dabb, 32 Cal.2d 491, 500, 197 P.2d 1.

[3] Defendant next contends that a mixing bowl and pestle found in his apartment should not have been admitted in evidence. One of the State Inspectors testified that narcotics, especially morphine, are mixed or cut in mixing bowls and sold in diluted form. There was testimony that the narcotics found on defendant's premises in the red can were more concentrated than those found in the cigar box in Fresno County. Defendant admitted ownership of the property and its admission into evidence did not constitute prejudicial error.

[4] Defendant makes no claim that the evidence in the instant case is insufficient to justify the verdict. The evidence of guilt is satisfactory and strong, and if we assume there was some error in the admission of evidence, we are not of the opinion that the errors complained of resulted in a miscarriage of justice. Under such circumstances the judgment should be sustained. Carr v. Duncan, 90 Cal.App.2d 282, 202 P.2d 855; People v. Jordan, 24 Cal.App.2d 39, 53, 74 P.2d 519.

Defendant's final point is that the court erred in pronouncing separate judgments on the first six counts against him because all of the offenses charged were based upon a single transaction constituting but one offense, "thereby inflicting double punishment."

[5] This question was decided by this court in People v. Mandell, 90 Cal.App.2d 93, 202 P.2d 348. The defendant in the instant case was not tried with his wife and Hovermale, but was arrested when they had been convicted and sentenced. The evidence is quite similar in both cases, with added testimony involving the defendant in the instant case. There was but one cigar box which contained three different types of narcotics shown to have been possessed and transported in Fresno County. The possession was that which was incident to the transportation charged and was a necessary part of the transportation. The possession of narcotics in Solano County is alleged as an overt act in the conspiracy charge but is not pleaded in any of the other counts of the information. We conclude, as we did in the prior case, People v. Mandell, supra, that the evidence as to possession and transportation of narcotics discloses three punishable offenses, rather than six, and is sufficient to sustain a conviction on three separate charges of possession, or on three separate charges of transportation, but not on six separate offenses.

The judgment is affirmed as to counts 1, 2, and 3, and 7 of the information, and is reversed as to counts 4, 5 and 6. The order denying a new trial is affirmed.

BARNARD, P. J., concurs.

CLEMONS v. CITY OF LOS ANGELES et al.

Civ. 16856.

District Court of Appeal, Second District,
Division 1, California.
July 22, 1949.

Hearing Granted Sept. 19, 1949.*

1. Municipal corporations 🔑625

The exercise of the police power by a city under which zoning regulations are upheld can not be made an excuse for unlimited and unreasonable legislation, and only in those cases where a clear and reasonable relation exists between the particular regulation and the public welfare can such interference with private rights of individuals be tolerated.

2. Municipal corporations 🔑625

City ordinance attempting to limit the sale or leasing for 99 years of residential lots to areas of not less than 5,000 square feet and not less than 50-foot frontage is unreasonable and invalid. Business and Professions Code, § 11540; Const. art. 1, § 14.

3. Constitutional law 🔑70(3)
Municipal corporations 🔑63(2)

A court has no concern with the wisdom or exercise of the legislative judgment in passing police regulations but where it clearly appears that a law or city ordinance has no reasonable or substantial relation to a proper purpose, courts should not be lax in curbing what amounts to a clear invasion of personal or property rights under the guise of police regulation.

Appeal from Superior Court, Los Angeles County; W. Turney Fox, Judge.

Action by Charles L. Clemons against the City of Los Angeles and others for declaratory relief for the purpose of determining the validity of an ordinance of the City of Los Angeles and for an injunction. From a judgment in favor of the defendants, the plaintiff appeals.

Judgment reversed.

E. H. Delorey and Harold L. Newman, Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Bourke Jones and Roger Arnebergh, Ass't City Attys., Lester L. Lev, Deputy City Atty., Los Angeles, for respondents.

O'Melveny & Myers, Louis W. Myers, W. B. Carman, Jr., Sidney H. Wall, and William W. Alsup, Los Angeles, for California Land Title Ass'n as amicus curiae on behalf of appellant.

DORAN, Justice.

On December 12, 1946, plaintiff, who had purchased the real property involved herein within two years prior thereto, instituted the present action for declaratory relief for the purpose of determining the validity of a Los Angeles City Odinance which, in the language of appellant's brief, "attempts to limit the sale or leasing for 99 years of residential lots to areas of not less than five thousand square feet and not less than fifty foot frontage". The action also sought an injunction.

The property in question, located in Zone C-2, at the time of plaintiff's purchase was improved with nine bungalow units which had been erected prior to September 28, 1936. The bungalows were occupied for dwelling purposes by separate families. Quoting from appellant's brief, "within the year prior to the commencement of plaintiff's action herein, plaintiff sold or leased for 99 years eight units of said property to different individuals, the land upon which the same was situated, and an area of contiguous land surrounding said bungalows, together with an easement of ingress and egress to and from Beverly Boulevard (Agreed Statement, p. 5); that each unit so sold was of less than fifty feet in width and less than five thousand square feet in area." The City "threatened plaintiff with arrest and prosecution for such sales or leasing claiming that they were in violation of Section 12.21-C of the Municipal Code (Ordinance No. 77,000 adopted September 28, 1936, as amended by Ordinance No. 90,-500, adopted March 7, 1946)".

The trial court, giving judgment for the defendants, held that the ordinance in question "is constitutional, valid and enforceable"; that the transactions made by plaintiff were in violation of the ordinance and hence "null and void". Plaintiff appeals from that judgment.

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* Subsequent opinion 216 P.2d 1.

The appellant contends that the City had no authority to prohibit a sale or leasing of a lot less than 5,000 square feet and having less than a 50 foot frontage; that "The attempted exercise of police power is unreasonable and arbitrary"; that the ordinance deprives plaintiff "of his property without compensation therefor, the use of his property without due process of law, and denies the plaintiff the protection of the law". Appellant's brief maintains that "Such a prohibition in itself is unreasonable, arbitrary, capricious and unnecessary for the preservation of health, safety, morals or welfare".

An amicus curiae brief in behalf of appellant's position, has been filed by the California Land Title Association, in which it is insisted that "The transfer of land title is a matter of statewide concern, regarding which the City has no power of regulation"; that even if such power of regulation exists, the ordinance "would be invalid to the extent that it conflicts with the state law by declaring void a sale which the state law, Subdivision Map Act, Business and Professions Code, sec. 11540, provides shall be voidable only at the option of the purchaser". This brief also cites several cases holding that "A zoning ordinance may be generally valid, but its enforcement with respect to particular property will be restrained by the courts if it is unreasonable, arbitrary and discriminatory in its application thereto". It is also pointed out that "There is no reasonable relation between a reduction in the area of an improved lot, without change in its improvements, its use or its existing yard, areas, and the protection of public health, safety, morals or welfare".

The respondents' position is that "Minimum lot area requirements may be adopted by a city as an incident of its power to enact zoning regulations", and that the ordinance in question "is a valid means of assuring the continued maintenance of minimum lot areas".

The present appeal is upon an agreed statement of facts and no cases have been cited in which the exact question here involved has been decided. Those referred to in the appellant's brief relate merely to general principles, such as the purpose of zoning ordinances, unreasonable exercise of police power, etc. The same is true in respect to respondents' brief. The matter, therefore, in its present aspect, may be said to be one of first impression.

It may be conceded, as said in Miller v. Board of Public Works, 195 Cal. 477, 488, 234 P. 381, 385, 38 A.L.R. 1479, that "the regulation of the development of a city, under a comprehensive and carefully considered zoning plan, does tend to promote the general welfare of a community, and * * * when fairly conceived and equably applied, is well within the scope of the police power. The increase of our urban population makes regulation necessary." The same opinion also mentions a "tendency to a more liberal construction of the police power, as applied in zoning and other regulatory laws". It is also stated in this and other cases that a municipal legislative body may exercise a reasonable discretion in the enactment of such regulations.

[1] Examination of the various cases on this subject makes it clear that exercise of the so-called "police power" under which zoning regulations are upheld, cannot be made an excuse for unlimited and unreasonable legislation. It is, indeed, only in those cases where a clear and reasonable relation exists between the particular regulation and the public welfare, that such interference with the private rights of individuals can be tolerated. Otherwise, if the term "police power" be interpreted too broadly as a general excuse for the exercise of unlimited power not otherwise possessed, the result is regimentation and dictatorial excess bordering on totalitarianism.

In the regulation here under consideration, the amicus curiae brief properly says that "There is no reasonable relation between a reduction of the area of an improved lot, without change in its improvements, its use or its existing yard areas, and the protection of public health, safety, morals or welfare". This being so the zoning ordinance which attempts to limit the sale or leasing for 99 years of appellant's residential property because each of such bungalow courts, so divided will have less than 5,000 square feet and less than 50 foot frontages, cannot be sustained.

[2] Whatever may be the power to regulate new building, that matter is not here under consideration. The nine bunalow courts appear to have been constructed on appellant's property some 20 years before the adoption of the ordinance in question. The city ordinances do not purport to require the removal of these improvements, nor cessation of the present use thereof. The property will, indeed, remain exactly as it has been in the past,—the only difference is that the various bungalows will be owned by different people. It is significant that no claim has been made to the effect that the property in question constitutes a menace to public health, safety or morals. And, as mentioned in the amicus curiae brief, "the city evidently does not consider such bungalow courts a nuisance, for its ordinances permit the present construction of just such improvements on 5,000 square foot lots held under single ownership in the 'C-2' zone, with a requirement of only 800 square feet of lot area per dwelling unit. (Agreed Statement, p. 1b.) Each of the parcels into which appellant subdivided his property contained approximately 925 square feet".

The contention that the city zoning regulation is in conflict with the state law known as the Subdivision Map Act making sales contrary to Act voidable only at the option of the purchaser, need not be considered, since the city zoning act here in question, is in itself, unreasonable and invalid in relation to the transactions concerning appellant's property.

Article I, Section 14 of the California Constitution provides that "Private property shall not be taken nor damaged without just compensation". In this connection it should be remembered that private property consists not merely of the ownership and possession of a thing, but the unrestricted right to use and enjoy it. Anything which destroys any of these elements of property, to that extent destroys the property itself. Whether the damage or destruction is accomplished in one way or another, the result is the same, and where, as in the present case, "No police power" is offered as an excuse for the interference, the necessity for and the reasonableness of the regulation is a matter for serious consideration.

[3] As stated in 5 Cal.Jur. page 716, "With the wisdom of the exercise of the legislative judgment in passing police regulations, the court has no concern". However where "it clearly appears that the law or ordinance *has no reasonable or substantial relation to a proper purpose*", the courts should not be lax in curbing what amounts to "a clear invasion of personal or property rights under the guise of police regulation". (Italics added.) As hereinbefore indicated, such is the situation in the instant case. In the language of the amicus curiae brief, "a division in the ownership of a lot cannot be said to constitute a threat to public health, safety, morals, order or welfare".

The judgment is reversed.

WHITE, P. J., and DRAPEAU, J., concur.

QUADER-KINO A. G. v. NEBENZAL et al.

Civ. 16925.

District Court of Appeal, Second District,
Division 2, California.
July 13, 1949.

Rehearing Denied July 29, 1949.

Hearing Granted Sept. 8, 1949. *

1. Contracts 🔑143

A single phrase of a document cannot be isolated for the purpose of ascertaining its true meaning but must be read with the text in which it occurs.

2. Contracts 🔑156

When an all-inclusive word or phrase follows a specific use of such word or phrase, the meaning of the generic term extends no further than the specific designation.

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* Subsequent opinion 217 P.2d 650.

3. Contracts 🔑172

The requirement that option be exercised not later than specified date meant that thereafter the contractual relations of the parties would be at an end if the option was not so exercised.

4. Literary property 🔑6

Where French talking picture based on novel which was 95 per cent history and 5 per cent original was produced under license from novelist which would expire on October 8, 1945, and owner-licensee sold rights in and to such picture not based on original part of such novel and reserved right to exploit original French version in such language, and gave buyer option to purchase any rights based on the novel and owned by owner-licensee if exercised by July 8, 1945, in which event owner-licensee would endeavor to procure extension of license at buyer's expense, and option provided that "under all circumstances" owner-licensee should be entitled to use "rights dealt with herein" for its own purposes in conformity with such reservations, court properly held, under the evidence, that purchase of novelist's rights by buyer after expiration of such license was valid and that owner-licensee was not thereafter entitled to use such French talking picture.

5. Evidence 🔑219(1)

Where license to use original part of novel in French talking motion picture had expired, efforts of one acquiring license from novelist to purchase that part of motion picture not based on original part of the novel did not constitute an admission that former licensee could legally continue to use scenes based on original part of the novel, particularly in view of fact succeeding licensee had theretofore agreed with prior licensees not to exhibit English version in certain parts of Europe.

6. Appeal and error 🔑1008(1)

Findings of trial court may not be supplanted so long as they are a reasonable response to the evidence and inferences reasonably drawn therefrom and the applicable law.

7. Trial 🔑404(1)

Trial court's findings must be liberally construed to support the judgment.

8. Appeal and error 🔑1008(3)

When the construction given an instrument by the trial court appears to be reasonably consistent with the intention of the parties, such construction will not be set aside on appeal.

9. Corporations 🔑1

Finding that defendant corporation was not the alter ego of individual defendant was supported by the evidence.

10. Corporations 🔑1

The mere ownership of a majority of shares in corporation did not constitute it the alter ego of the majority stockholder.

11. Corporations 🔑1

In order to profit in a lawsuit by the doctrine of alter ego it must be proved not only that the corporation is a mere conduit of the stockholders, but that they are the alter ego of one another.

12. Corporations 🔑1

The ownership of all the stock by one or more persons does not destroy the separate existence of the corporation, nor does it establish fraud by such owner or owners.

13. Corporations 🔑1

Finding that there was no fraud by majority stockholder so as to warrant disregard of corporate fiction was sustained by the evidence.

14. Judgment 🔑204

Where evidence showed that the rights of plaintiff were not as broad as alleged, a judgment delimiting such rights accordingly and completely adjudicating all the rights of the parties according to the evidence and the dictates of equity was proper and was not subject to the criticism that it constituted declaratory relief.

WILSON, J., dissenting.

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Action by Quader-Kino A. G. against Seymour Nebenzal, also known as Seymour Nebenzahl, and Nero Films, Inc., and others. From a judgment for defendants, the plaintiff appeals.

Affirmed.

Herzbrun & Chantry and David Mellinkoff, Beverly Hills, for appellant.

Fred Horowitz, Los Angeles, for respondents.

MOORE, Presiding Justice.

The question for decision is whether the trial court fairly construed ambiguous writings with the aid of extraneous proof. Appellant contends that the findings are unsupported by the evidence and that the court erred in declaring the rights of the litigants.

Cinematic Rights to "Mayerling"

Prior to 1935 one Claude Anet, a popular French author, wrote a novel titled "The Mayerling" of which 95 per cent was history, and therefore in the public domain. Five per cent was the product of Anet's genius. It is the story of a crown prince of Austria who committed suicide.

October 8, 1935, respondent Nebenzal paid Anet a liberal sum for a five-year license, herein referred to as the "Anet rights," for the use of this story by his company, Concordia, to produce a French talking picture. As producer for Concordia respondent purchased an extention of the Anet rights for an additional five years and he and associates composed a screen play from which they successfully produced and distributed the French version of "Mayerling." Three years later he assigned the Anet rights to "Dr. Gruess," the agent of appellant. Although respondent had disposed of his interest in Concordia in 1939, in 1940 he acquired an option (never exercised) to purchase the Anet rights from another. In November, 1943, he opened correspondence with Dr. Gruess with a view to repurchasing the Anet rights for the purpose of producing an English version of Mayerling. Gruess made a price of $20,000. After a year had passed respondent informed Gruess that he was no longer interested; that since he could not finish the English version before the expiration of the Anet rights then owned by appellant, he preferred "to take the basic and historical background of Mayerling * * * and *the screen play*" which his own playwrights had prepared for Concordia and eliminate therefrom everything original with Anet.

Notwithstanding Gruess' approval of respondent's decision, as appellant's attorney-in-fact he succeeded in reaching an agreement with respondent on July 25, 1944, whereby appellant as owner obligated itself to sell and quitclaim to respondent "all the *Owner's rights in and to the motion picture* to the extent that it owns those rights itself including * * * the right to use the title 'Mayerling' * * * but excluding those rights expressly excepted and/or reserved herein, Provided, however, that the right to use the novel by Claude Anet or the name of the author thereof is not being transferred."

By the next three paragraphs the parties obligated themselves as follows: Second, owner does not warrant his title; Third, the right to exploit the picture to be made by purchaser shall not be exercised by him in 10 designated European countries until three years after the conclusion of European hostilities; Fourth, the film of purchaser shall not be exhibited in theaters controlled by specified persons or corporations. The Fifth paragraph is the passage requiring judicial interpretation. It is as follows:

"Fifth: The unqualified right of the Owner to exploit the original French version in the original French language under the title 'Mayerling' is hereby expressly reserved. Nothing herein shall prejudice the unqualified right of the Purchaser to superimpose on the new motion picture in the English language subtitles in any foreign language, nor his right to dub the new motion picture in any foreign language. Nor shall anything herein prejudice the unqualified right of the Owner to superimpose on the original French version subtitles in any language.

"The Purchaser and the Owner mutually agree that neither one will produce nor permit to be produced nor transfer any rights so to produce any motion picture based on any of the foregoing material in any language."

On the same day the parties executed an option agreement. Its preamble refers to the main contract and recites that "the Purchaser does not desire to use in the new production the features peculiar to the Claude Anet novel, 'Mayerling', but to base the story of the new production on historical facts, on features original to the script of the Motion Picture, and on such new features as he may deem fit to introduce * * * the rights based on the Claude Anet novel are not being transferred by the Owner to the Purchaser in the abovementioned agreement." Then, in consideration of $1.00 and of the mutual promises and covenants set forth it was agreed:

"First: In case the Purchaser should, in the future, for any reason whatever, desire to acquire the rights based on the Claude Anet novel, the Owner grants to the Purchaser the option to acquire those rights to the extent the Owner owns them itself and for the time the Owner owns those rights, and exclusively for the territories of the member countries of the International Copyright Union, without, however, any warranty whatsoever in these respects, and with these express qualifications, the Owner agrees to transfer and assign those rights to the Purchaser for the price of One Hundred ($100) United States Dollars,

"Provided, the Purchaser exercises the option by a notification by registered mail, reaching the Owner within three (3) months after the Armistice concluding the present war in Europe, however, at the latest by July 8, 1945.

"Second: In the event the Purchaser should exercise the option, the Owner also agrees, upon express request to be made by the Purchaser, to try to the best of the Owner's abilities to obtain an extension of the Claude Anet rights which, under the last grant, expire on October 8, 1945, for another five (5) years, provided that the Purchaser, at the option of the Owner, either furnishes the consideration to be paid to the heirs of Claude Anet for that extension, or repays the Owner that sum in case the Owner should choose to advance the money out of its own funds.

"Third: Under all circumstances, and without having to make any contribution to the price to be paid to the heirs of Claude Anet for the extension of the rights, the Owner shall be entitled to the use and exploitation of the rights dealt with herein for its own purposes in accordance with the reservations made in the agreement signed simultaneously, and those reservations are hereby expressly made part of this agreement."

Nebenzal, herein referred to as respondent, did not exercise this option but instead subsequently purchased the Anet rights from the assignee of the Anet heirs. The right of appellant to exploit Anet's novel having expired, respondent attempted in 1946 to prevent its further exhibitions of Mayerling. Diplomatic efforts having failed, respondent instituted a law suit in the French courts to effectuate his purpose. Thereupon, appellant commenced the instant action.

Pleadings.

The complaint alleged that appellant's license to use Anet's material expired October 8, 1945; plaintiff is the owner of the world-wide motion picture and allied rights in and to a sound and talking motion picture photoplay in the French language, released, distributed, and exhibited in the United States and throughout the world under the title of Mayerling; such exhibitions were profitable; by the Fifth and Eleventh paragraphs of its contract with Nebenzal and by a declaration in the preamble to the option agreement, respondent had acquired from appellant the right to produce and exhibit the Mayerling in the English language, "with limitations on such release, distribution, exhibition and exploitation in certain enumerated European countries"; nothing contained in the contract shall "prejudice the unqualified right of the owner to superimpose on the original French version subtitles in any language"; the Anet rights were not conveyed by the contract; but by the option it was agreed that plaintiff, without having to make any contribution to the purchase price of the Anet rights, shall be entitled to use them for its own purpose in accordance with the reservations made in the contract; because plaintiff has refused to sell its right in the Mayerling, Nebenzal has secretly, maliciously and fraudulently acquired an extension of the Anet rights from the Anet heirs, thereby rendering it impossible for plaintiff to secure an extension thereof; Nebenzal falsely represented to the sellers of the Anet rights that he owned all the world-wide motion picture rights to the Mayerling, with the exception of the Anet rights, in order to induce the sellers to grant an extension of such rights. It is also alleged that defendant Nero Films, Inc., was organized by respondent who dominates and uses it to conceal his fraud; defendants have advised theaters and distributors that plaintiff has no right to exhibit or license others to exhibit Mayerling in any country and has filed suit in the courts of France to prevent plaintiff's exhibiting or distributing the picture; some licensed exhibitors have rescinded their contracts for showing the film, to plaintiff's pecuniary detriment. The prayer was for an injunction against the acts of defendants, and for damages.

Findings.

After an extended trial, the court found against appellant on practically all its allegations; found that after October 8, 1945, appellant did not have the right to release, distribute, or exhibit the French version of the picture anywhere in the world; that Nebenzal had not acted secretly, maliciously or fraudulently in acquiring the Anet rights, and had done nothing to render it impossible for appellant to acquire them.

The Issues and Testimony

Appellant contends that because by the contract it reserved to itself the "unqualified right" to exploit the original French version "under all circumstances," Nebenzal is now precluded from attempting to prevent its continued exhibition. It must be conceded that appellant reserved to itself what the contract designates "the unqualified right. * * * to exploit the original French version." However, that right was not "unqualified." On the contrary, it was limited by the terms of appellant's license from Claude Anet, namely the automatic termination date of the license, to wit, October 8, 1945. Thereafter, unless an extension should be obtained, all right to show the French film ceased and neither appellant nor respondent, nor any other person could infringe the copyright of the Anet heirs by exhibiting the picture containing the scenes created by Anet. Appellant did not secure an extension; nor was it obligated by its agreement to do so. It merely promised that upon Nebenzal's "express request" it would "try to the best of the owner's abilities to obtain an extension * * * for another five years." By the contractual reservations appellant retained only such rights as it had under its license from Anet and the right to exhibit the French version until October 8, 1945. But Nebenzal could not by any concession confer upon appellant any rights whatever in the Anet novel.

[1, 2] Appellant seeks to extend elastically the phrase, "under all circumstances" as used in the option to embrace every conceivable situation. There is no basis in reason or authority for such interpretation. A single phrase of a document cannot be isolated for the purpose of ascertaining its true meaning but must be read with the text in which it occurs. When an all-inclusive word or phrase follows a specific use of such word or phrase, the meaning of the generic term extends no further than the specific designation. See Jersey Island Dredging Company v. Whitney, 149 Cal. 269, 273, 86 P. 509, 691.

[3] By virtue of the last above quoted phrase appellant contends that it should be permitted to continue the distribution and exhibition of its French picture. Such contention is based also upon a strained construction of the option which provides that "the owner shall be entitled to the use and exploitation of the rights *dealt with herein* [emphasis ours] for its own purposes in accordance with the reservations" in the main contract which "are hereby expressly made part of this agreement." By such argument appellant ignores the fact that the only "rights dealt with" in the option contract were the Anet rights then held by appellant. But they

were to terminate on October 8, 1945, and respondent had in the main contract declared and agreed that he would not use them because he could not wait until France would be reoccupied or until the date of such termination. The main contract dealt with all that appellant had a right to sell. It specifically stipulated (1) "that the right to use the novel by Claude Anet or the name of the author thereof is not being transferred"; (2) "but nothing herein contained shall be deemed to prevent the purchaser from using any material in said novel which may be in public domain and/or historical in source." The option agreement was the child of Gruess' brain. He proposed it and urged Nebenzal to accept it for the reason that the latter might change his mind about not using the Anet rights. But appellant shortened the term of the option by the provision that in the event respondent should exercise the option he must send notice of his intention to do so to appellant by July 8, 1945. Such requirement could mean no more nor less than that after that date the contractual relations of the parties under the option would be at an end.

[4] The evidence reasonably justified the implied finding that the option agreement did not mean that respondent was required to share the benefits of the Anet rights with appellant upon his gaining ownership thereof. Concededly, it is ambiguous and in order to derive its meaning, much testimony as well as correspondence was received.

Gruess advised respondent by letter on March 8, 1944, that it was impossible to reach his principal in Switzerland or the Anet heirs in France. April 3, 1944, respondent wrote Gruess of the danger of a "hold-up" in the event that appellant's script should be used without an extension of the license. Later in New York respondent explained to Gruess the folly of waiting until he could obtain the Anet rights. No one knew when France would be liberated; since he intended to begin production soon, he could not afford to wait longer for the Anet rights which would expire in October, 1945, and, of course, he could not use the Anet scenes and take chances on the demands the Anet heirs might make. Respondent testified that (1) prior to the contracts he explained to Gruess his reasons for not desiring the Anet rights; (2) he intended to use the basic and historical background of Mayerling which is told in many books; (3) the screen play had been written by his own screen playwrights; (4) he could eliminate therefrom the three scenes that were original with Anet and thus produce the picture without resort to the Anet novel.

For the screen play respondent paid appellant's agent $20,000. He then discovered that title to Mayerling was vested in the alien property custodian and to obtain a release of the screen play respondent contributed the further sum of $7,500.

Trial Court's Interpretation

Guided by the apparent purpose of the parties and the circumstances of their execution the court below interpreted the contracts, Civ.Code, sec. 1647, and determined the sense in which "the promisor believed * * * the promisee understood it." Civ.Code, sec. 1649. The circumstances as proved and found were as follows: In July, 1944, Nebenzal desired to remake the Mayerling in English. Appellant at the time owned the license to use the portion taken from Anet's novel until its expiration, October 8, 1945. By that time the English picture might be finished and appellant's rights to the use of Anet's novel would have expired. The heirs of Anet could not be reached in France or the officers of appellant in Switzerland. This rendered it impracticable for respondent to use the Anet rights, with the mere expectation of acquiring an extension. To make the English Mayerling would entail an expense of a million dollars. For these reasons respondent decided to deal with only what was available and what he thought was disentangled, namely, the history of the Austrian prince and the script upon which the French version was based with the scenes created by Anet eliminated. That decision met with appellant's approval. While it reserved the right to exploit its own picture, necessarily its privilege of doing so would by the terms of the license expire fifteen months later.

Hoping to acquire a renewal of its license from the heirs of Anet in October, 1945, appellant caused to be inserted in the contracts the reservation of a continuing right to exploit the French version thereafter everywhere. That reservation did not operate against Anet and, a priori, against his heirs or their future assignees.

The contracts were not made to create for appellant some rights against respondent in property he might subsequently acquire. The main contract conveyed to Nebenzal only such rights in the Mayerling photoplay as appellant then owned, except the remaining fifteen months of the life of the Anet license. Respondent did not even promise to request a renewal. Appellant merely offered to extend its good offices to assist Nebenzal in acquiring the Anet rights in the event the latter should exercise the option. Neither did respondent promise that he would, or would not, buy the Anet rights from another. In fact there is no evidence that on the day of the contracts he secretly or otherwise intended to acquire those rights, as contended by appellant. His acquisition thereof came about by reason of the fact that the new assignee, Marcel Hellman, was for a long time the friend of respondent. Hellman had purchased a ten-year license to October, 1955, for the purpose of producing an English version on his own account, only to discover on his arrival in Hollywood that Nebenzal was about to do that very thing without using the scenes from Anet's novel. Is it reasonable to say that upon Hellman's offer to sell the Anet rights, respondent was, by virtue of the option agreement, obligated to drive Hellman from his office to that of appellant so that the latter might purchase the Anet rights from him? Promptly upon closing his transaction with Hellman, respondent, in February, 1945, advised Dr. Gruess of his success and Gruess notified the Paris office of appellant. That was eight months before Nebenzal received the documentary assignment. Not a word of criticism came then from any official of appellant.

Inasmuch as there was neither moral inhibition nor contractual obligation against Nebenzal's acquisition of the Anet rights, no reason appeared to the trial court why he should not purchase them from Hellman. He violated no rights of appellant in doing so. A rational interpretation of the language of both contracts is supported by the correspondence and behavior of all parties and by the testimony of respondent. Having before it the parties, their witnesses and all pertinent documents, the court below exercised its prerogative to adopt that evidence which it believed to be true. Not only did respondent commit no fraud in acquiring the Anet rights, there is not the slightest proof that he did anything to prevent appellant from doing so. After July, 1944, had passed without its having received respondent's notice of his desire to exercise the option given him by the agreement, appellant was utterly free to buy Anet's novel and even his very name. Not having done so it is in no position to assert the right to use scenes from the novel, the copyright of which has been assigned to respondent.

Had appellant at the time of executing the writings intended to require respondent to deal only with it, an appropriate, binding provision would have been incorporated in the option agreement. Since Nebenzal had not by either contract divested himself of the right to look elsewhere he was at liberty thereafter to procure a license to use the Anet novel from any person holding title thereto. This was a reasonable deduction of the court below.

[5] Appellant asserts that respondent, after acquiring the Anet rights from others, attempted to procure from appellant all its rights in the French film, thereby demonstrating his acknowledgement of appellant's right to show and distribute that film after October 8, 1945. Such an argument assumes that without the Anet rights appellant would be deprived of all rights to exhibit the French film. Such assumption is without factual basis. As shown above the Anet rights embodied only five per cent of that film and a deletion of that five per cent would leave appellant unqualifiedly free under its contract to exhibit the remainder of the French version. Therefore, the efforts of Nebenzal to acquire appellant's 95 per cent of the French picture can-

not be reasonably construed as a concession that appellant could legally continue using the three scenes from Anet's novel after its license should have expired. Moreover, since Nebenzal had contracted not to exhibit the English version in certain areas of Europe until three years after cessation of hostilities, his efforts to acquire appellant's remaining rights were reasonably construed by the trial court as an attempt to free himself from such a self-imposed restraint, and not necessarily as an admission that appellant had greater rights than those reserved. His efforts were no indication that appellant had reserved more rights than he had or than were specified in the contracts. Upon the expiration of the Anet rights appellant had no authority to continue the exhibition of the picture which included Anet's original scenes and such license could not be extended by "reservations" in a contract with respondent who in July, 1944, had no claims upon Anet's novel. Should the French picture continue at large, great expense would be entailed to prevent its competition with respondent's English version. While respondent would have paid the price of $12,500 which he offered, he declined to add another $1500 to it as demanded by appellant.

[6-8] The foregoing résumé demonstrates that the findings are amply supported by the evidence. Therefore, they cannot be supplanted so long as they are a reasonable response to the evidence and inferences reasonably drawn therefrom and the applicable law. They must be so liberally construed as to support the judgment. Wallace Ranch Water Company v. Foothill Ditch Company, 5 Cal.2d 103, 118, 53 P.2d 929; Hotaling v. Hotaling, 193 Cal. 368, 385, 224 P. 455, 56 A.L.R. 734; In re Reid Estate, 79 Cal.App.2d 34, 39, 179 P.2d 353; Bell v. Scudder, 78 Cal. App.2d 448, 457, 177 P.2d 796; Davis v. Stulman, 72 Cal.App.2d 255, 262, 164 P.2d 787; Agdeppa v. Glougie, 71 Cal.App.2d 463, 467, 162 P.2d 944. Also, when the construction given an instrument by the trial court appears to be reasonably consistent with the intention of those who signed it, such holding will not be set aside on appeal. Kautz v. Zurich General Accident & Liability Insurance Co., 212 Cal. 576, 582, 300 P. 34; Davis v. Stulman, 72 Cal.App.2d 255, 269, 164 P.2d 787.

Other Findings Attacked

[9-13] Appellant's criticism of the finding that Nero Films, Inc. is not the alter ego of respondent appears to pale in the glow of the finding that no fraud was perpetrated on appellant. There was ample evidence to support the finding. The corporation was organized for the sole purpose of producing photoplays. It made other pictures besides Mayerling. There were other stockholders; attorney Silverberg owns 10 per cent of the outstanding stock. While respondent owned a majority of the shares and could control the corporation those facts are not sufficient to have caused the court to disregard the corporate entity of Nero Films and to consider it as respondent's alter ego. Hollywood Cleaning & Pressing Co v. Hollywood Laundry Service, 217 Cal. 124, 129, 17 P.2d 709. In order to profit in a law suit by the doctrine of alter ego it must be proved not only that the corporation is a mere conduit of the stockholders, but that they are the alter ego of one another. The ownership of all the stock by one or more persons does not destroy the separate existence of the corporation. Gardner v. Rutherford, 57 Cal.App.2d 874, 880, 136 P.2d 48; Erkenbrecker v. Grant, 187 Cal. 7, 11, 200 P. 641. Moreover, ownership of all the capital shares of a company by one who dominates it does not for that reason establish fraud in the owner. Wiseman v. Sierra Highland Mining Company, 17 Cal. 2d 690, 697, 111 P.2d 646. The only occasion for disregarding the corporate fiction is when it is shown to have been fabricated for the purpose of perpetrating a fraud. Not only did the trial court determine the absence of fraud from respondent's conduct but there is no substantial evidence to support a contrary finding.

The finding that Nebenzal assigned his English version and the extended Anet rights to Nero Films, Inc. and that the corporation reassigned same to Nebenzal is supported by the testimony and correspondence introduced at the trial. But even if it were unsupported, it is not apparent how such a finding could be prejudicial to appellant. There is obvious error in finding XI but it is just as obvious that it is inadvertent, clerical, and therefore harmless error. The phrase "which the *defendant* had advised the defendant" should read "which Hellman had advised the defendant."

[14] The court did not err in determining the precise rights of the parties to this litigation. While the complaint alleged that appellant is the owner of certain world-wide rights in the Mayerling the court found that appellant's rights were not as all-encompassing as asserted, and in its judgment delimited those rights according to its findings. Thereby the court made a complete determination of the rights of the parties and disposed of the litigation according to the evidence and the dictates of equity. Such is not declaratory relief. O'Melia v. Atkins, 73 Cal.App.2d 143, 148, 166 P.2d 298.

The judgment is affirmed.

McCOMB, J., concurs.

WILSON, Justice.

I disagree with the majority in their decision that the agreements between plaintiff and Nebenzal are ambiguous. When the two agreements are read together, as they must be since they are parts of and constitute one transaction, no ambiquity will be found. Therefore (1) there was no necessity for evidence to explain their meaning; (2) a reviewing court is not bound by the construction placed on them by the trial court; (3) the court should construe the agreements as they are written without regard to the decision of the trial court and without considering the evidence by which defendants attempted to show that they contemplated a result different from that which would flow from the plain language of the documents themselves. It is manifest that when the agreements were executed by Nebenzal he neither desired nor intended to use any material which originated in the mind of Claude Anet but that his English version of Mayerling was to consist entirely of historical episodes and material in the public domain, supplemented by such additions as his own script writers might make.

I do not find any fraud in Nebenzal's subsequent purchase of the right to use the material from the Anet novel, but such acquisition apparently caused him to adopt a new plan for making his picture and with the change of plan came his decision to prevent plaintiff from continuing the exhibition of its French picture, contrary to the express provisions in the agreements assuring that right.

The evidence does not sustain the court's finding that after October 8, 1945, plaintiff did not have the right to release, distribute or exploit the motion picture Mayerling anywhere in the world.

Nebenzal had been in the motion picture business for many years in Germany and France. He came to Hollywood where he entered into the same business. Desiring to remake Mayerling in the English language he opened negotiations in 1943 with plaintiff for the remake rights of the picture, including the Anet rights which were to expire on October 8, 1945. Negotiations, which were conducted with Dr. Gruess, the accredited agent and attorney in fact of plaintiff in the United States, consisted of conferences between Nebenzal and Gruess in New York and a mass of correspondence between them when Nebenzal was in Hollywood.

At the outset of the negotiations Nebenzal desired to acquire (1) the right to remake the picture in the English language, (2) plaintiff's Anet rights, (3) an extension of such rights beyond October 8, 1945, and, in addition, wanted (4) the assurance that plaintiff's French picture would not compete with his proposed English remake, especially in the United States. Nebenzal wrote to Gruess: "You understand that it is impossible to have the French version in circulation in the United States at such time when the English version is ready to be released." Plaintiff refused to give such assurance, and on its part desired (1) the unqualified right to continue the showing of the original French Mayerling, and (2) assurance that the English version to be made by Nebenzal would not compete with the French picture anywhere in Europe.

Plaintiff's agent, Gruess, wrote to Nebenzal that "my friends [referring to those in control of Quader-Kino] also wish to make a contract exclusive of Europe, since the picture has not been exploited in many European countries so far." World War II had prevented the exhibition of the picture in practically all Europe except France.

The divergent desires of plaintiff and Nebenzal were adjusted by two agreements, referred to as the main and supplementary agreements of July 25, 1944, which were entered into in New York between Nebenzal and plaintiff through the latter's agent Gruess. Both agreements recite that no Anet rights were being conveyed to Nebenzal.

In the main agreement plaintiff is referred to as "owner" and Nebenzal as "purchaser." Among the preliminary recitals are these:

(1) "Whereas, the Purchaser does not desire to use the features peculiar to the Claude Anet novel but base the story on the new production on historical facts, on features original with the script of the Motion Picture, especially as conceived by Von Cube and Kessel, and on such new features as he may deem fit to introduce,"

(2) "Whereas, the Purchaser desires to purchase all rights which the Owner may own, except such as may be expressly excluded and/or reserved by the Owner herein".

The portions of the agreement necessary to be considered in the determination of this case are as follows:

The first article reads: "First: For Value received the Owner hereby sells, assigns, quitclaims and grants to the Purchaser all the Owner's rights in and to the Motion Picture to the extent that it owns those rights itself, including the right to make and produce a motion picture in English based thereon, as well as the right to use the title 'Mayerling' and the dubbing, titling, and/or other incidents thereof, but excluding those rights expressly excepted and/or reserved herein, Provided, however, that the right to use the novel by Claude Anet or the name of the author thereof is not being transferred. But nothing herein contained shall be deemed to prevent the Purchaser from using any material in said novel which may be in public domain and/or historical in source."

The third article provides that the right to release and exploit the new motion picture to be produced by Nebenzal should not be exercised in certain named countries in Europe until three years after the Armistice concluding the war then in progress, or until three years after the cessation of hostilities in the respective countries.

The fifth article reads: "Fifth: The unqualified right of the Owner to exploit the original French version in the original French language under the title 'Mayerling' is hereby expressly reserved. Nothing herein shall prejudice the unqualified right of the Purchaser to superimpose on the new motion picture in the English language subtitles in any foreign language, nor his right to dub the new motion picture in any foreign language. Nor shall anything herein prejudice the unqualified right of the Owner to superimpose on the original French version subtitles in any language.

"The Purchaser and the Owner mutually agree that neither one will produce nor permit to be produced nor transfer any rights so to produce any motion picture based on any of the foregoing material in any language."

The eighth article recites that the agreement "embodies all previous understandings between the parties" and no representations or warranties have been made or given by either party except as set forth in the agreement.

Article 11 is as follows: "Eleventh: It is agreed that all questions arising on a disagreement, including all questions relating to the construction, performance and enforcement thereof, shall be determined in accordance with the laws of the State of New York."

The supplementary agreement, executed simultaneously with the main agreement, repeats Nebenzal's disinterest in the Anet rights as follows: "Whereas, the Purchaser does not desire to use in the new production the features peculiar to the Claude Anet novel 'Mayerling' but to base the story of the new production on historical facts, on features original to the script of the Motion Picture, and on such new features as he may deem fit to introduce[.]"

The agreement recites that in case the purchaser, Nebenzal, should desire in the future to acquire those rights the owner, plaintiff, grants to the purchaser the option thereon to the extent and for the time the owner owns them, and in the event the purchaser should exercise the option the owner agrees, upon purchaser's request, to endeavor to obtain an extension of the Anet rights for a period after October 8, 1945.

Paragraph third of the supplementary agreement reads as follows: "Third: *Under all circumstances, and without having to make any contribution to the price to be paid to the heirs of Claude Anet for the extension of the rights,* the Owner shall be entitled to the use and exploitation of the rights dealt with herein for its own purposes in accordance with the reservations made in the agreement signed simultaneously, and those reservations are hereby expressly made part of this agreement." (Emphasis added.)

The finding and judgment that plaintiff had no right to distribute, release, exhibit or exploit the motion picture anywhere in the world are clearly erroneous since plaintiff is thereby deprived of its rights expressly reserved in the main agreement and repeated and confirmed in the third paragraph of the supplementary agreement.

The negotiations began with (1) Nebenzal's expressed desire to obtain assurance from plaintiff that its French picture would not compete with his English remake, (2) plaintiff's refusal to give such assurance, (3) plaintiff's desire for the unqualified right to continue the exploiting of its French picture, and (4) plaintiff's request for assurance that it would not be met with competition in Europe by Nebenzal's English version. These features of the negotiations lend emphasis to the provisions of the resulting agreements in which Nebenzal did not obtain what he desired but on the other hand plaintiff's demands were met.

The main agreement recites that Nebenzal did not desire to purchase material originating in the Anet novel but did desire to purchase plaintiff's rights *except* those expressly excluded and reserved by plaintiff. The main agreement provides that (1) there are *excluded* from the grant (a) "those rights expressly excepted and/or reserved herein" and (b) the right to use the novel or the author's name; (2) Nebenzal's picture should not be released in certain countries in Europe until three years after the Armistice or three years after the cessation of hostilities in any country; (3) plaintiff reserved the *"unqualified right"* (a) to exploit the original French picture, and (b) "to superimpose on the original French version subtitles in any language." The supplementary agreement confirmed the main agreement by providing that *"under all circumstances"* plaintiff shall be entitled to exploit the rights to the picture in accordance with the reservations of the main agreement. By its findings and judgment the trial court placed, and the majority of this court affirms, not only a qualification but an absolute prohibition on plaintiff's reserved "unqualified right."

The terms "unqualified right" and "under all circumstances" are meaningless if plaintiff's right to release and exploit the original French picture terminated on October 8, 1945. The agreements contemplated that either Quader-Kino or Nebenzal would own the Anet rights after that date since they were contracting with reference to the showing of both the French picture and the English picture for a period of three years after the end of the war, which at the date of the agreements was unpredictable.

The right reserved to plaintiff to superimpose on its French picture subtitles in any language shows clearly that plaintiff was to continue the exhibition of its picture and to exploit it in countries other than France. Otherwise foreign language subtitles would be useless.

The agreements provided that the new motion picture to be produced by Nebenzal should not be released or exploited in the countries of central Europe until three years after the Armistice. If, as contended by defendants, plaintiff's right to exhibit the French picture expired on October 8, 1945, then during the period between that date and three years after the Armistice neither picture could have been exploited in those countries. This prohibition upon Nebenzal's right to release the English picture confirms plaintiff's contention as to the construction of the contract, namely, that in the relations of the contracting parties plaintiff's rights did not cease on the date mentioned.

As between Quader-Kino and Nebenzal the former reserved the right to exhibit its picture in the French language anywhere in the world after October 8, 1945, and the purchase of the Anet rights by Nebenzal from Hellman did not and does not prevent plaintiff from exercising such right. The reason for the prohibition of showing Nebenzal's English picture in certain European countries until three years after the termination of the war was that plaintiff desired to show its French version first without competition in all countries where it had not been shown.

It is important to note the provision in the supplementary agreement that *without having to make any contribution* to the price to be paid for the extension of the Anet rights, plaintiff was to be entitled to the use and exploitation of those rights for its own purposes in accordance with the reservations in the main agreement, which reservations were expressly made a part of the supplementary agreement.

Had it been the intention or understanding that plaintiff's right to exploit its picture would terminate on October 8, 1945, the provision would not have been inserted in the agreement that plaintiff should be entitled to exercise such right "without having to make any contribution to the price to be paid [by Nebenzal] to the heirs of Claude Anet for the extension of the rights" beyond that date. Why would the parties have agreed that plaintiff was not required to contribute to the cost of the extension of the Anet rights if it then had been contemplated that plaintiff would not have the privilege of making use of such rights in the event they were extended?

When the following provisions of the two agreements are considered there is no ambiguity and the intent of the parties is manifest without the evidence introduced at the trial: (1) "The owner shall be entitled to the use and exploitation of the rights dealt with herein for its own purposes." (2) "Under all circumstances, and without having to make any contribution to the price to be paid" for the extension of the Anet rights the owner should be entitled to exploit the rights dealt with in the contracts for its own purposes. (3) Nebenzal was restricted in the exploitation of his English remake for three years after the Armistice, which period would extend far beyond October 8, 1945. (4) There was reserved to plaintiff the unqualified right to exhibit its French picture after October 8, 1945, and to superimpose subtitles thereon in any language. These provisions make it clear that if Nebenzal should obtain an extension of the Anet rights such extension should inure to the benefit of plaintiff to the extent provided in the contracts.

Nebenzal testified that he did not desire the option contained in the supplementary agreement nor to sign the agreement. Nevertheless he signed it and cannot now escape the results by claiming that he signed it merely because Gruess insisted that he do so. The signing of the main agreement by plaintiff was not conditioned upon Nebenzal's execution of the supplementary agreement and he was not otherwise coerced into signing it.

The main agreement provides that all questions with reference to its construction shall be determined in accordance with the laws of New York. In Woolsey v. Funke, 121 N.Y. 87, 92, 24 N.E. 191, 192, it is held that "the practical interpretation of this agreement by both parties is a consideration of very great importance." The New York court cites Brooklyn Life Insurance Co. v. Dutcher, 95 U.S. 269, 273, 24 L.Ed. 410, 412, in which the court said: "The practical interpretation of an agreement by a party to it is always a consideration of great weight. The construction of a contract is as much a part of it as anything else. There is no surer way to find out what parties meant, than to see what they have done. Self-interest stimulates the mind to activity, and sharpens its perspicacity. Parties in such cases often claim more, but rarely less, than they are entitled to. The probabilities are largely in the direction of the former."

The rule is the same in California as in New York. Whenever it appears that the parties to a contract have themselves practically interpreted it the courts will follow that practical construction. Mitau v. Roddan, 149 Cal. 1, 14, 84 P. 145, 6 L.R.A.,N.S., 275; Hill v. I. A. C., 10 Cal.App.2d 178, 185–186, 51 P.2d 1126; Skousen v. Herz, 135 Cal.App. 116, 120–121, 26 P.2d 498; Hill v. Fowble, 65 Cal.App.2d 25, 30–31, 149 P.2d 862.

The parties to this action construed the agreements as reserving to plaintiff the right to exhibit the original French picture in its entirety after October 8, 1945. There was correspondence between Nebenzal and plaintiff's agent Gruess concerning the purchase of plaintiff's reserved rights in the picture. On June 1, 1945, Gruess wrote a letter to Nebenzal stating that he could possibly obtain the consent of Quader-Kino to "relinquish in your favor the rights to the original French version of 'Mayerling' *as reserved under the agreement* of July 25 and August 29, 1944 against a consideration of $10,000. *The European territories* where the film has not been shown so far and which are *enumerated in our aforesaid agreement would have to be excepted.* Nor can the French rights for the United States be affected by the new agreement in view of the provisions of the contract with Mr. Lopert." (Emphasis added.) On June 26, 1945, Nebenzal wrote to Gruess stating that he thought another $10,000 to stop the *future distribution* of the old French picture in certain territories was highly exaggerated and asked for a reconsideration of the matter. On July 21 Nebenzal wrote to Gruess, on a letterhead of Nero Films, Inc., discussing the possibility of the showing of the picture in Europe and said "I would, however, to get rid of the matter, agree to pay Ten Thousand ($10,000.) Dollars if with this payment you could withdraw the old picture world-wide." Why was such an offer made if plaintiff's rights terminated October 8, 1945, only two and one-half months after the letter was written? Nebenzal's picture would not be ready for distribution until months after that date and if his present theory is correct plaintiff's French picture could not possibly have interfered with Nebenzal's remake. On September 17, 1945, Nebenzal wrote to Gruess stating "* * * perhaps it would be possible to work out a deal on the basis of $12,500.00 world-wide, that is, including the United States * * *." On September 22 Gruess replied to Nebenzal offering to transfer plaintiff's rights for $14,000. On September 27 Nebenzal wrote to Gruess stating he would be in New York in about two weeks and "we can then try to come to an arrangement." On October 24 Nebenzal wrote that his trip to New York had been delayed. On October 30 Gruess died. Negotiations for the purchase by Nebenzal of plaintiff's picture apparently ceased with Gruess' demise.

Defendants contend in their brief that the real desire of Nebenzal was to obtain possession of the negatives and prints of the original French picture in order that they would not be in circulation after he completed his English remake. The correspondence between Nebenzal and Gruess, only a portion of which is above alluded to, makes no mention of such desire.

The letters all refer to the purchase of *plaintiff's rights reserved* by the agreement of July 25, 1944. The right to exhibit the original French picture necessarily included the right to exhibit the entire picture including those parts based on material originating in the Anet novel. The omission of such portions of the picture would render it incomplete. The majority opinion states that the deletion of the Anet material, 5 per cent of the picture, would leave plaintiff free to exhibit the remainder of the original French version. Such statement does not take into account the fact that the omission of scenes destroys the continuity of a picture. It would be analogous to selling a book with several chapters omitted, or to playing the Merchant of Venice without Shylock. Moreover, to require such omission would be in violation of the express reservation of plaintiff's right to exhibit its original French picture, not just a portion of it, after October 8, 1945.

There is no evidence that at any time prior to the death of Gruess defendants asserted that such reserved rights did not extend beyond October 8, 1945. With Gruess unable to testify it seemed easy to make the contention now asserted by defendants.

If Nebenzal had not recognized the continuing right of plaintiff under the contracts to exhibit its original French picture in its entirety after October 8, 1945, he who had been in the motion picture business for 25 years and was familiar with the established methods of such business would not have made the offer in his letter of July 21, 1945, only two and one-half months prior to October 8, 1945, to pay $10,000 to stop the *future distribution* of the picture and the withdrawal world-wide of rights that would have had validity for so short a period succeeding the date of the offer.

The entire correspondence between Nebenzal and Gruess shows that the former recognized and acknowledged plaintiff's right to continue the exhibition and exploitation of Mayerling and including the Anet material after October 8, 1945, and that Nebenzal was eager to obtain an assignment of such rights so that the release of his English remake would be without competition.

There is an implied covenant between the parties that Nebenzal would not do any act tending to prevent plaintiff from exercising the rights reserved in the contract. Equity and justice require that he should not act contrary thereto.

After the Anet rights were assigned to Nebenzal he in turn assigned them to defendant Nero Films, Inc., a corporation. Plaintiff contends that the corporation is wholly controlled and dominated by Nebenzal and acts for him, carries out his directions, and is his alter ego. At one time Nebenzal was the owner of 70 per cent of the outstanding capital stock of the corporation, the attorney then acting for him (not defendant's counsel in the instant case) 10 per cent, and his son 20 per cent. Nebenzal admitted that he had paid for the stock issued to his son. In the joint answer filed in this action by Nebenzal and Nero Films, Inc., they admit that Nebenzal now owns 85 per cent of the capital stock, his former attorney 10 per cent and "another individual" the remaining 5 per cent; that Nebenzal is president and executive producer of the corporation, his attorney is secretary and treasurer, and they are two of its three directors; that as owner of a majority of the capital stock Nebenzal can control the action of the corporation. The evidence shows that Nebenzal's personal business office and the principal office of the corporation have the same address; that his purported dealings with the corporation were actually made with himself and for himself. For example, he dictated a letter addressed to himself purporting to be from Nero Films, Inc., setting forth the consideration for the transfer of the picture rights in Mayerling, in which it was provided that no rights should be deemed to have been conveyed to the corporation until payment had been made to Nebenzal therefor. The letter is signed "Nero Films, Inc., Jeorgia Curtwright" and is endorsed "Agreed to: Seymour Nebenzal." When asked why he had Miss Curtwright sign the agreement on behalf of the corporation, with frankness and naivete he replied "I didn't want to sign it myself, I didn't want to sign a letter to myself, myself, that is all."

Since Nebenzal so controlled the affairs of the corporation that he was able to act for both in making an agreement between himself and the corporation, without benefit of legal counsel and advice and without authorization of the board of directors, it is immaterial whether the corporation was or was not his alter ego. Its act was his act and his was its. The hand and the voice were of the same person. Nebenzal's purported assignment of the Anet rights to defendant corporation was intended by him to deprive plaintiff of any rights or privileges reserved to it in the two agreements. It did not so operate and was in violation of the express provision of the agreement that neither party would transfer any rights "to produce any motion picture based on any of the foregoing material in any language."

The finding that since October 8, 1945, plaintiff has not had the right to distribute or exhibit its picture anywhere in the world has no support in the evidence. The judgment to that effect deprives plaintiff of a valuable property right which was unconditionally reserved to it and cannot be abrogated in the absence of plaintiff's consent.

The judgment should be reversed.

92 Cal.App.2d 834

In re CECALA'S ESTATE.

CECALA et al. v. NASO.

Civ. 14040.

District Court of Appeal, First District, Division 2, California.

July 15, 1949.

Rehearing Denied Aug. 13, 1949.

Hearing Denied Sept. 12, 1949.

1. Wills 🔑386

In a will contest, the weight to be accorded the evidence, the province of reviewing court and the rule respecting conflicting evidence are the same on appeal as in any other civil case.

2. Wills 🔑384

On appeal from order admitting will to probate, appellants have the burden of showing that verdict was not sustained by substantial evidence and reviewing court must review the evidence in light most favorable to respondent and resolve all conflicts in his favor.

3. Wills 🔑289, 302(1)

A will which bore admittedly genuine signatures of at least two attesting witnesses, though there was no conventional attestation clause, came before trial court clothed with presumption that it had been duly executed and such presumption was independent evidence which might be weighed against positive testimony. Probate Code, § 50.

4. Wills 🔑303(3)

Where witness, who signed will as attesting witness, knowing the nature of his act and that decedent would rely upon his name as a part of execution of will, undertakes by his testimony to overthrow or cast suspicion upon will, his evidence should be closely scrutinized.

5. Wills 🔑303(6)

A will may be proved otherwise than by the subscribing witnesses if subscribing witness denies or does not recollect execution of the writing. Code Civ.Proc. § 1941.

6. Wills 🔑303(6)

In will contest, jury could properly accept testimony of testator's daughter as to due execution of will and reject that of testator's son-in-law and a neighbor denying such execution. Code Civ.Proc. § 1941.

7. Trial 🔑207

Where testimony as to declarations by testator's widow, since deceased, that daughter had forged will was admitted in will contest, instruction was necessary that such declarations could be considered only for purpose of explaining in some degree what may have happened to document after testator's death and that they should be viewed with extreme caution.

8. Wills 🔑329(4)

Where testimony of proponent as to due execution of will was directly opposed to that of two other witnesses, proponent was entitled to instruction that testimony of one witness worthy of belief is sufficient for proof of any fact. Code Civ. Proc. § 1844.

9. Wills 🔑324(4)

Whether filing by widow of earlier will and delay of approximately 11 years after death of testator and until death of widow in filing later will indicated forgery of later will by proponent was a question exclusively for jury.

10. Witnesses 🔑331½

Evidence tending to show misconduct of daughter nine years before alleged execution of father's will offered by daughter for probate was too remote to be admissible as impeachment, particularly where parents and daughter had been reconciled following alleged misconduct and before execution of will. Code Civ.Proc. § 2051.

11. Wills 🔑295

Where attesting witness has no recollection of matters connected with making of will, proof of handwriting of testator and subscribing witnesses, or any of them, is admissible as evidence of execution of will and is sufficient, in absence of any countershowing, to prove such execution. Code Civ.Proc. § 1315.

12. Wills 🔑111(3)

A testator who cannot write may execute his will by mark, his name being written near mark by a person who writes his own name as a witness. Code Civ.Proc. § 17; Civ.Code, § 14.

13. Wills 🔑337

Affidavit of one juror, who did not assent to verdict in will contest, that jurors resented attitude of contestant in answering questions and were filled with sympathy for proponent and that evidence was not weighed at all did not justify setting aside verdict and granting a new trial. Code Civ.Proc. § 657, subd. 2.

Appeal from Superior Court, Santa Clara County; A. M. Runnels, Judge.

Proceeding in the matter of the estate of Filippo Cecala, deceased, by Sarah Naso, as proponent, for probate of decedent's will which was contested by Rosario Cecala and another. From an order admitting the will to probate, contestants appeal.

Order affirmed.

O. H. Speciale, San Jose, for contestants and appellants.

Rankin, Oneal, Luckhardt, Center & Hall, M. S. Hall, Foley & Foley, James W. Foley, San Jose, for respondent.

GOODELL, Justice.

A document purporting to be the last will and testament of Filippo Cecala, dated February 9, 1935, was admitted to probate after a contest tried by jury. A new trial was denied. From the order entered on the verdict this appeal was taken. The contestants and appellants are the son and a daughter of the testator; the proponent and respondent is his other daughter.

The testator died on February 12, 1935 at about 5 a. m. leaving a widow, Rosaria Cecala (who died in 1946) and said son and two daughters.

Appellants' contention was and is that after decedent expired respondent forged the will by typewriting it in the home about 6:30 a.m. and making the "X" thereon which purports to be her father's mark, and then prevailed on R. Anzalone (her sister's husband), P. Morroni and Rosi Morroni, and Rosaria Cecala (testator's widow) to sign as witnesses, by representing to them that the document had to do with funeral arrangements; that they signed it separately before the body had been taken to the undertaker's.

R. Anzalone testified that he signed in the kitchen at Sarah Naso's instance and with nobody but her present, about an hour and a half after the death, on her representation that the document had to do with the funeral.

P. Morroni testified to the same effect.

Rosi Morroni admitted the signature on the document was hers, but had no recollection of the time or circumstances of signing it. The Morronis were neighbors of the Cecalas but not related or named in the will.

The signature of Rosaria Cecala is admittedly genuine.

It should be noted, also, that R. Anzalone testified on cross-examination that his brother-in-law (appellant Rosario Cecala) was in the house when he signed the document.

Respondent testified that she lived with her parents at the ranch from 1934 until her father died and thereafter until 1945; that a few weeks after she returned home in 1934 (after an estrangement) her father told her he had made a will in 1933, the general provisions of which he disclosed to her. She testified that he said he had cut her "out of the property, and that he was going to change that, being that I had returned home and that I didn't have to worry, that he would take care of me and the baby." When asked what he had said he intended to do about a new will she answered "he said the property was to be divided equally amongst the three children." She testified that before his illness her father discussed the question of his property on several occasions "and then when he became ill he mentioned it several times." His last illness was of but 5 or 6 days duration. During his convalescence from an earlier illness he mentioned to respondent in the present of her mother and brother that he wanted to go to a lawyer and draw up a new will. He said this 7 or 8 times during his convalescence.

About the second day of his last illness "he said he wanted to make this new will"; he tried to get up; "he was looking for his clothes" but his wife told him he was too ill. He told respondent he wanted to "go down town to the lawyer to draw a new will because he didn't get to draw that will yet." He tried on 2 or 3 occasions to get up but "he couldn't make it." She testified: "Finally * * * he asked me if I would write up a will for him; and then Mr. and Mrs Morroni came over and he asked them if they would be witnesses to this new will, and they said 'Yes'; so he called me and he dictated in his own words what he wanted in this will. The Morronis and respondent's mother were present at this time. Respondent testified that she made a few notes of what her father said, and he asked the Morronis to come back the following day to sign it. Respondent typed the will the following day and read it to her father; he said it was all right; that her brother-in-law, R. Anzalone, came in and "my dad told him that he was having me type up a will, and asked him if he would come back and sign it as a witness, and my brother-in-law said 'Yes; I will stop in on my way home from town'." He stopped in that evening and at her father's request she called the Morronis, who came over. She testified that Mr. and Mrs. Morroni, her brother-in-law (R. Anzalone), her mother, and herself were present in the bedroom with her father. Then: "My father asked me to bring the will that I had typed, and * * to read it to them, and I read it, and my dad asked me to bring a pen, and I handed him the pen and he signed his cross and asked me to write his name in there for him, and then he asked my brother-in-law to sign it, and the Morronis, and my mother." Respondent wrote "Philip Cecala" and "his mark" and "witnessed by". Testator, she said, asked the others to sign as witnesses, telling them it was his will, and all four signed it in his bedroom in his and in each other's presence.

She testified that after it was signed she "didn't see it any more" and the last one who had it in the room was her mother. She testified that she never saw the will after that "until today"; never had it in her hands until it was handed to her in the courtroom.

These two versions present a clear-cut conflict.

[1, 2] On appeal the weight to be accorded the evidence and the province of the reviewing court are the same in a will contest as in any other civil case. In re Estate of Bristol, 23 Cal.2d 221, 143 P.2d 689; In re Estate of Teel, 25 Cal.2d 520, 154 P.2d 384; In re Estate of Trefren, 86 Cal. App.2d 139, 194 P.2d 574; In re Estate of Llewellyn, 83 Cal.App.2d 534, 189 P.2d 822, 191 P.2d 419; In re Estate of Pohlmann, 89 Cal.App.2d 563, 201 P.2d 446. The rule respecting conflicting evidence being the same as in other civil cases, appellants have the burden of showing that there is no substantial evidence to sustain the verdict. This court must view the evidence in the light most favorable to respondent and resolve all conflicts in her favor.

[3] Under settled rules appellants had the burden of overcoming a well-recognized presumption. Admittedly the signatures of R. Anzalone, P. Morroni, Rosi Morroni and Rosaria Cecala are genuine. Thus there were on the face of the document the signatures of "at least two attesting witnesses". Sec. 50 Probate Code. There was not, it is true, the conventional attestation clause, but such clause was not necessary. In re Estate of Tyler, 121 Cal. 405, 53 P. 928; In re Estate of Pitcairn, 6 Cal.2d 730, 59 P.2d 90, 93. The document therefore came before the trial court clothed with the presumption that it had been duly executed, and such presumption is

"independent evidence which may be weighed against positive testimony". In re Estate of Pitcairn, supra.

[4] Moreover, the testimony of Messrs. Anzalone and Morroni went in subject to another well-recognized rule, for it has been settled law in this state ever since. In re Estate of Tyler, supra, 1898, and perhaps before, that "When a witness who has solemnly subscribed his name to a will as an attesting witness, knowing the nature of his act, and that deceased would rely upon his name as a part of the execution of the will, undertakes by his evidence to overthrow or cast suspicion upon it, his evidence should be closely scrutinized." In re Estate of Motz, 136 Cal. 558, 561, 69 P. 294, 295. See, also, In re Estate of Dow, 181 Cal. 106, 113, 183 P. 794, and In re Estate of Novotny, 94 Cal.App. 782, 787, 271 P. 923, 273 P. 58. In re Estate of Wright, 7 Cal.2d 348, 60 P.2d 434, 435, the court comments on the rather strong language with which the decisions have characterized the testimony of witnesses who have signed a testamentary document and thereafter repudiated it, and remarks that what we have just quoted from In re Estate of Motz "must be in the mind of every person who gives any thought to the subject." The jury was given an instruction containing the substance of that rule.

[5] That a will may be proved otherwise than by the subscribing witnesses is definitely settled. Sec. 1941, Code Civ. Proc., provides that "If the subscribing witness denies or does not recollect the execution of the writing, its execution may still be proved by other evidence."

Here one of the four witnesses had died; one did not recollect the execution of the writing and the other two denied it outright.

At 10 Cal.Jur. p. 874 it is said: "The early decisions indicate that prior to the adoption of the code proof of an instrument by a subscribing witness was the preferred mode. No such preference is recognized by the code, however; nor is undue weight to be attached to the testimony of such a witness * * *", quoting sec. 1941, supra.

At 26 Cal.Jur. p. 793 it is said: "A denial by one of the witnesses that the statutory requirements were complied with does not necessarily require a rejection of the propounded instrument. Sec. 1941 of the Code of Civil Procedure provides that if the subscribing witness denies the execution of the writing, proof may be made by other evidence. Admission of the paper to probate may be decreed on the testimony of the other witness and the inference to be derived from the attestation; or the testimony of another witness may be accepted, and the statements of the attesting witnesses rejected * * *." In re Estate of Motz, supra, and In re Estate of Dow, supra, are cited.

[6] In this case it appears that the jury accepted the testimony of Sarah Naso and rejected that of Messrs. Anzalone and Morroni.

In re Weber's Estate, 15 Cal.App. 224, 114 P. 597, 603, is directly in point and is illustrative of the rule. Weber made a will, followed 7 months later by a codicil to which there were two attesting witnesses. Both witnesses on the contest gave testimony which was inconsistent, to say the least, with their role as subscribing witnesses and with the testimony they had given on its admission to probate. Indeed it might be said to have been a "denial" of the due execution of the codicil. The testimony of one of these witnesses *on the contest* was in some respects similar to that in this case. She "testified that nothing was said by the testator; that she was requested by Mr. Bender to come to Mr. Weber's room and sign a paper; that Mr. Weber said nothing and Mr. Bender said nothing 'only to sign'; that she knew nothing at all about what she was signing." Bender, a close friend of the testator and his executor, was present at the execution and gave testimony showing the usual acts and declarations of a person executing a will and of the two attesting witnesses. The court held, 15 Cal.App. at page 238, 114 P. at page 603, that there was "nothing in the evidence * * * which would justify us in holding that the trial court erred in accepting Mr. Bender's testimony and rejecting that of the two subscribing witnesses."

At 4 Wigmore on Evidence, 3d ed., p. 599, sec. 1301, the author says that any rule other than that just discussed "would be unfair and disastrous, especially in testamentary causes."

No facts need be stated herein beyond those necessary for an understanding of the legal points involved on the appeal. Such facts have been given, but in fairness it should be said that there was an abundance of evidence from which the jury could have reached a contrary conclusion, notably the delay of about 11 years in presenting the 1935 will for probate. Apparently the jury was satisfied on that score. Testator had made a will in 1933, which was offered for probate by the widow almost 2 years after his death. It left a life estate to the widow, on whose death Sarah was to get $500, while her sister was to get a half interest in a 23-acre ranch and her brother was to get a 15.75-acre ranch. The 1935 will left a life estate to the widow, and on her death the estate was to be divided in equal thirds to the children. Distribution under the 1933 will had been decreed in 1941 but respondent never got her $500.

There was evidence of strife and litigation within the family. All this was freely admitted in evidence and fully aired before the jury. It showed, however, a reconciliation between respondent and her parents in 1934 which remained unbroken thereafter.

[7] Appellants attack an instruction which told the jury that certain evidence had been admitted for a limited purpose. Rosario Cecala testified that in 1942 his mother delivered to him the document dated February 9, 1935, telling him at the time that respondent had forged it and had prevailed on the four witnesses (including herself of course) to sign it after the decedent had expired, and directing him to destroy it. Rosario's wife testified to a conversation she had had with the widow to the same general effect. Both conversations were hearsay, of course, and were strenuously objected to. The court instructed the jury that these declarations could be considered "only for the purpose of explaining in some degree what may have happened to the document" after the death, and that they should be viewed with extreme caution. The widow's hearsay declarations that her daughter had forged the father's will, standing alone and without the cautionary instruction, would have been most harmful to respondent's case, and such instruction was not only proper but was absolutely necessary as long as the hearsay evidence had been admitted.

[8] Appellants attack the instruction based on section 1844, Code Civ.Proc., which told the jury that "The testimony of one witness worthy of belief is sufficient for the proof of any fact * * *." Respondent's testimony was directly opposed to that of Messrs. Anzalone and Morroni, and she was certainly entitled to the instruction, given in every civil and criminal case (except in perjury and treason cases).

[9] Appellants argue that the fact that the widow did not file this 1935 will for probate but filed the earlier one of September 11, 1933, is convincing evidence that the 1935 will was forged. As we have already pointed out, there was a delay of about 11 years in filing the 1935 will. The jury could have concluded from that delay that respondent did not want the 1935 will to come to court while her mother lived, but that was a question exclusively for the jury. So, too, with respect to the filing by the widow of the 1933, rather than the 1935, will. The appellant, Rosario Cecala, not the respondent, had possession of the 1935 will from 1942 when his mother gave it to him until he and Rosa Anzalone produced it in 1946 in obedience to an order of court which respondent procured.

[10] Error is claimed in the court's rejection of certain tendered evidence of an occurrence in 1926, which appellants claim showed wrongdoing on respondent's part. They argue that it might have supplied the reason for the estrangement. The court held it too remote—9 years before the 1935 will—moreover there had been a reconciliation in 1934. It was not admissible as impeachment. Sec. 2051, Code Civ.Proc.

[11] It cannot be said that respondent's testimony is wholly lacking in corroboration. Rosi Morroni testified that she did not remember signing. On cross-examina-

tion she was asked "Are you in the habit of signing papers without knowing what they are, Mrs. Morroni?" and she gave the emphatic answer "No sir-ee". She then admitted that she knew that placing her signature on a paper was liable to be a pretty important matter. Moreover, "Where an attesting witness has no recollection as to certain matters connected with the making of the will, the case is, upon principle, in the same condition as where he is dead, insane, or absent; and in such case 'proof of the handwriting of the testator and of the subscribing witnesses, or any of them, may be admitted as evidence of the execution.' Code Civ.Proc., § 1315. *And such evidence is sufficient, in the absence of any countershowing, to prove the execution.*" In re Estate of Tyler, 121 Cal. 405, 409, 53 P. 928, 929, supra; emphasis added.

[12] No difficulty arises from the fact that the execution was by mark, since "signature or subscription includes mark, when the person cannot write, his name being written near it by a person who writes his own name as a witness"; sec. 17, Code Civ. Proc., sec. 14, Civ.Code; see, also, In re Guilfoyle, 96 Cal. 598, 31 P. 553, 22 L.R.A. 370; In re Mullin Estate, 110 Cal. 252, 42 P. 645; In re Estate of Holloway, 195 Cal. 711, 235 P. 1012.

[13] The verdict was assented to by 11 jurors. The affidavit of the other juror was filed on the motion for new trial. It deposed that the jurors resented Rosario Cecala's attitude in answering questions "in coming back with counter questions"; that they "were filled with sympathy for Mrs. Naso"; that "to my mind, the evidence was not weighed at all". No attempt was made to show the verdict was reached by resort to chance, which was really the ground specified in the motion. The verdict could not be upset on such a showing. Sec. 657, subd. 2, Code Civ.Proc.; 24 Cal.Jur. p. 877; 18 McKinney's Digest, "New Trial", sec. 169 and cases cited.

There was no showing of newly discovered evidence.

We find no error in the record.

The order is affirmed.

DOOLING, J., concurs.

Hearing denied; TRAYNOR, J., dissenting.

92 Cal.App.2d 861

Ex parte WALDEN.

Cr. 674.

District Court of Appeal, Fourth District, California.

July 15, 1949.

Criminal law ⟹982

Where petitioner, after having been found guilty of manslaughter, a misdemeanor, without gross negligence, was granted probation and was released upon condition that he violate no laws, that he refrain from use of intoxicating liquors and that he refrain from operating a motor vehicle during two-year term of probation, written notice to probation officer pursuant to statute was not essential before court could revoke prior order granting probation and proceed to pronounce judgment. Pen. Code, §§ 1203.2, 1203.3, 1203b.

Appeal from Superior Court, San Bernardino County; Martin J. Coughlin, Judge.

Proceeding in the matter of the application of Clinton Ernest Walden for a writ of habeas corpus. From order granting petition and discharging petitioner, the People appeal.

Reversed.

Fred N. Howser, Attorney General, Kent C. Rogers, Deputy Attorney General, Jerome B. Kavanaugh, District Attorney, Dan J. Cowett, Deputy District Attorney, San Bernardino, for appellant.

BARNARD, Presiding Justice.

This is an appeal from an order granting a petition for a writ of habeas corpus and discharging the petitioner.

The petitioner was found guilty of manslaughter, a misdemeanor, without gross negligence. On January 10, 1947, his application for probation was granted and he was released upon the conditions that he violate no laws, that he refrain from the use of intoxicating liquors, and that he refrain from operating a motor vehicle during the two-year term of probation.

On January 7, 1949, an affidavit was filed in the superior court alleging that he had violated the terms of his probation by driving a motor vehicle without a driver's license and while his license to drive was revoked, and that he had failed to make a boulevard stop. The court issued a bench warrant for his arrest, and a hearing was had on January 8, 1949. After hearing evidence, both for the People and the petitioner, the court made an order finding the allegations of this affidavit to be true, and further ordering that the probation theretofore granted to the petitioner be revoked. Thereupon, and on the same day, the court pronounced judgment sentencing him to imprisonment in the county jail for one year, with the further provision that the last six months of that term be suspended.

On January 13, 1949, a petition for a writ of habeas corpus was filed, alleging that the detention and imprisonment of the petitioner was illegal in that the court was without jurisdiction to issue its order of commitment because the court or the clerk had failed, prior to making the order revoking probation and pronouncing judgment, to notify the probation officer in writing of the court's intention to revoke, modify or change the order of probation theretofore made. A preliminary writ was issued and a hearing was had on January 15, 1949. On January 25, 1949, an order was entered finding that no written notice was given by the court or clerk to the probation officer, as provided by section 1203.3 of the Penal Code, granting the petition for a writ of habeas corpus, and ordering that the petitioner be discharged. In an opinion filed, the court expressed the opinion "that in all cases no order can be made revoking, modifying or changing a prior order of probation, unless prior thereto, notice is given to the probation officer of the intention to revoke, modify or change." This appeal followed.

The sole question presented is whether written notice to the probation officer, pursuant to section 1203.3 of the Penal Code, was essential in such a case as this before the court could revoke a prior order granting probation and proceed to pronounce judgment, as was here done.

The probation here granted was terminated and judgment was pronounced pursuant to the provisions of section 1203.2 of the Penal Code, which provide that the court may issue a warrant for the rearrest of a probationer; that it may thereupon revoke and terminate such probation if it shall have reason to believe from the report of the probation officer, or otherwise, that any of the conditions of probation are being violated; and that the court may, upon such revocation and termination, proceed to pronounce judgment. The question presented is whether this action by the court, authorized by section 1203.2, was void because the notice called for by section 1203.3 was not given. Section 1203.3 reads:

"The court shall have authority at any time during the term of probation to revoke, modify, or change its order of suspension of imposition or execution of sentence. It may at any time when the ends of justice will be subserved thereby, and when the good conduct and reform of the person so held on probation shall warrant it, terminate the period of probation and discharge the person so held, but no such order shall be made without written notice first given by the court or the clerk thereof to the proper probation officer of the intention to revoke, modify, or change its order, and in all cases, if the court has not seen fit to revoke the order of probation and impose sentence or pronounce judgment, the defendant shall at the end of the term of probation or any extension thereof, be by the court discharged subject to the provisions of these sections."

For many years these two sections were included among the subdivisions of one section, 1203. In 1935, they were made separate sections of the code. For some 40 years these provisions have remained substantially the same except that in 1917 the provision for notice to the probation officer was inserted in the second sentence of what is now section 1203.3 and, in 1927, what is now section 1203.2 was amended to permit a rearrest, without warrant, by any peace officer as well as by a probation officer.

The respondent argues that section 1203.2 is a mere grant of authority to a court to revoke and terminate probation and proceed to enforce judgment where a violation of probation is found, without purporting to provide the necessary procedure therefor. And that section 1203.3 is intended to provide the necessary procedure that must be followed in exercising the authority granted by section 1203.2.

We are unable to agree with this interpretation of those statutes, which appear to us to have been adopted for separate and distinct purposes. Section 1203.2 provides for and covers one situation, namely, where a probationer is rearrested because of a claimed violation of the terms of his probation. That section provides that the court may thereupon revoke and terminate his probation if it has reason to believe from the report of the probation officer, or otherwise, that the terms of the probation have been violated, and may then proceed to enforce the judgment. This appears to be sufficient not only as a grant of power in this regard but as adequately pointing out the procedure to be followed. The statute appears to be complete in itself, it is quite definite in what may be done under those circumstances, and it requires no notice to the probation officer who may not have initiated the proceedings.

On the other hand, section 1203.3 seems to cover another situation entirely, and to provide for revocation, modification or termination of the original order in cases where the probationer has not been rearrested. In the first sentence it gives the court general power at any time within the period to revoke, modify or change its probation order. The second sentence originally authorized the court, when the good conduct of the probationer should warrant it, to terminate the probation and discharge the person so held; with the further provision that in all cases where probation was not revoked and the judgment enforced, the defendant should be discharged at the end of the probationary period. The provision for notice to the probation officer was inserted in 1917 in the middle of this second sentence and immediately following the provision for termination and discharge because of good conduct. The provision that "no such order shall be made without written notice" would seem to have been intended to refer to the order of termination and *discharge* just provided for, and not to the other kind of order for termination and enforcement of judgment provided for in section 1203.2.

Section 1203.3 seems to have been intended, primarily, to deal with cases where the defendant has satisfied the terms of his probation, in whole or in part. People v. Williams, 24 Cal.2d 848, 151 P.2d 244. While it may also be intended to cover the revocation, modification or change of the probation order upon other grounds and for other purposes, it rather clearly appears that this wide coverage was intended to apply to situations other than those involving the rearrest of the person, and the enforcement of judgment against him. Those more drastic steps are authorized by and completely covered in section 1203.2. Even if the notice requirement in the second sentence of 1203.3 should be held applicable also to the first sentence thereof, it has no application in the situation covered by 1203.2.

Incidentally, the original order of probation was here made without a reference to the probation officer, as permitted by section 1203b. While we do not regard this as controlling here it emphasizes the fact that there is good reason for not requiring a notice to the probation officer in such a case as this.

We conclude that the order of the court terminating probation and sentencing the petitioner was a valid order, and that no such notice as that contended for was necessary before that order could be made.

The order appealed from is reversed.

MUSSELL, J., concurs.

93 Cal.App.2d 33

PILTINGSRUD v. HARMAN et al.

Civ. 16829.

District Court of Appeal, Second District, Division 1, California.

July 19, 1949.

1. Appeal and error ⚷1041(2)

Permitting plaintiff in action for money lent, to amend his complaint at conclusion of the trial to include a second cause of action for money had and received, was not prejudicial error, where amendment was surplusage, and there was substantial evidence to sustain finding that money advanced by plaintiff to defendants was a loan.

2. Partnership ⚷52, 217(3)

In action by manager of resort against partners operating resort to recover money allegedly lent by manager to partners, evidence sustained finding that money advanced by manager was a loan which he was entitled to recover, rather than an investment in partnership business.

◆

Appeal from Superior Court, Los Angeles County; Frederick F. Houser, Judge.

Action for money lent by Guy B. Piltingsrud against Charles Harman and others, doing business as Seminole Hot Springs. From a judgment for the plaintiff, the defendants appeal.

Judgment affirmed.

Michael Lavelle, Los Angeles, for appellants.

Harry Alkow, Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from the judgment.

Defendants Harman and McKinney had leased a health resort known as Seminole Hot Springs; plaintiff was employed to manage and operate the business. A month or so thereafter plaintiff entered into an agreement by the terms of which in substance plaintiff was to purchase an interest in the business for $7,500.00 provided plaintiff could obtain that amount. It was agreed as the plaintiff testified, that $2,500.00 which was paid to defendants by plaintiff would be considered a loan, if plaintiff was unable to obtain the additional $5,000.00. Other interests were sold by defendants Harman and McKinney; plaintiff was unable to obtain the additional $5,000.00 and demanded payment of the alleged loan. Payment being refused the within action "for money loaned" followed.

The court found for plaintiff, that is to say, at the conclusion of the trial the trial judge stated in part, "The court holds it is a loan"; the findings recited that defendants Harman and McKinney "had regarded said sum of $2,500.00 delivered to them by plaintiff, as a loan * * *".

It is contended on appeal that "The evidence was insufficient to justify the judgment"; that the court erred in rendering judgment for plaintiff on both the first cause of action for money loaned and on the second cause of action for money had and received, and that the court erred in "permitting plaintiff to amend his complaint after the trial and after the cause was submitted".

[1, 2] At the conclusion of the trial and during the argument, the record reveals the following:

"The Court: Do you wish to amend, Mr. Alkow, your complaint to include another count for moneys had and received?

"Mr. Alkow: Yes, I meant to do that * * *".

The defendant objected, whereupon the court stated, "I cannot see that your cause has been damaged any, Mr. Lavelle, by permitting this amendment to be made * * *." An argument followed but, it does not appear why the suggestion was made by the court in the first instance. In any event no prejudice appears to have resulted; the amendment was surplusage and unnecessary and there is substantial evidence to sustain the findings based on the complaint as filed.

The record reveals no prejudicial errors wherefore the judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

93 Cal.App.2d 43

YBARRA v. SPANGARD et al.

Civ. 16598.

District Court of Appeal, Second District,
Division 1, California.

July 20, 1949.

Hearing Denied Sept. 15, 1949.

1. Appeal and error 🔑1099(7)

Judgment on prior appeal that proof of a traumatic injury during unconsciousness was sufficient to make out a prima facie case against hospital owner and nurses and doctors in attendance on plaintiff in connection with performance of an appendectomy was the law of the case on subsequent appeal.

2. Hospitals 🔑8
Physicians and surgeons 🔑18(8)

Finding that patient suffered a traumatic injury while unconscious during performance of an appendectomy was sustained by the evidence in action against nurses and doctors and hospital owner.

3. Appeal and error 🔑1011(1)

Conflicting evidence as to whether injury was traumatic or the result of an infection was for determination of the trial judge whose finding was conclusive on appeal.

4. Appeal and error 🔑1008(1)

Whether the circumstantial evidence giving rise to res ipsa loquitur rule had been overcome by the positive testimony of the defendants was for trial judge.

5. Evidence 🔑587, 595

The trial judge need not accept direct testimony rather than inferences which may be reasonably drawn from circumstantial evidence.

6. Evidence 🔑54

In a civil case if the first inference is a reasonably probable one it may be used as a basis for a succeeding inference.

7. Hospitals 🔑7
Physicians and surgeons 🔑16

Where unconscious patient sustained an injury while undergoing an appendectomy and trial judge did not accept the testimony of defendants, judgment was properly entered against all the nurses and doctors involved and hospital owner though all the defendants were not present at all times during the operation.

8. Appeal and error 🔑1097(5)

The District Court of Appeal may not re-evaluate the opinion of the Supreme Court rendered on first appeal.

9. Appeal and error 🔑1071(1)

Where certain findings sufficiently supported the judgment, other findings were unimportant.

Appeal from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

Action by Joseph Ramon Ybarra against Lawrence C. Spangard and others for damages for personal injuries. From a judgment for plaintiff, the defendants appeal.

Judgment affirmed.

Parker, Stanbury and Reese, Los Angeles, for appellants.

Marion P. Betty, Westover & Smith, Los Angeles, Joseph D. Taylor, Los Angeles, of counsel, for respondent.

DOOLING, Justice assigned.

This case was before the Supreme Court on an appeal from a judgment of nonsuit and that judgment was reversed. A second trial without a jury resulted in a judgment in favor of plaintiff and against all of the defendants and all of the defendants appeal. The general nature of the action and the relation of the several defendants thereto are set out in the opinion of the Supreme Court on the previous appeal. Ybarra v. Spangard, 25 Cal.2d 486, 487–488, 154 P.2d 687, 162 A.L.R. 1258. For the purposes of this opinion it is sufficient to notice that the action is one against the several nurses and doctors who were in attendance upon the plaintiff while he was unconscious because of an anesthetic administered to him in connection with the performance of an appendectomy, and against the owner of the hospital as employer of certain of the other defendants.

The trial court found that during his state of unconsciousness plaintiff suffered a traumatic injury to a nerve in his right shoulder with resultant injury to and paralysis of the right arm and that this was the proximate result of the negligence of defendants and each of them. The chief attack is upon these findings.

[1] On the first appeal the court held that proof of the receipt of a traumatic injury during the unconsciousness of anesthesia was sufficient to make a prima facie case against all of the defendants under the rule of res ipsa loquitur. This is the law of the case on the second appeal, Allen v. California Mutual Bldg. & Loan Ass'n, 22 Cal.2d 474, 139 P.2d 321, and, as well, establishes a rule of law binding upon us as an intermediate appellate court.

[2, 3] The finding that plaintiff suffered a traumatic injury while unconscious although attacked by appellants finds ample support in the record. Respondent's medical experts and an independent expert appointed by the court all testified that in their opinion the injury was traumatic. Respondent testified that prior to the operation he had never had any pain in or injury to the right arm or shoulder and discovered this injury after awakening from the anesthesia. While all of these experts admitted the possibility that respondent's condition might be caused by infection rather than trauma they were strongly of the opinion that the injury was traumatic. Appellants' experts while admitting the possibility of trauma were as strongly of the opinion that the condition was the systemic product of some infection. The resolution of this conflict was for the trial court and we are concluded on appeal by the trial judge's determination on conflicting evidence of medical probabilities. Travelers Ins. Co. v. Industrial Acc. Comm., 33 Cal.2d 685, 203 P.2d 747.

[4, 5] All of the defendants except the owner of the hospital, who was not personally in attendance upon the respondent, gave evidence and each testified that while he was present he saw nothing occur which could have produced the injury to respondent's arm and shoulder. Upon this evidence appellants insist that the prima facie case made under the res ipsa doctrine was overcome. But it was for the trial judge to weigh the circumstantial evidence which made the prima facie case under the res ipsa rule against the positive testimony of the appellants and to determine whether the prima facie case had been met. Michener v. Hutton, 203 Cal. 604, 612, 265 P. 238, 59 A.L.R. 480; Barham v. Widing, 210 Cal. 206, 215, 291 P. 173; Haag v. Harris, 4 Cal.2d 108, 110, 48 P.2d 1; Druzanich v. Criley, 19 Cal.2d 439, 444, 122 P.2d 53. There is nothing inherent in direct testimony which compels a trial court to accept it over the contrary inferences which may reasonably be drawn from circumstantial evidence. Gray v. Southern Pacific Co., 23 Cal.2d 632, 640–641, 145 P.2d 561. The view taken of the evidence by the trial judge is illustrated by the following remark made at the hearing of the motion for new trial: "I believe it arose from a traumatic condition. Now, where did it happen? That puts the court right back. Even though their explanations were honest, that there was something they did not appreciate happened in the course of the operation, in the course of handling the patient. That is the way I figured the case and that was my decision."

It thus appears that reasoning from the circumstantial evidence the trial judge concluded that respondent suffered a traumatic injury during the unconsciousness of anesthesia and concluded therefore that, whether honest or not, appellants' testimony that they did not observe any incident which could have caused the injury did not establish that no such incident occurred.

[6] Appellants' claim that the court based inference upon inference is answered by Vaccarezza v. Sanguinetti, 71 Cal.App.2d 687, 697–702, 163 P.2d 470, and Brown-Forman Distillers Corp. v. Walkup, etc., Co., 71 Cal.App.2d 795, 798–799, 163 P.2d 878. The rule is too narrowly stated in Stewart v. Norsigian, 64 Cal.App.2d 540, 545, 149 P.2d 46, 48, 150 P.2d 554, "that an inference may be based on another inference when the first inference is the only one which a reasonable mind could draw from the facts proven." The correct rule is found in the Vaccarezza case, 71 Cal.App.

2d at page 698, 163 P.2d at page 477: "In a civil case, if the first inference is a reasonably probable one it may be used as a basis for a succeeding inference."

Appellants argue that since all of them were not present at all times while respondent was unconscious all cannot be held liable except by pure conjecture. Appellants' argument is reminiscent of the questions decided against them on the first appeal. We quote from Ybarra v. Spangard, supra, 25 Cal.2d at pages 488–489, 154 P.2d at page 688: "Defendants take the position that, assuming that plaintiff's condition was in fact the result of an injury, there is no showing that the act of any particular defendant, nor any particular instrumentality, was the cause thereof. They attack plaintiff's action as an attempt to fix liability 'en masse' on various defendants, some of whom were not responsible for the acts of others; and they further point to the failure to show which defendants had control of the instrumentalities that may have been involved. Their main defense may be briefly stated in two propositions: (1) that where there are several defendants, and there is a division of responsibility in the use of an instrumentality causing the injury, and the injury might have resulted from the separate act of either one of two or more persons, the rule of res ipsa loquitur cannot be involved against any one of them; and (2) that where there are several instrumentalities, and no showing is made as to which caused the injury or as to the particular defendant in control of it, the doctrine cannot apply. We are satisfied, however, that these objections are not well taken in the circumstances of this case."

The court concludes, 25 Cal.2d on page 494, 154 P.2d on page 691: "We merely hold that where a plaintiff receives unusual injuries while unconscious and in the course of medical treatment, all those defendants who had any control over his body or the instrumentalities which might have caused the injuries may properly be called upon to meet the inference of negligence by giving an explanation of their conduct."

[7] The court having held that the rule of res ipsa loquitur applied in this case, if the defendants had rested without giving any evidence a judgment against all of them would properly have followed. Instead they gave evidence which did not satisfy the court that any of them had met the prima facie case against them. A judgment against all of them as logically resulted.

[8] Appellants ask us to re-evaluate the opinion of the Supreme Court on the first appeal in this case. An intermediate appellate court is in no position to assume such a responsibility, but if we were, the Supreme Court has already done its own re-evaluating in Summers v. Tice, 33 Cal.2d 80, 86, 199 P.2d 1, 4, where that court said, referring to this case on the first appeal:

"In a quite analogous situation this Court held that a patient injured while unconscious on an operating table in a hospital could hold all or any of the persons who had any connection with the operation even though he could not select the particular acts by the particular person which led to his disability."

Appellants question the logic of this result. Given the premise laid down in Ybarra v. Spangard, supra, 25 Cal.2d 486, 154 P.2d 687, 162 A.L.R. 1258, the judgment herein logically follows. It is not for us to question the logic of the Supreme Court in arriving at the controlling decision on the former appeal but we may note, what Justice Holmes many years ago pointed out, "that law does not always keep step with logic." Charles Nelson Co. v. Morton, 106 Cal.App. 144, 149, 288 P. 845, 847.

[9] The findings herein discussed sufficiently support the judgment. Other findings, including findings of want of post-operative care, therefore become unimportant. Cornell v. Hollywood Turf Club, 32 Cal.App.2d 204, 208, 89 P.2d 449. 2 Cal. Jur. 1028–1029.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

DRAPEAU, J., did not participate.

Hearing denied; TRAYNOR, J., dissenting.

93 Cal.App.2d 4

PEOPLE v. WARD.

Cr. 4341.

District Court of Appeal, Second District, Division 2, California.

July 18, 1949.

1. Homicide 🔑23(2)

"Murder of second degree" is a willful act resulting in death of a human being, characterized by the presence of malice aforethought and, at least ordinarily, by the specific intent to kill, and by the absence of premeditation and deliberation.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Murder of Second Degree".

2. Homicide 🔑23(1)

Murder of the second degree may be defined as the unlawful killing of human being with malice aforethought but which killing is not perpetrated by means of poison, or lying in wait, or torture, is not willful, deliberate, and premeditated, and is not committed in the perpetration of or attempt to perpetrate arson, rape, robbery, burglary, or mayhem.

3. Homicide 🔑254

Evidence sustained conviction of murder in the second degree.

4. Criminal law 🔑1159(3)

Minor discrepancies and conflicts in the evidence will not be considered by the court since it is the province of the trier of fact to determine which witnesses are to be believed.

5. Criminal law 🔑935(1)

On a motion for a new trial after the verdict of a jury, defendant is entitled to a decision by the trial judge on the sufficiency of the evidence giving due weight to conflicts and inconsistencies in the evidence and the credibility of the testimony of witnesses.

6. Criminal law 🔑935(1)

Denial of defendant's motion for a new trial after conviction of murder in the second degree, was not objectionable on ground that judge failed to weigh evidence.

◆

Appeal from Superior Court, Los Angeles County; Kenneth C. Newell, Judge.

Arnold Douglas Ward was convicted of murder in the second degree and he appeals.

Affirmed.

Kenneth J. Murphy, Los Angeles, for appellant.

Fred N. Howser, Attorney General, James A. Doherty, Deputy Attorney General, for respondent.

McCOMB, Justice.

From a judgment of guilty of murder of the second degree after trial before a jury, defendant appeals. He also appeals from the order denying his motion for a new trial.

Viewing the evidence in the light most favorable to the people (respondent) the essential facts are:

Mr. Bradley and a friend named Slater were sitting under a pepper tree on the south side of Filbert street in Duarte, when defendant, who knew Mr. Bradley, emerged from a store across the street, walked over and sat down in front of the two men who were talking. He listened to their conversation for approximately two minutes, then stood up, drew a revolver from his belt and put it against Mr. Bradley's stomach. Mr. Bradley remained in a sitting position and told defendant not to do what he was doing. Defendant then pulled the trigger, wounding Mr. Bradley from which wound he died approximately 36 hours later.

Questions

First: *Was there substantial evidence to sustain a judgment of guilty of second degree murder?*

This question must be answered in the affirmative and is governed by this rule:

[1] Murder of the second degree is a willful act resulting in death of a human being, characterized by the presence of

malice aforethought and, at least ordinarily, by the specific intent to kill, and by the absence of premeditation and deliberation. People v. Bender, 27 Cal.2d 164, 181 et seq., 163 P.2d 8.

[2] Defendant's argument is that a finding of guilty of murder of the second degree is the equivalent of a finding that the killing was not willful, not deliberate and not premeditated. Therefore the judgment of guilty of murder of the second degree is not supported by the evidence. Diametrically opposed to this contention is the holding in People v. Thomas, 25 Cal.2d 880, 903, 156 P.2d 7, 19. Mr. Justice Schauer, speaking for the Supreme Court of California in such case gives the correct construction of section 189 of the Penal Code by emphasizing the word "and" in the following quotation from the decision: "Murder of the second degree may be defined as the unlawful killing of a human being with malice aforethought but which killing is not perpetrated by means of poison, or lying in wait, or torture, is not wilful, deliberate, *and* premeditated, and is not committed in the perpetration [of] or attempt to perpetrate arson, rape, robbery, burglary, or mayhem. (See Pen. Code, §§ 187, 189.) It is apparent from the facts previously recited that the homicide in this case, if it was murder at all, was murder of the second degree unless the killing was 'wilful, deliberate and premeditated.'" By the interpretation thus placed upon section 189 of the Penal Code if the homicide is not willful, deliberate *and* premeditated the crime is murder of the second degree.

[3] It is evident that defendant unlawfully killed Mr. Bradley without any provocation by the use of a gun in a manner which showed an abandoned and malignant heart and hence there was implied malice aforethought. Since there is evidence of the other elements necessary to constitute murder of the second degree the judgment is supported by the evidence.

[4] Minor discrepancies and conflicts in the evidence will not be considered by this court since it was the province of the trier of fact to determine which witnesses were to be believed. People v. Pianezzi, 42 Cal.App.2d 270, 277, 108 P.2d 685.

[5] Second: *Did the trial judge abuse his discretion in denying defendant's motion for a new trial by not weighing the evidence pursuant to the rule set forth in People v. Navarro, 74 Cal.App.2d 544, 554, 169 P.2d 265, to wit, that on a motion for a new trial after the verdict of a jury, defendant is entitled to a decision by the trial judge on the sufficiency of the evidence giving due weight to conflicts and inconsistencies in the evidence and the credibility of the testimony of witnesses?*

[6] This question must be answered in the negative. After hearing the motion for a new trial Judge Newell, who presided over the trial, stated, "Well, *I think there was sufficient evidence for the jury to return the verdict they did.* The matter was submitted to them and, apparently, they unanimously were convinced beyond a reasonable doubt that the defendant was guilty. The motion will be denied." (Italics added.)

Clearly from the foregoing statement of the trial judge and particularly that portion which is italicized, he meant to convey and did convey the idea that after reviewing the evidence pursuant to the rule stated above he was of the same opinion as the jury that the evidence was sufficient to sustain a verdict of guilty of murder of the second degree. In other words, he said that after considering the evidence he came to the same conclusion as the jury and that he agreed with the verdict.

The judgment and order are and each is affirmed.

MOORE, P. J., and WILSON, J., concur.

34 Cal.2d 136

Application of JACKSON.

Ex parte ZANETTI.

Cr. 4974.

Supreme Court of California, in Bank.
July 28, 1949.

1. Evidence 🔑63
Insane persons 🔑26

Generally, all persons are presumed to be sane until the contrary is proved; but when insanity, other than temporary or spasmodic, has once been fully adjudicated, it is presumed to continue until the contrary is shown.

2. Insane persons 🔑37, 49

Discharge of an insane person from a mental institution does not warrant a discharge of a guardian appointed for that person, nor does appointment of a guardian warrant confinement in an institution. Probate Code, §§ 1460–1462, 1470; Welfare and Institutions Code, § 5000 et seq.

3. Insane persons 🔑51

Where patient was committed under statute providing for commitment to mental hospital, of persons adjudicated to be in need of restraint, and guardian was appointed under the Probate Code providing for appointment in cases of insane persons unable to manage their affairs, restoration of patient to status of sane person in proceeding to discharge guardian did not supersede original commitment and deprive superintendent of hospital of authority to withhold certificate of discharge. Probate Code, §§ 1460–1462, 1470; Welfare and Institutions Code, §§ 5000 et seq., 5041, 5050.9, 6620, 6725.5, 6726, 6729 et seq.

4. Insane persons 🔑29

If administrative officer of mental institution issues certificate of discharge for insane person, and letters of guardianship are outstanding, that action does not terminate order of court granting letters, and is not necessarily the equivalent of a judicial determination that ward is capable of managing his person and affairs. Probate Code, §§ 1460–1462, 1470; Welfare and Institutions Code, §§ 5000 et seq., 5041, 5050.9, 6620, 6725.5, 6726, 6729 et seq.; Const. art. 6, § 4.

Proceeding in the matter of the application of Margaret Jackson for a writ of habeas corpus on behalf of John A. Zanetti to secure his release from a state hospital for mentally ill persons.

Writ discharged, and patient remanded to custody.

James W. Harvey and Elmer C. Mower, San Francisco, for petitioner.

Fred N. Howser, Attorney General, Clarence A. Linn, B. Abbott Goldberg and Doris H. Maier, Deputy Attorneys General, and Charles J. McGoldrick, District Attorney, Santa Rosa, for respondent.

SCHAUER, Justice.

By this application for the writ of habeas corpus, Mrs. Margaret Jackson seeks the release of her brother, John A. Zanetti, hereinafter sometimes called the patient, who is allegedly being unlawfully detained in the Napa State Hospital by the superintendent and medical director of that institution. His detention, it is contended, has been rendered unlawful as the result of a probate court order adjudging Zanetti sane and competent and revoking letters of guardianship previously awarded to Mrs. Jackson. This contention, as will hereinafter appear, is without merit.

[1] On February 14, 1947, the patient was committed to the Napa State Hospital by order of the superior court of Sonoma County. Such commitment was upon proceedings had pursuant to provisions of Division 6, Part 1, Chapter 1, of the Welfare and Institutions Code which provide for the commitment of "mentally ill persons who have been adjudicated by a court to be so psychotic as to be dangerous to themselves or to the person or property of others and are found to be in need of supervision, treatment, care and restraint." (Wel. & Inst. Code, § 5041). A hearing was had (Wel. & Inst. Code, § 5050.9) in which lay witnesses and medical examiners testified as to the patient's mental condition. On request of counsel the question of Mr. Zanetti's mental illness or insanity was submitted to a jury; on the issues there involved he was found "mentally ill." Judgment was rendered and an order of commit-

ment filed. No action or proceeding has been had to challenge directly the initial validity of this judgment, to terminate its effectiveness, or to relieve the patient from its operation. It is true that as a general rule "All persons are presumed to be sane until the contrary is proved" (14 Cal.Jur. 362, § 19), but it is also the rule that when insanity, other than "temporary or spasmodic," has once been finally adjudicated it "is presumed to continue unless the contrary is shown" (see 14 Cal.Jur. 363, § 19; 28 Am.Jur. 751, § 121; In re Estate of Baker (1917), 176 Cal. 430, 436, 168 P. 881). The Sonoma County judgment, therefore, remains, and will continue to remain, a valid and effective warrant for detaining the patient in the state hospital, or subject to parole therefrom, until and unless he is discharged by the medical superintendent of such hospital (see Wel. & Inst. Code, § 6729 et seq.) or until his right to release from such detention or supervision has been adjudged by a court of competent jurisdiction in a proceeding directed to that end (see Wel. & Inst. Code, § 6620; Penal Code, § 1473; Calif.Const., Art. VI, § 4; In re Buchanan (1900), 129 Cal. 330, 332, 61 P. 1120, 50 L.R.A. 378; Kellogg v. Cochran (1890), 87 Cal. 192, 197, 25 P. 677, 12 L.R.A. 104).

On April 24, 1947, the superior court of San Francisco, on application of Mrs. Jackson, and pursuant to Probate Code sections 1460–1462, adjudged the patient insane and incompetent and awarded the petitioning sister letters of guardianship. Section 1460 of the Probate Code provides: "Any superior court to which application is made * * * may appoint a guardian for the person and estate or person or estate of an insane or an incompetent person. As used in this division of this code, the phrase 'incompetent person,' 'incompetent,' or 'mentally incompetent,' shall be construed to mean or refer to any person, whether insane or not, who by reason of old age, disease, weakness of mind, or other cause, is unable, unassisted, properly to manage and take care of himself or his property, and by reason thereof is likely to be deceived or imposed upon by artful or designing persons."

Zanetti was paroled[1] from the state hospital, under the Sonoma County commitment, on January 19, 1948. In November, 1948, while he was on leave of absence from the hospital on such parole, his sister proceeded in the superior court of the City and County of San Francisco, under section 1470 of the Probate Code, to have him restored to competency and to revoke the letters of guardianship theretofore issued to her by that (the San Francisco) court. The petition alleged the incompetency adjudication by the San Francisco court and the ensuing appointment of the sister as guardian of the incompetent; it further alleged that Zanetti was of "sound mind and competent and fully capable of taking care of himself and managing his property." It made no reference to the Sonoma County commitment or to the issues adjudicated in that proceeding. Notice of the hearing in this guardianship matter was mailed to Mrs. Jackson and to the patient; no notice was given to the Napa Hospital superintendent. Present at the proceedings were Zanetti, his sister, and a Dr. John Scamenti. After preliminary questions relating to identification, the following are the only material questions which were asked regarding Zanetti's condition. The Court asked Dr. Scamenti: "Q. What is his condition at the present time? A. His condition at the present time is one of recovery—Q. (interrupting) Has he improved to the extent that you feel that he should be restored to capacity? A. Yes. Q. Do you think that he can attend to his own affairs? A. Yes. Q. And that he would not be taken advantage by artful or designing persons if he were restored to capacity? A. Yes." The Court added: "I think that is sufficient basis for a restoration to capacity—this Doctor has been attending him, and his sister is in a position to know his condition." Upon the above recited showing Zanetti, on November 18, 1948, was adjudicated sane and competent, "capable of managing and taking care of himself and his property," and restored to capacity by the superior court of San Francisco.

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[1] The word "parole" as used in relation to patients committed to a state hospital means "leave of absence" (Wel. & Inst. Code, § 6725.5); it may be granted by the superintendent under general conditions prescribed by the Department of Mental Hygiene (id. § 6726).

On December 2, 1948, Zanetti's parole was revoked; he was apprehended and returned to the Napa State Hospital. Demand for his release from the hospital was made to the medical superintendent on December 6, 1948, and was refused. Thereafter, on December 21, 1948, Mrs. Jackson filed a verified petition for a writ of habeas corpus in the superior court of Napa County. In the return to the writ the hospital superintendent relied on the February 14, 1947, judgment of commitment. A hearing was had and the writ was denied. A similar petition was filed in the District Court of Appeal on January 20, 1949, and was denied without opinion.

The application for the writ to this court states: "* * * John A. Zanetti was * * * summarily reconfined in the said Napa State Hospital as a mentally ill person without benefit of any legal process whatsoever. That the said Theo K. Miller [superintendent of the Napa State Hospital] * * * held and does now hold said John A. Zanetti in confinement and restraint, notwithstanding the fact that the said John A. Zanetti was at said time and place and is now sane and competent under and by virtue of an adjudication of his 'legal condition' as a sane and competent person by a Superior Court of this State, in and for the City and County of San Francisco * * *." The "adjudication" referred to is the revocation of letters of guardianship and restoration to capacity in the proceeding under the Probate Code. Petitioner does not allege that Zanetti is not "so psychotic as to be dangerous" to himself "or to the person or property of others" or that he is no longer mentally ill, or that he has recovered to the degree that he is no longer in need of supervision, treatment, care or restraint. At the oral argument petitioner specifically disclaimed any desire to amend her petition and asserted that she chose to rely exclusively upon the adjudication by the San Francisco court restoring the ward to competency and discharging the guardian. It is clear, therefore, that the petitioner does not ask for a factual determination of present sanity but relies on the guardianship adjudication of November 18, 1948, by the superior court of San Francisco, as conclusive upon the superintendent of Napa State Hospital that Zanetti is sane and as terminating the operation or effectiveness of the Sonoma County superior court judgment. The position of petitioner is further evidenced by the statement in her petition: "That the original order for the commitment of * * * John A. Zanetti * * * on the 14th day of February, 1947, was superseded and nullified by the subsequent judgment of the [San Francisco superior court] * * * which had acquired jurisdiction of the guardianship of the person and estate of * * * Zanetti upon petition of Margaret Jackson, his sister, when letters of guardianship were issued to her * * *." The question before us is, therefore, exclusively one of law.

The law governing insane and incompetent persons in the state of California is primarily statutory. An examination of the statutes involved and the cases relevant thereto will serve to indicate the definitive variants of the term "insanity" and the possibility of its use in different situations. Among others can be noted: 1) insanity or incompetency with relation to capacity to contract (Civ.Code, §§ 38–40); 2) insanity or incompetency with relation to capacity to make testamentary disposition (Prob. Code, § 20; In re Estate of Worrall (1942), 53 Cal.App.2d 243, 127 P.2d 593; In re Estate of Baker (1917), 176 Cal. 430, 436, 168 P. 881); 3) insanity with relation to capacity to commit crime (Pen.Code, § 26); 4) insanity as "mental illness" which warrants confinement under provisions of Welfare and Institutions Code, Division 6; and, 5) insanity or incompetency pursuant to which, under Probate Code section 1460, letters of guardianship are issued. "Insanity" may and does mean a variety of different things. Depending on the pertinent statute, a variety of issues of fact can be the subject of litigation. And, depending on which statute is invoked, the parties to the litigation are different and the results obtained are to different ends.

[2] This difference in issues has been recognized and considered in a number of cases. The early case of Kellogg v. Cochran (1890), supra, 87 Cal. 192, 25 P. 677, 12 L.R.A. 104, determined that under Probate Code section 1470 (at that time section 1766 et seq. of Code of Civ.Proc.), the probate court, in revoking letters of guardianship, could restore only that which it had taken away, namely, it could determine that a guardian was no longer necessary and that the incompetent could now adequately take care of himself and his property. Said the court (at page 197 of 87 Cal., at page 678 of 25 P.):

> "* * * [I]t seems clear that the proceeding against insane and other mentally incompetent persons, authorized by the Code of Civil Procedure, is entirely distinct from the proceedings authorized by the Political Code [now Wel. & Inst. Code] for the commitment of insane persons to the state insane asylum. * * * The application of [Probate Code, § 1470] to persons committed to the asylums would be utterly inconsistent with the government of those institutions according to the requirements and regulations of the Wel. & Inst. Code].
>
> After a person has been committed to either of the insane asylums on a charge of insanity, and received into the asylum, no court in this state is authorized to discharge him therefrom, or to restore him to the capacity of a sane person, under any circumstances, except upon a writ of habeas corpus. The power to discharge him otherwise than upon habeas corpus is vested exclusively in the officers of the asylum."

In the same manner Aldrich v. Superior Court (1898), 120 Cal. 140, 52 P. 148, and Aldrich v. Barton (1908), 153 Cal. 488, 95 P. 900, recognized these two statutes as mutually exclusive. (See also Knorp v. Board of Police Commissioners (1916), 31 Cal.App. 539, 161 P. 12.) Discharge from a mental institution does not in itself warrant discharge of a guardian (In re Des Granges' Estate and Guardianship (1929), 102 Cal.App. 592, 283 P. 103; In re Guardianship of Gordon (1943), 56 Cal.App.2d 523, 527, 132 P.2d 824) and, conversely, appointment of a guardian does not in and of itself warrant confinement in an institution (Sullivan v. Dunne (1926), 198 Cal. 183, 193-194, 244 P. 343). Similarly, appointment of a guardian puts an incompetent under a disability to contract (Civ. Code, § 40; Hellman Commercial Trust & Savings Bank v. Alden (1929), 206 Cal. 592, 604-605, 275 P. 794) but, despite commitment to an institution, the patient's power to contract is left unimpaired (Fetterley v. Randall (1928), 92 Cal.App. 411, 416, 268 P. 434). With reference to release from an institution or the discharge of a guardian it is pointed out in 28 Am.Jur. 679-680, that "The courts have largely relied upon the opinions of qualified physicians and alienists in testing the advisability of discharging those confined to insane asylums, but have at the same time recognized that the determinant factors in such situations are not necessarily the same as those which decide the discharge of a committee or guardian of an incompetent. In the latter instance entirely different considerations are involved from those which arise in discharging the person of a lunatic from custody."

[3] Limiting our discussion to the two codes involved in this decision, then, it is clear that the proceedings for commitment under the Welfare and Institutions Code and the guardianship proceedings under the Probate Code are two dissimilar and separate proceedings and an order restoring to capacity one who has had a guardian does not entitle him to release from the state hospital when he is held by commitment under the first mentioned code. Proceedings pursuant to the provisions of the Probate Code (see § 1460, quoted above) are designed to protect an incompetent who is for any reason mentally incapable of taking care of himself and of his property. The incompetency determined here need not be the result of insanity, e. g. "mental illness," and no confinement is contemplated. Protection of the incompetent from others is the main purpose of the statute. (Sullivan v. Dunne (1926), supra, 198 Cal. 183, 190, 244 P. 343; In re Des Granges' Estate and Guardianship (1929), supra, 102 Cal.App. 592, 598, 283 P. 103.) The pro-

ceedings pursuant to the Welfare and Institutions Code (see § 5041, quoted above), on the other hand, contemplate determination of the question whether the person is so mentally ill or deranged as to be *dangerous* to himself or others and, in order to protect society, a proper subject for commitment to the state hospital.

[4] Petitioner contends that "the restoration to the 'legal condition' or status of a sane and competent person may be accomplished under the Welfare and Institutions Code by a 'certificate of discharge as recovered' issued by the Medical Director of a State Hospital for the Insane, *if, but only if, no guardian has been appointed for such person*" and from this premise argues that, hence, the court adjudication in the guardianship proceeding must be regarded as paramount. It is true that if the administrative officer issues a "certificate of discharge" and letters of guardianship are outstanding, the action of the administrative officer does not supersede or vacate or terminate the order of the court granting the letters; it would not necessarily and under the specified circumstances be the equivalent of a judicial determination that the ward was capable of managing his person and affairs. (In re Des Granges' Estate and Guardianship (1929), supra, 102 Cal.App. 592, 283 P. 103.) Cases which support this proposition of law, however, are not authority for the further proposition, in effect that which is expounded by petitioner, that once a guardian has been appointed then the action by the judicial body (probate court) in the guardianship proceeding supersedes any earlier adjudication under the Welfare and Institutions Code, deprives the administrative officer of all authority in the premises and becomes the exclusive manner for restoration to sanity and competency in any and all of its variants.

Since the issues before the probate court in the guardianship proceeding did not encompass the issues which were determinative in the proceeding before the superior court in Sonoma County, and since it is under the commitment of the latter court that the respondent has acted, we are satisfied that petitioner has failed to make out a case.

For the reasons stated the writ is discharged and the patient is remanded to the custody of the superintendent of the state hospital at Napa.

SHENK, CARTER, and SPENCE, JJ., concur.

EDMONDS and TRAYNOR, JJ., concur in the judgment.

34 Cal.2d 125

MAY v. BOARD OF DIRECTORS OF EL CAMINO IRR. DIST.

Sac. 6030.

Supreme Court of California, in Bank.

July 22, 1949.

1. Pleading 🔑121(2)

Defendant's denial of plaintiff's allegation of ownership of bonds and coupons on ground that defendant had "no knowledge or information sufficient to enable it to answer" was insufficient to present an issue on subject of ownership. Code Civ. Proc. § 437.

2. Water and water courses 🔑231

Board of directors of an irrigation district has mandatory duty to levy assessment to pay its bonds and interest thereon. Water Code, §§ 15, 24483, 24500, 25219, 25650.

3. Constitutional law 🔑143
Water and water courses 🔑230

The statute under which bonds are issued by irrigation district is a part of the contract between bondholders and district, and contract cannot be substantially impaired under constitution. Code Civ.Proc. § 437.

4. Water and water courses 🔑230(8)

Remedy of holders of bonds issued by irrigation district, in case of default on bonds, is a part of contract. Water Code, § 20500 et seq.

5. Mandamus 🔑115

Where irrigation district defaults on bond, remedy of mandamus to compel district to levy assessment to pay bonds and interest is available to bondholders. Water Code, §§ 15, 24483, 24500, 25219, 25650

6. Execution 🔑22

Property of irrigation district is not subject to execution to enforce payment of judgment.

7. Mandamus 🔑115

Where payment of valid bonds issued by irrigation district is to be made from assessments to be levied and collected by district, it is no defense to mandamus proceeding by bondholder to compel levy of taxes to pay bond or interest thereon, that such levy will impoverish or cause serious financial embarrassment to the district. Water Code, §§ 15, 24483, 24500, 25219, 25650.

8. Mandamus 🔑3(2), 7

Whether writ of mandate should issue lies within discretion of court but writ must be issued in all cases where there is not a plain, speedy and adequate remedy, in ordinary course of law. Code Civ.Proc. § 1086.

9. Mandamus 🔑115

Where irrigation district had failed to levy assessments to pay bonds and interest thereon and bondholder had no other effective remedy, writ of mandamus would be granted notwithstanding financial distress of district and alleged fact that bonded indebtedness was greater than value of land in district. Water Code, §§ 15, 24483, 24500, 25219, 25650; Code Civ.Proc. § 1086.

10. Evidence 🔑18

It is a matter of common knowledge that during the war years and since farmers have prospered, receiving substantial prices for their produce.

11. Courts 🔑207(4)

The Supreme Court ordinarily will not entertain an original application for writ of mandate, where proceedings could have been prosecuted in Superior Court but Supreme Court will act where circumstances justify it. Rules on Appeal, rule 56.

12. Courts 🔑207(4)

Where irrigation district had consistently refused to levy an assessment for retirement of its bonded obligations or accrued interest thereon for many years, and it was unlikely that Superior Court would issue writ in view of prior decision of District Court of Appeal affirming a denial of writ, Supreme Court would entertain original application for writ of mandate and would grant writ. Rules on Appeal, rule 56; Water Code, §§ 15, 24483, 24500, 25219, 25650; Code Civ.Proc. § 1086.

Mandamus proceeding by Mary Ruth May against the Board of Directors of El Camino Irrigation District, a public corporation, to compel the board to levy assessments to pay bonds and interest thereon issued by the district.

Writ granted.

W. Coburn Cook, Turlock, for petitioner.

L. C. Smith, Redding, for respondent.

CARTER, Justice.

This is a proceeding in mandamus to compel the Board of Directors of the El Camino Irrigation District to levy assessments to pay bonds and interest thereon issued by the district.

[1] The district is an existing irrigation district organized under the laws of this state, Water Code, Div. 11, Part 1, and embracing an area of 6548 acres. Respondent is the board of directors of the district. The district, in 1926, pursuant to law, issued valid enforceable bonds in the principal sum of $423,000, which are general obligations of the district. They bore interest at 6% payable semi-annually. Petitioner is the owner of six $1000 bonds becoming due after 1950, with interest coupons payable from 1931 to the present, which interest coupons have been presented to the district for payment, but payment has been refused and none has been offered. Respondent admits that the interest coupons have not been paid, but with respect to petitioner's allegation of ownership of the bonds and coupons, alleges that it has "no knowledge or information suffi-

cient to enable it to answer" that claim and denies it on that basis. A denial in that form is insufficient to present an issue on the subject of ownership. Code of Civil Procedure, sec. 437; Ord v. Steamer The Uncle Sam, 13 Cal. 369; San Francisco Gas Co. v. City of San Francisco, 9 Cal. 453; Turner v. Watkins, 36 Cal.App. 503, 172 P. 620; Overton v. White, 18 Cal.App.2d 567, 64 P.2d 758, 65 P.2d 99; McNeill v. Pappas, 74 Cal.App. 591, 241 P. 897; Aronson & Co. v. Pearson, 199 Cal. 295, 249 P. 191; 21 Cal. Jur. 152. The principal of the above-mentioned bonded debt matures serially from 1937 to 1954. No part of it or any of the interest coupons have been paid. No assessments to pay the bonds or interest thereon have ever been levied by the district for any period subsequent to 1933. Demand has been made upon respondent, the Board of Supervisors of Tehama County, the District Attorney of that county, and the Attorney General, to cause the assessments to be levied. They have refused to act from "year to year" since 1932. The bonded debt now outstanding against the district approximates $708,190. In the early 1930's the district acquired title to most of the land within the district by reason of nonpayment of assessments levied prior thereto. For several years after 1931 most of such land was leased by the district to tenants for about $2.00 per acre per year. Such lands were conveyed to private ownership by the district. In 1948, the district levied sufficient assessments to pay operating expenses but none for its bonded debt, reciting in its resolution that the bonded debt was more than the land was worth.

Petitioner alleges that no offer has been made by the district to settle the bonded debt, to which respondent replies that it has offered to have an appraisal made by the Reconstruction Finance Corporation and endeavor to refinance its bonded debt on the basis of such appraisal. Apparently the district has made no move to proceed under the federal bankruptcy law, 11 U.S.C.A. §§ 401–403. Respondent's defense is that the district is insolvent considering the bonded debt; that the debt is greater than the value of the land in the district; that to require a levy of an assessment will create chaos and confusion and will not benefit the bondholders; and that the formation of the district and issuance of the bonds in the first instance was unwise. For all these reasons it asserts that mandamus, being a discretionary writ, should not issue.

[2-6] Pertinent to these contentions are several fundamental principles. The duty of the board of directors of an irrigation district to levy an assessment to pay its bonds and interest thereon is clear, unequivocal and mandatory; the board has no discretion in the matter. The statutes under which the bonds were issued and the district was formed and exists provide: "Unless otherwise provided in the proceedings for the issuance of the bonds, they and the interest on them *shall* be paid from money derived from an annual assessment upon land or charges which in the discretion of the board are fixed and collected in lieu thereof and *all land shall be and remain liable to be assessed for these payments.*" Water Code, sec. 25219. [Emphasis added.] "Each district by its board each year * * * *shall* levy an annual assessment upon the land within the district in an amount sufficient to raise all of the following: (a) Interest due or that will become due on all outstanding bonds of the district and interest which the board believes will become due on district bonds authorized but not sold, all respectively before the close of the next ensuing calendar year. (b) Principal of all bonds of the district that have matured or that will mature before the close of the next ensuing calendar year." Water Code, sec. 25650. [Emphasis added.] As used in that Code, "'Shall' is mandatory * * *." Water Code, sec. 15. Bond and bond interest funds are established in which the assessment money is to be paid and from which the matured bonds and accrued interest must be paid. Water Code, secs. 24483, 24500, 24501. The cases have supported the clear mandatory duty in accordance with the statute. Provident Land Corp. v. Zumwalt, 12 Cal.2d 365, 370, 85 P.2d 116; Mulcahy v. Baldwin, 216 Cal. 517, 15 P.2d 738. The statute under which the bonds are issued is a part of the con-

tract between the bondholders and the district and cannot be substantially impaired under the Constitution. Rand v. Bossen, 27 Cal.2d 61, 162 P.2d 457; County of San Bernardino v. Way, 18 Cal.2d 647, 117 P.2d 354; Moody v. Provident Irr. Dist., 12 Cal.2d 389, 85 P.2d 128. And the bondholders' remedy in case of default on the bonds is a part of that contract. County of San Bernardino v. Way, supra. Mandamus is the only remedy of any consequence which the bondholders have. Moody v. Provident Irr. Dist., 12 Cal.2d 389, 396, 85 P.2d 128; Carpenter v. Glenn-Colusa Irr. Dist., 14 Cal.2d 338, 94 P.2d 345; Clough v. Compton-Delevan Irr. Dist., 12 Cal.2d 385, 85 P.2d 126. While it is true that they may obtain a money judgment against the district, Irvine v. Bossen, 25 Cal.2d 652, 155 P.2d 9, the property of the district is not subject to execution to enforce the payment of such judgment, Irvine v. Bossen, supra; El Camino Irr. Dist. v. El Camino Land Corp., 12 Cal.2d 378, 85 P.2d 123; Clough v. Compton-Delevan Irr. Dist., supra; Moody v. Provident Irr. Dist., supra. It is apparent that the bondholders have no effective remedy except, as expressed in Irvine v. Bossen, supra [25 Cal.2d 652, 155 P.2d 13]: "* * * by mandamus proceedings [to] compel the proper officials of the governmental agency to levy and collect the tax or assessment and to do the other things required by the statute under which the bonds were issued to obtain the funds necessary to pay the bonds."

[7] Giving consideration to the foregoing factors, it has been held repeatedly that where the payment of valid bonds issued by a municipality or similar public corporation is to be made from taxes or assessments to be levied and collected by such public corporation, it is no defense to a proceeding by a bondholder to obtain a writ of mandate to compel the levy of taxes or assessments to pay the bonds, or interest thereon, that such levy will impoverish or cause serious financial embarrassment to the public corporation. Rees v. City of Watertown, 19 Wall. 107, 86 U.S. 107, 116, 22 L.Ed. 72; City of Galena v. Amy, 5 Wall. 705, 72 U.S. 705, 710, 18 L.Ed. 560; State ex rel. Dos Anigos v. Lehman, 100 Fla. 1313, 131 So. 533; County Comissioners Columbia Co. v. King, 13 Fla. 451; Klemm v. Davenport, 100 Fla. 627, 129 So. 904, 70 A.L.R. 156; City of Victor v. Halstead, 84 Colo. 450, 271 P. 185; Rountree v. State, 102 Fla. 246, 135 So. 888; United States ex rel. Fisher v. Board of Directors of Public Schools, 5 Cir., 229 F. 1; Van Derzee v. City of Long Beach, 265 App.Div. 1059, 39 N.Y.S.2d 401; see, City of Little Rock v. United States, 8 Cir., 103 F. 418, 421; Town of Columbus v. Barringer, 4 Cir., 85 F.2d 908. Illustrative of the reasoning on which such rule is based, we quote at length from the opinion of the Supreme Court of Florida in State ex rel. Dos Anigos v. Lehman, supra, 131 So. 533, 537:

"But the city contends that by reason of its depressed and poverty stricken condition it should not be required to levy the tax as required by the alternative writ. We have searched diligently and have found no authority supporting the view that poverty may be successfully interposed as a defense to the payment of lawful obligations honestly made. This court has taken its position squarely against such a defense. In Columbia County Commissioners v. King, supra, the county commissioners of Columbia county were required to levy a tax sufficient to pay interest on its bonded indebtedness. As a defense, the county urged that more than half of the taxable area of the county had since the issue of the bonds been detached from it by the state in the creation of new counties; that two-thirds of its taxable value was in slaves which had been freed; that its farms and homes were in ruins and worthless as a result of the Civil War; and that, in consequence of such poverty and distress on the part of its people, an adequate tax to pay the interest on its bonds would be unduly burdensome and uncollectable, but this court held that Columbia county could not under such a plea be relieved of the burden that it had in law and good faith assumed.

"In Klemm v. Davenport, [100 Fla. 627], 129 So. 904, 909, filed August 5, 1930, this court examined and reaffirmed the doctrine announced in Columbia County Commissioners v. King, supra, using the following language: 'It may be that the act brought in question was passed under the afflatus of unusual conditions, and that by reason of the liberal exercise of its provisions and the blasted hopes of anticipated profits therefrom, to now enforce an ad valorem tax to pay the bonds will result in hardships and inequalities. In fact, it is asserted by the defendants in error that it will amount to confiscation, the destruction of real estate values in many communities, and the making it impossible to collect taxes thereon. This contention would have been pertinent and should have received serious consideration if it has been urged in resistance to the issuance of the bonds, but when they have been issued, validated, and sold, and the proceeds applied to pave the streets of the city and to enhance the value of the property of its citizens and have contributed to its general betterment, the bonds matured, and pay time has arrived, such a contention is ill timed and offers no bar for a court of justice to decline to administer a valid law.'

"The judgment of this court in Columbia County Commissioners v. King, and Klemm v. Davenport is supported by Judge Cooley in his work on taxation in these terms:

"'It sometimes happens that a municipality is found to have contracted indebtedness to an extent that is felt to be extremely burdensome, and then a local sentiment may spring up in favor of refusing to raise the necessary taxes for its payment. The purpose may be either to avoid the payment altogether, or to postpone it for a time, or, perhaps, to force a compromise with creditors and an abatement. Whatever may be the purpose, the refusal to levy taxes to meet municipal obligations according to terms is a public wrong.' Cooley's Taxation (2d Ed.) page 75.

"The authorities in this country where the question has been litigated or treated approve this rule. [Citing cases.]

"The reason for the rule is patent. The state has authorized the city of Sanford to issue its bonds and exercise its power of taxation to an extent necessary to pay the principal and interest thereon when they mature. When issued and negotiated they become a contract between the city and the holder. The power to tax is the very essence of the bonds. In the absence of a legal right to enforce this power, they would be worthless. Under the law of this state the property in the municipality is not bound in like manner, as the property of an individual under a mortgage for their payment, but, when issued under such acts as those brought in question, the act itself becomes a part of the contract, protected from invasion by the federal Constitution (article 1, § 10), as much so as if it had been written at length on the face of the bond. Such statutes or the rights of bondholders acquired under them cannot be repealed or abrogated by any law of the state statutory or constitutional, until the obligations incurred under them are paid and discharged according to their terms. The law cannot be disregarded because it imposes a heavy burden on one of the parties to a suit; if it can, the sanctity of contracts is nothing more than the shadow of the substance.

* * * * * *

"The power to tax is legislative, it cannot be conferred on the judiciary. The amount of a tax which can be imposed on a community without being confiscatory depends on many elements, but ultimately it is a question of fact that cannot be determined except by proof. It is not shown in this case that respondent has bonded beyond its ability to pay in fact; on the ground of poverty its defense is not near so strong as was made by the county in Columbia County Commissioners v. King, supra, while its taxing power is much superior to Columbia county, but if it was not such a defense is a matter to be directed by the city to its creditors to secure such abatement or indulgence as it can, in the way of reducing its volume of indebtedness. It is not a matter over which this court has any control. With full knowledge of its taxing ability and the terms of the controlling statutes, the city has made its contracts. These contracts are protected by both state and federal Constitutions, and this court is powerless to relax the terms of the controlling statutes. To both the citizen and his government the right to contract is the most valuable right known to the law. The Constitution guarantees its inviolability. It is the duty of every citizen to keep it so. Supporting this view in Klemm v. Davenport, supra, we said: 'A "promise to pay" is in no different situation when executed by an individual than when executed by a governmental entity. It is a serious matter, is not subject to the vicissitudes of fortune, and should be as scrupulously observed in the performance, in the one instance as in the other. In times of stress and adversity, individuals are often required to toil through years and exercise the most rigid self-denial and economy to "pay," even though the business engaged in proved a failure. A like course of conduct is no less incumbent on a governmental entity. The very foundation of our social and economic structure is confidence, and while the demands of government on the taxpayers are burdensome, it is also true that society in turn is making unusual demands on the government.' [Citing cases.]

"To uphold the city's contention would lead to most disastrous consequences. It would mean that a contract holder has nothing more than a bare abstract right which he has no power to enforce, in other words a right without a remedy, which is as if it were not. Without the remedy or means to enforce, a contract in law may be said not to exist, and its obligation falls in the class of a mere social amenity, its enforcement resting solely on the whim and caprice of the obligor. If the obligor rather than the court is to adjudicate the question of when or whether or not the obligation of his contract, in the light of the statute controlling, may be enforced, then there is no such thing as the inviolability of contracts and the stain of repudiation is on every governmental entity in this state. Our credit and integrity at home and abroad would be destroyed and no worthy enterprise could borrow a dollar. The aggravated effect of the boom, the fly quarantine, the hurricane, and other misfortunes that have befallen us would not be comparable to the situation thus created."

The propositions (1) that mandamus may be denied or granted within the discretion of the court, and (2) that here the exercise of such discretion requires a denial because of the circumstances mentioned in respondent's contentions, should not result in a refusal to issue the writ in the instant case.

[8] It has been stated generally in many decisions that whether or not a writ of mandate issues, lies within the discretion of the court. Irvine v. Gibson, 19 Cal.2d 14, 118 P.2d 812; Betty v. Superior Court, 18 Cal.2d 619, 116 P.2d 947; Ault v. Council of the City of San Rafael, 17 Cal.2d 415, 110 P.2d 379; Bartholomae Oil Corp. v. Superior Court, 18 Cal.2d 726, 117 P.2d 674; Cases cited 16 Cal.Jur. 768 et seq.; 7 Cal.Jur. Ten Year Supp., p. 795 et seq., and pocket supps. Yet it must be remembered that "The writ *must* be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law. * * *" Code of Civ.Proc. sec. 1086, [emphasis added], and where "* * * the petitioner has shown that the respondents have refused to perform a clear legal duty not involving the exercise of any discretion. Under such circumstances, the writ should issue." Betty v. Superior Court, 18 Cal. 2d 619, 622, 116 P.2d 947, 949. Or, as otherwise phrased, "* * * where one has a substantial right to protect or enforce, and this may be accomplished by such a writ, and there is no other plain, speedy, and adequate remedy in the ordinary course of law, he is entitled, as a matter of right, to the writ; or, in other words, it would be an abuse of discretion to refuse it." Gay v. Torrance, 145 Cal. 144, 148, 78 P. 540, 542. See, to the same effect, Potomac Oil Co. v. Dye, 10 Cal.App. 534, 102 P. 677; Larkin v. Superior Court, 171 Cal. 719, 726, 154 P. 841, Ann.Cas. 1917D, 670; Hutchison v. Reclamation Dist. No. 1619, 81 Cal.App. 427, 254 P. 606; Williams v. City of Stockton, 195 Cal. 743, 235 P. 986; City and County of San Francisco v. Superior Court, 94 Cal.App. 318, 271 P. 121. It has been held that the writ will issue as a matter of right on behalf of the obligee to enforce his obli-

gation against a municipality—that there is no discretion. See, United States ex rel. Metzger v. City of Vero Beach, 5 Cir., 90 F.2d 70; City of Victor v. Halstead, 84 Colo. 450, 271 P. 185; State ex rel. Bottome v. City of St. Petersburg, 126 Fla. 233, 170 So. 730. From the cases heretofore cited holding that financial distress is not a defense to the issuance of the writ, it follows that in a case such as this there could be no element of discretion involved.

[9, 10] Equitable considerations favor the granting of the writ. There is no question that petitioner has a substantial right to be protected. She holds valid, binding and solemn obligations of the district. She has no other effective remedy. The district has made no move to discharge those obligations for over fifteen years. It is unfortunate that the district is in financial difficulties, and in effect, insolvent, but that furnishes insufficient reason under the circumstances for its refusal to levy the assessment here demanded. It may be that the burden of the assessment will be heavy on the landowners within the district, yet during the war years and since, it is a matter of common knowledge that farmers have prospered, receiving substantial prices for their produce. In spite of that, the district continued to refuse to levy any assessments to pay its bonds or interest which had accrued thereon. The stalemate cannot be permitted to continue indefinitely. The district is not without relief from its predicament. For many years the door has been open, and still is, for it to proceed in bankruptcy under the federal laws, a step which many distressed districts have taken. In such a proceeding recalcitrant minority bondholders may be brought into line with an adjustment plan approved by the federal courts. 11 U.S.C.A. §§ 401–403. The equities here are on the side of the bondholders, for the landowners in the district, through their board of directors, are in a position to postpone indefinitely the levy of an assessment. They have their land and are reaping the profits from it. The bondholders, on the other hand, are completely helpless unless they accept less than the face value of their obligations, or the courts give them the only remedy available which will bring the matter to a head and require action by the district.

The case of El Camino Land Corp. v. Bd. of Supervisors, 43 Cal.App.2d 351, 110 P.2d 1076, involved the refusal of a writ of mandate asked by some of the bondholders of the district here concerned, which proceeding was directed to the board of supervisors rather than the board of directors of the district. The superior court's refusal to issue the writ was affirmed by the District Court of Appeal. That case failed to give consideration to the authorities and factors above discussed and must be disapproved. Moreover, the proceeding there was commenced in 1940, and the decision by the District Court of Appeal was rendered on March 6, 1941. Since then the values of farm products and lands have increased considerably, yet the district still has refused to levy any assessments whatsoever for the purpose of raising money to pay the matured bonds or interest coupons. Thus, regardless of the holding of the court in 1941, the subsequent events and changed conditions have eliminated the controlling factors considered in that case.

[11, 12] While this Court ordinarily will not entertain an original application for a writ of mandate where the proceeding could have been prosecuted in the superior court, it will act where the circumstances justify it. See Lindell Co. v. Board of Permit Appeals, 23 Cal.2d 303, 144 P.2d 4; 16 Cal.Jur. 863-4; Rules on Appeal, Rule 56; 165 A.L.R. 1431. Here, we have the following salient considerations: The district has consistently refused to levy any assessment for the retirement of its bonded obligation or the accrued interest thereon for many years; it is unlikely that a superior court would issue a writ in view of the holding in El Camino Land Corp. v. Bd. of Supervisors, supra; since the decision in that case, more than eight years have elapsed and still the district does nothing; the district is a public agency of the state and its credit should

not continue to be in disrepute in view of the changed economic conditions of which we take judicial notice.

Let the writ of mandate issue ordering respondent to levy an assessment pursuant to law sufficient to discharge the matured obligations held by petitioner, together with interest thereon as provided by law.

SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

34 Cal.2d 144

PHYLE v. DUFFY.

S. F. 17855.

Supreme Court of California, in Bank.
Aug. 1, 1949.

Rehearing Denied Aug. 25, 1949.

1. Constitutional law 🔑270

Where trial court entertained a petition for writ of mandamus to compel warden to institute a proceeding for determination of present sanity of a prisoner awaiting execution, which prisoner had previously been found insane by a jury in a proceeding instituted by warden, had been committed to state hospital and then returned to prison with certificate of hospital superintendent that he had regained his sanity, and issue of present sanity was raised and decided against prisoner on ample evidence, due process for a judicial hearing on such issue was accorded prisoner. Pen.Code, §§ 3701, 3704; U.S.C.A. Const.Amend. 14; Const.Cal. art. 1, § 13.

2. Constitutional law 🔑270

Where a statute has expressed legislative concern that state shall not execute a person who is insane, due process clause of Fourteenth Amendment requires a hearing upon question of sanity of a prisoner awaiting execution when question is presented for consideration in a proper manner. Pen.Code, § 1367; U.S.C.A.Const. Amend. 14.

3. Habeas corpus 🔑1

The normal method of reviewing legality of a prisoner's detention is by habeas corpus. Pen.Code, §§ 1473, 1486, 1487(5), 1493.

4. Mandamus 🔑61

Where prisoner awaiting execution had been found insane by a jury in a proceeding instituted by warden, had been committed to state hospital, and had been returned to prison with hospital superintendent's certificate that prisoner had recovered sanity, and prisoner asserted right under statute prohibiting execution of insane persons, claiming right to reliance upon proposition that insanity, once adjudicated, is presumed to continue until an adjudication of restoration by another jury, mandamus to compel warden to institute a new proceeding to have jury determine present sanity was not an appropriate remedy. Pen.Code, §§ 1367, 1486(2), 3700–3704; Const. art. 1, § 7; U.S.C.A.Const. Amend. 14.

SCHAUER and CARTER, JJ., dissenting in part.

Appeal from Superior Court, Marin County; Arthur Coats, Judge assigned.

Mandamus by Anna M. Phyle, on behalf of William Jerome Phyle, against Clinton T. Duffy, Warden of the State Prison at San Quentin, to compel respondent to institute a proceeding for determination by a jury of the sanity of William Jerome Phyle, a prisoner awaiting execution. From a judgment discharging the alternative writ and vacating the stay of prisoner's execution, petitioner appeals.

Affirmed.

Morris Lavine, Los Angeles, for appellant.

Fred N. Howser, Attorney General, and Clarence A. Linn, Deputy Attorney General, for respondent.

EDMONDS, Justice.

William Jerome Phyle was convicted of murder. He was sentenced to death, the conviction has been reviewed and affirmed upon appeal. People v. Phyle, 28 Cal.2d

671, 171 P.2d 428. In December, 1946, two days prior to the time set for his execution, the warden of San Quentin prison, as authorized by section 3701 of the Penal Code, stated to the district attorney of Marin County that there was "good reason to believe" Phyle was insane. In a proceeding to determine that question, a jury adjudged Phyle to be insane, and he was committed to the state hospital. Less than one month later, the superintendent of the hospital certified to the Governor that Phyle had recovered his sanity. He was returned to prison and the execution was set for the following May.

Shortly before that time, a petition for a writ of habeas corpus was filed with this court. The writ issued and the execution was stayed. Subsequently the writ was dismissed and Phyle was remanded to custody for the execution of the sentence of death. 30 Cal.2d 838, 186 P.2d 134. A petition for rehearing was filed, and denied. March, 1948, was then fixed for execution. Again, a new legal proceeding was commenced and Phyle's petition to the United States Supreme Court for certiorari and stay of execution was granted. 333 U.S. 841, 68 S.Ct. 656. Upon the further consideration of the matter, the writ of certiorari was dismissed. 334 U.S. 431, 68 S.Ct. 1131.

A third date, September, 1948, was then fixed for the execution of Phyle, but a few days before that time, Phyle's mother, on his behalf, filed in the superior court a petition for a writ of mandate to compel the warden to institute a proceeding for the determination of his sanity by a jury in accordance with the provisions of section 3701 of the Penal Code. An alternative writ was issued and a stay of execution granted. Upon a trial, the court found that there was no reason to believe Phyle was insane. The alternative writ was discharged, and the stay of execution was vacated.

The present appeal is from that judgment. Prior to the filing of any briefs, the attorney general moved for the following relief in the alternative: (1) To dismiss the appeal as frivolous and taken solely for delay; (2) To affirm the judgment; (3) To advance the cause on the calendar and submit the same for decision; or (4) For such other relief as may be proper. Following the argument upon the motion, the appeal was advanced for hearing on the merits.

As grounds for reversal of the judgment, Phyle asserts: (1) that since he was declared insane by the verdict of a jury, he is presumed to be insane until a jury finds to the contrary; (2) section 3704, if constitutionally construed, gives him a right to a trial by jury on that question; (3) the failure to grant a jury trial in the present proceeding was a violation of due process under the federal constitution; (4) any procedure denying a full judicial hearing, as provided by the laws of the State of California is a denial of due process under the guarantee of the federal constitution; and (5) section 3704 of the Penal Code is constitutional only if construed as requiring a trial by jury upon the issue of restoration to sanity. In substance, Phyle's position is that both under California law and the requirements of federal due process, he is entitled to a trial by jury to determine whether he has been restored to sanity.

After section 3704 of the Penal Code was construed by this court adversely to Phyle in the habeas corpus proceeding, In re Phyle, 30 Cal.2d 838, 186 P.2d 134, the Supreme Court of the United States granted a writ of certiorari "because of the serious nature of the due process contentions presented in the petition". 334 U.S. 431, 68 S.Ct. 1131, 1132. The questions presented, as stated by the court, were "that execution of an insane man is offensive to the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, Adamson v. California, 332 U.S. 46, 54, 67 S.Ct. 1672, 1677, 91 L.Ed. 1903, 171 A.L.R. 1223; Carter v. Illinois, 329 U.S. 173, 175, 179, 67 S.Ct. 216, 218, 220, 91 L.Ed. 172, and * * * that life shall not be taken by a state as the result of the unreviewable ex parte determination of a crucial fact made by a single executive officer. See Ng Fung Ho v. White, 259 U.S. 276, 142 S.Ct. 492, 66 L.Ed. 938." But the jurisdiction to determine these issues was expressly limited as follows: "It is not appropriate for us to pass on such constitutional questions in this habeas corpus case if, as the California attorney general contends, there is a state remedy by mandamus available to petitioner under which he can invoke judicial action to compel the warden to initiate judicial proceedings, and in which mandamus proceedings the court will hear and consider evidence to determine whether there is 'reason to believe' that the petitioner is insane."

After an analysis of the California statutes and decisions, the writ of certiorari was dismissed with a reference to In re Phyle, supra, which it was said, held "that neither habeas corpus nor any other remedy is available to test sanity of a condemned defendant, except the remedy under § 3701 which only the warden can institute. Hence, so far as here appears, mandamus to compel action by the warden is the only available remedy." And the court concluded: "We cannot say at this time that California's remedy by mandamus will be less than a substantial equivalent of one which authorized him to apply directly to a court for full hearing * * * [and] in this situation we find no federal constitutional question presented which is ripe for decision here." Mr. Justice Frankfurter's concurring opinion likewise viewed the situation as one of local procedure: "The Court now finds that all that the California Supreme Court did was to hold that as a matter of California procedure the petitioner's claim could not be passed on by the direct remedy of habeas corpus, but that there is available a special local remedy, labeled mandamus, *whereby the petitioner can judicially test his present sanity*." (Emphasis added.) Otherwise stated, certiorari was granted Phyle claimed he was to be executed after determination as to his sanity by a hospital superintendent with no further proceeding open to him, and the court dismissed the writ when it appeared that there is a way whereby one in his position may continue to press the right to prove present insanity and obtain a judicial determination of the question.

As indicated in the opinion of Mr. Justice Frankfurter, it is clear that the claim which must be subject to judicial review is "present sanity"; it is presently that Phyle is to be executed, and it is only his threatened execution which could compel a judicial hearing.

However, Phyle's counsel insists that the Supreme Court, by its opinion, has directed this court to review the determination by the hospital superintendent, which was the question decided in the habeas corpus appeal. The argument wholly ignores the issues here involved. In neither opinion in the Supreme Court is there any holding or implication that Phyle is entitled to a trial by jury as a matter of right for the purpose of reviewing the finding of the hospital superintendent concerning restoration to sanity. In the case of In re Phyle, 30 Cal.2d 838, 186 P.2d 134, this court determined that the law of California does not give one a right to such a review, and the United States Supreme Court, in analyzing its decision in Nobles v. Georgia, 168 U.S. 398, 18 S.Ct. 87, 42 L.Ed. 515, rejected the argument that there is a right to a trial by jury under such circumstances. It said: "A condemned defendant cannot automatically block execution by suggestions of insanity, and * * * a state tribunal, particularly a judge, must be left free to exercise a reasonable discretion in determining whether the facts warrant a full inquiry and hearing upon the sanity of a person sentenced to death."

[1] Assuming, therefore, that due process of law requires a judicial hearing upon the issue of present sanity of a person condemned to execution, this proceeding in mandate accords Phyle such hearing. By it, he has been given a judicial determination upon the only issue he could properly raise, and it is significant that the judgment is not challenged upon the ground of the insufficiency of the evidence to support it.

In addition to the points presented in the brief, at the oral argument counsel for Phyle argued that the law of California requires a trial by jury in a proceeding brought to compel the warden to initiate a hearing on the issue of a prisoner's sanity in accordance with the provisions of section 3701 of the Penal Code. Section 7 of Article I of the California Constitution provides: "The right to trial by jury shall be secured to all, and remain inviolate." That right, however, is only such as existed at common law. Pomeroy v. Collins, 198 Cal. 46, 243 P. 657; People v. Powell, 87 Cal. 348, 25 P. 481, 11 L.R.A. 75; People v. Bruneman, 4 Cal.App.2d 75, 40 P.2d 891; Estate of Escover, 108 Cal.App. 697, 292 P. 167; Gregory v. Hecke, 73 Cal.App. 268, 238 P. 787. It has always been held in this state that the right of jury trial does not extend to special proceedings Vallejo & N. R. R. Co. v. Reed Orchard Co., 169 Cal. 545, 147 P. 238, and mandate being a special proceeding, is not subject to the constitutional requirement, Hutchison v. Reclamation District No. 1619, 81 Cal.App. 427, 254 P. 606, although the Legislature has provided that, where the answer raises a question of fact as to an essential matter, "the court may, in its discretion, order the question to be tried before a jury." Code Civ.Proc. § 1090.

In the present case, Phyle did not request the court to submit any issue raised by the petition to a jury, nor, had such request been made, would it have compelled an affirmative ruling because a trial by jury of issues of fact in a mandate proceeding is wholly within the sound discretion of the trial judge. Instead of making such a request, Phyle's counsel placed themselves in the rather anomalous position of petitioning for a writ of mandate and then demanding that the writ issue as a matter of right without offering any evidence whatever.

At the outset of the trial, counsel for Phyle said: "I might state our position. I do not wish to offer any evidence at this time. I do not think it is the proper time to offer evidence." After a discussion of the opinion in the prior proceedings brought by Phyle, the trial judge asked: "Are you going to submit any evidence or is this argument? As I understand it at the present time on this petition for mandate, all you are asking is that the Warden of the State Prison certify that he believes the defendant to be insane." Following counsel's affirmative reply, the court continued: "Therefore, as * * * he has refused to certify, we can take evidence to determine whether on not there is reasonable ground for the Warden's opinion, that is as far as this writ is concerned. If you wish to present evidence, you may." This offer was declined by counsel who stated: "I don't believe any evidence is necessary your honor."

But the attorney general insisted upon the presentation of evidence. He said: "If your Honor please, because of the gravity of the matter, before I would be willing to close the book on it, I would want the Warden to take the stand and have him give the reasons that impel him to the conclusion that he has reached." Counsel for Phyle again stated his position that the issue before the court for decision was one of law: "I think what is before this Court [apparently referring to the prior judgment declaring Phyle insane which was mentioned but never offered in evidence] is res adjudicata as to the question of insanity—certainly at that time." It is clear, therefore, that counsel was acting on the assumption that by this proceeding in mandate, the question as to Phyle's insanity as of December, 1945, and January, 1946, was being opened up, and throughout the entire mandate proceedings, he refused to meet the issue of *present* sanity as the subject of inquiry.

Although there was no evidence offered by Phyle to support the petition for the writ, the court heard witnesses called by the attorney general and cross-examined by counsel for petitioner. Finally, two witnesses testified for Phyle. Therefore, notwithstanding the theory followed by petitioner's counsel, a full and fair hearing was held upon the issue of Phyle's sanity at that time.

The record has been examined and discloses that the findings of the trial court are fully supported by the evidence. Warden Duffy appeared as a witness and testified that he had visited Phyle on a number of occasions; it was his opinion that Phyle was presently sane, and there was no reason he knew of to believe that Phyle was insane. This conclusion, he stated, he reached upon the basis not only of his personal observation, but also from reports from six different psychiatrists, all of whom had examined Phyle and found him sane.

Two of these six psychiatrists were called as expert witnesses by respondent, and each testified that, in his opinion, Phyle was sane. They both reported that Phyle knew he was in San Quentin convicted of the murder of Frazee, knew he was under judgment of death, knew that his execution had been stayed by the mandate proceeding, was conversant with the facts of his original trial, and was not suffering from any hallucinations or delusions.

One of these experts was Dr. Walter Rappaport, the hospital superintendent who issued the certificate of restoration to sanity after the judgment entered upon the verdict of a jury to the contrary. Upon cross-examination, Dr. Rappaport explained that shortly after Phyle's commitment to the hospital, he "told me very frankly he had faked the whole thing and he was surprised that Dr. Schmidt [the prison psychiatrist] was fooled but not surprised that he fooled the warden. * * * He said other prisoners conducted examinations and that naturally if they are friendly and want to help you they would indicate to you what you should say and what the answer should be. He was very frank."

At this point, counsel for petitioner called Dr. David G. Schmidt, the prison psychiatrist, who testified that, although at one time he had been convinced that Phyle was insane, he was presently certain of Phyle's sanity. This testimony was unshaken in spite of severe cross-examination.

Mrs. Anna Phyle, the petitioner and mother of Phyle, then testified. The most direct testimony she gave was that, after his return from the war, her son acted queerly and she "couldn't figure him out * * * he was almost violent [and she] was really afraid of him." She then stated that "he was improved some but *when he left and committed this crime*, he was not in his right mind, he was mentally sick." (Emphasis added.) Such testimony falls far short of a compelling reason for a conclusion of *present* insanity.

[2] The record, therefore, fully supports the determination that the warden "does not have, nor is there any good reason to believe that said William Jerome Phyle has become insane or is presently insane." In such circumstances, the trial judge could not have done other than discharge the alternative writ. Whatever may have been Phyle's mental condition at other times, the legislative concern expressed in section 1367 of the Penal Code is that the state shall not execute a person who is insane. The United States Supreme Court indicated that the due process clause of the Fourteenth Amendment requires a hearing upon that question when it is properly presented for consideration. Phyle was afforded the opportunity to "judicially test his present sanity" and no legal ground has been shown for disturbing the finding adverse to him.

In order that there be no misunderstanding as to the scope of this holding see Young v. Ragen, 69 S.Ct. 1073, following Loftus v. Illinois, 334 U.S. 804, 68 S.Ct. 1212, the law of California, as it has heretofore been stated, is as follows: The case of In re Phyle, 30 Cal.2d 838, 186 P.2d 134, 137, held that "there is no authority * * * for the proposition that [a condemned] defendant has a right to habeas corpus or other judicial proceeding to determine the question of his sanity after his release from the state hospital." The United States Supreme Court granted certiorari, but later dismissed the writ upon procedural grounds intimating that due process of law requires some sort of judicial hearing upon the issue of the present sanity of a person under sentence of death. Phyle v. Duffy, 334 U.S. 431, 68 S.Ct. 1131. Because of the insistence of the attorney general that mandate is an available remedy, the court found "no federal constitutional question * * * ripe for decision". Otherwise stated, until Phyle is finally and unequivocally denied a judicial hearing in any form, a determination as to whether there is a constitutional right to such a hearing would be premature.

After that case was decided, the claim of insanity made on behalf of one Eggers, then under sentence of death, came to this court by an appeal from a denial of a writ of mandate by the trial court. The remedy of mandate was utilized to compel the warden to bring Eggers before a jury for a determination as to his sanity under the procedure specified by section 3701 of the Penal Code. The judgment denying the writ was affirmed, Williams v. Duffy, 32 Cal.2d 578, 197 P.2d 341, but without any express determination that mandate is an available remedy. Certain statements made in deciding Phyle v. Duffy, 334 U.S. 431, 68 S.Ct. 1131, seemed to indicate that there was some question as to the soundness of the conclusion of this court in the first Phyle case, In re Phyle, 30 Cal.2d 838, 186 P.2d 134. Because of this uncertain situation, this court, in deciding Williams v. Duffy, supra, assumed the necessity of the remedy and concluded, upon the merits, that the evidence was insufficient to show any good reason to believe Eggers was insane. The decision in the present case has the same basis, for the record includes no evidence tending to show any reasonable foundation for a belief that Phyle is insane.

If, therefore, it is assumed that due process of law requires a judicial inquiry concerning the issue as to sanity, necessarily the conclusion reached in the decision of In re Phyle, supra, is incorrect, and the question for determination here would concern the remedy or remedies available to a person in Phyle's position. In turn, the particular relief sought by Phyle would be the decisive factor.

[3] The normal method of reviewing the legality of a prisoner's detention is by writ of habeas corpus. Pen.Code, sec. 1473; Ex parte Bell, 19 Cal.2d 488, 122 P.2d 22; 13 Cal.Jur. 216; cf. Loftus v. Illinois, 334 U.S. 804, 68 S.Ct. 1212, and where habeas corpus is available and adequate it is the exclusive remedy and mandate will be denied. Irvine v. Gibson, 19 Cal.2d 14, 118 P.2d 812; Ross v. O'Brien, 1 Cal.App.2d 496, 36 P.2d 1108. Certainly, in the absence of a particular statutory remedy, the procedure of habeas corpus would satisfy any assumed requirement of judicial hearing upon the issue of the present sanity of a condemned prisoner.

However, section 3701 of the Penal Code provides that where there is good reason to believe a condemned prisoner is insane the warden *must* institute a proceeding directed to obtaining a *jury trial* of the issue of his sanity. Due process does not require such a trial. Phyle v. Duffy, 334 U.S. 431, 68 S.Ct. 1131; Nobles v. Georgia, 168 U.S. 398, 18 S.Ct. 87, 42 L.Ed. 515. Its basis is entirely statutory, and the determination by a jury may be obtained only when the proceeding is instituted by the warden. Mandate is the proper remedy to compel a public officer to perform an official duty, and it may be had not only upon a failure to exercise a duty but also where the officer's refusal to do so constitutes an abuse of discretion. McClatchy Newspapers v. Superior Court, 26 Cal.2d 386, 394, 159 P.2d 944.

Where a prisoner seeks to invoke the statutory remedy provided by section 3701 of the Penal Code, mandate is the only available proceeding. Thus, upon the assumption that any judicial hearing as to sanity must be afforded one under sentence of death, there are two remedies, each directed to an exclusive form of relief. To acquire a simple judicial determination of the fact of sanity, habeas corpus is the proper and exclusive remedy. But to obtain a jury trial of that issue, as provided by section 3701 of the Penal Code, mandate is the only available and adequate remedy. As stated by Mr. Justice Black: "In view of this mandatory obligation [under Penal Code sec. 3701] upon the warden to initiate proceedings if 'there is good reason to believe' a defendant sentenced to death is insane, it would be somewhat anomalous, to say the least, if California courts were wholly without power to correct an executive agent's abuse of authority in a matter of such great significance as the execution of insane persons." Phyle v. Duffy, 334 U.S. 431, 68 S.Ct. 1131, 1135-36.

Throughout the habeas corpus proceeding and the one now under review, Phyle has sought only a *jury trial*. To obtain such relief, his proper remedy, if any is available, is the proceeding for mandate here under review. But upon the application for the writ itself he is not entitled to a trial by jury; only when he has obtained the writ may he have such a trial, and having failed so show any "good reason" why the warden should initiate an inquiry, the judgment denying the remedy allowed by section 3701 of the Penal Code must be affirmed.

It is so ordered.

GIBSON, C. J., and SHENK, J., concur.

TRAYNOR, Justice.

I concur in the judgment.

Petitioner contends that under the decision of the United States Supreme Court in Phyle v. Duffy, 334 U.S. 431, 68 S.Ct. 1131, he is entitled to the judicial hearing that this court has denied him.

Neither that decision nor any provision of the United States Constitution gives petitioner the right to an initial judicial determination of his restoration to sanity or to a judicial review of an administrative determination thereof. The statutes of this state, as construed in In re Phyle, 30 Cal. 2d 838, 186 P.2d 134, preclude both a judicial hearing and judicial review. This court there held that in Penal Code sections 3700–3704 the Legislature has prescribed the exclusive method by which the sanity or the restoration to sanity of one condemned to death who subsequently becomes insane may be determined. Penal Code section 3704 provides that "when the defendant recovers his reason, the superintendent of such hospital must certify that fact to the Governor, who must thereupon issue to the warden his warrant appointing a day for the execution of the judgment * * *." The court held that the determination by the hospital superintendent prescribed by the statute was not subject to judicial review by habeas corpus or otherwise. It invoked the provision of Penal Code section 3700 that "No judge, court, or officer, other than the Governor, can suspend the execution of a judgment of death, except the warden of the State prison to whom he is delivered for execution * * * unless an appeal is taken." Petitioner's appeal had previously been determined 28 Cal.2d 671, 171 P.2d 428 and his conviction had become final. A judicial review of the hospital superintendent's determination would compel suspension of the execution of the judgment, contrary to the express terms of section 3700.

[3] Gardner v. Jones, 126 Cal. 614, 59 P. 126, and In re Buchanan, 129 Cal. 330, 61 P. 1120, 50 L.R.A. 378, are not applicable here. Those cases determined that a person held in a state hospital as insane could properly bring habeas corpus to compel the superintendent to release him as cured; habeas corpus always lies at the petition of one unlawfully restrained of his liberty. Penal Code § 1473. They are not authority for the converse proposition that a person found sane and released from a hospital may maintain an action of habeas corpus to prove himself insane and thus gain readmission to the hospital. Petitioner was released from the state hospital because he was found sane. He would have gone free had he not been detained by respondent by virtue of a final judgment of a court of competent jurisdiction. Penal Code § 1486(2). He would have gone free had he not been convicted of murder and there can be no doubt that he could not invoke habeas corpus to return to the hospital. He cannot invoke it now to escape the execution of the judgment. The intervention of the judgment has no bearing on the question of his sanity; it does not give him a right to habeas corpus to get back into the hospital that he otherwise would not have.

Petitioner contended that the California procedure as thus interpreted would deprive him of his life without due process of law, and on that ground he petitioned the United States Supreme Court for a writ of certiorari. The court granted the petition to determine whether there was any merit in this contention. 333 U.S. 841, 68 S.Ct. 656. In granting certiorari, the court did not decide, as petitioner concludes, that the Fourteenth Amendment would be violated by a conclusive administrative adjudication that his sanity had been restored. It agreed merely to consider the question, but found it unnecessary to decide it because of the Deputy Attorney-General's statement that under California procedure a judicial remedy was available to petitioner. Mr. Justice Black, speaking for the majority, stated: "It is not appropriate for us to pass on such constitutional questions in this habeas corpus case if * * * there is a state remedy by mandamus available to petitioner under which he can invoke judicial action to compel the warden to initiate judicial proceedings, and in which mandamus proceedings the court will hear and consider evidence to determine whether there is 'reason to believe' that the petitioner is insane." Phyle v. Duffy, 334 U.S. 431, 68 S.Ct. 1131, 1135.

[4] This court, however, did not limit itself in In re Phyle to holding that habeas corpus was not the proper remedy, or even to holding that there could be no judicial review of the superintendent's determination. It held unequivocally that there could be no judicial review under California procedure and that petitioner's right to a judicial hearing depended solely upon whether the warden believed that he was insane. 30 Cal.2d 838, 847, 186 P.2d 134. The reasons for holding that there can be no judicial review of the superintendent's determination likewise preclude issuance of mandamus to compel action by the warden. The decision of this court in Williams v. Duffy, 32 Cal.2d 578, 197 P. 341, does not compel a contrary conclusion. In that case the court, proceeding on the assumption that mandamus was a proper remedy, held only that the petitioner therein did not present a sufficient case for the issuance of a peremptory writ. Penal Code section 3700 precludes the suspension of the execution of the judgment by mandamus just as it precludes its suspension by habeas corpus. This statute prohibits any judicial intervention unless initiated by the warden of the state prison. In the absence of a holding by the United States Supreme Court that this statute is unconstitutional, I do not believe that this court should countenance the use of mandamus to defeat its clearly stated purpose.

It bears emphasis that section 3700 presupposes a valid judgment of death after a trial that has met all the requirements of due process of law. Then and only then is it operative; it would not be constitutional otherwise. It does not preclude attack upon the judgment itself by habeas corpus, coram nobis, or any other appropriate proceeding. In the present case there is no question of the validity of the judgment.

Petitioner contends that the procedure the Legislature has prescribed for determining his restoration to sanity would deprive him of his life without due process of law. Petitioner is to be deprived of his life, not because an administrative officer has found him sane, but because a jury has duly found him guilty of murder in the first degree. Petitioner does not claim to have been insane at the time he committed the offense or unable to assist in his own defense because of insanity at the time of trial. He relies on the accidental intervention of insanity after trial and conviction as a basis for a right under the Fourteenth Amendment to have the execution of the judgment suspended pending a formal judicial determination. He contends that this right is so extensive that the state is powerless to leave the final determination of his sanity to an administrative officer.

Taking refuge in insanity as a means of escaping execution is not a constitutional right, but a privilege that the state has conferred as an act of mercy or special dispensation. As the United States Supreme Court stated in Nobles v. Georgia, 168 U.S. 398, 407, 18 S.Ct. 87, 91, 42 L.Ed. 515: "The plea at this stage is only an appeal to the humanity of the court to postpone the punishment until a recovery takes place, or as a merciful dispensation. The rights of the prisoner as an offender on trial for an offense are not involved. He has had the benefit of a jury trial, and it is now the court only which must be satisfied on the score of humanity." Accord: People v. Knott, 122 Cal. 410, 55 P. 154; Spann v. State, 47 Ga. 549; Davidson v. Commonwealth, 174 Ky. 789, 192 S.W. 846; Laros v. Commonwealth, 84 Pa.St. 200; State ex rel. Alfani v. Superior Court, 139 Wash. 125, 245 P. 929, 49 A.L.R. 801. Recognizing that the suspension of execution on the ground of intervening insanity is a privilege granted by the state, and not a fundamental right of the defendant, at least fifteen states[1] have dispensed with a formal judicial hearing upon the issue; others have provided merely for an informal inquiry that need satisfy only the trial judge of the defendant's sanity. Georgia, whose summary procedure was upheld in Nobles v. Georgia, supra, 168 U.S. 398, 18 S.Ct. 87, 42 L.Ed. 515, has repealed the statutes there questioned, and now provides no method by which the claim of intervening insanity may be raised. Cribb v. Parker, 119 Ga. 298, 46 S.E. 110. Even in states in which the determination is made by the trial judge, the proceeding is not regarded as judicial in nature. "The appointment of the commission and the investigation made by them was not deemed or intended to be a trial in any sense of the word. It was simply, in our judgment, the proper exercise of a discretionary power." State v. Nordstrom, 21 Wash. 403, 409, 58 P. 248, 250, 53 L.R.A. 584. It has been held proper for the state to make the decision of the initial arbiter final, expressly precluding any judicial review thereof. Webber v. Commonwealth, 119 Pa. 223, 13 A. 427, 4 Am.St.Rep. 634; Darnell v. State, 24 Tex.App. 6, 5 S.W. 522; State v. Nordstrom, 21 Wash. 403, 58 P. 248, 53 L.R.A. 584; see cases collected in 49 A.L.R. 804.

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[1] Arizona, California, Idaho, Mississippi, Missouri, Montana, Nebraska, New Jersey, New York, North Dakota, Ohio, Oklahoma, Utah, Virginia, Wyoming

There has been wide recognition of the value of delegating decisions of this kind to administrative experts. The British Criminal Lunatics Act, for example, provides, 47 and 48 Vict., ch. 64, that a person "* * * ceases to be a criminal lunatic (1) if he is remitted to prison by a warrant of the Secretary of State issued upon a certificate from two medical practitioners that he is sane. * * *" 26 Halsbury's Laws of England 207. The official draft of the proposed Code of Criminal Procedure of the American Law Institute makes provision, §§ 409–412, for a procedure similar to that established by the Penal Code. Section 412 of the American Law Institute Code provides for the commitment to an institution of a person under sentence of death who has been found to be insane. It then provides that "[I]f thereafter the proper officer of such institution is of the opinion that the defendant is sane he shall report this fact to the governor, whereupon the governor shall appoint a commission consisting of two competent disinterested physicians to determine whether the defendant has been restored to sanity. * * * If, after the report of the commission, the governor decides that the defendant has been restored to sanity, he shall cause the defendant to be returned to the custody of the ——— (officer in charge of the prison to which the defendant has been committed) and shall issue a warrant to the ——— directing him to execute the sentence at a time designated in such warrant." A.L.I., Code of Criminal Procedure, § 412. Under none of these provisions has it been deemed necessary or desirable that the defendant be accorded a judicial hearing or that his "right to insanity" be safeguarded against ex parte determination by appropriate administrative officials. See also People v. Sloper, 198 Cal. 601, 246 P. 802; People v. Eldred, 103 Colo. 334, 86 P.2d 248; Bingham v. State, 82 Okl. Cr. 305, 169 P.2d 311; State v. Nordstrom, 21 Wash. 403, 58 P. 248, 53 L.R.A. 584.

The reason ordinarily advanced against executing a man who has become insane since judgment is that he might, if sane, recall something in stay of execution. See 4 Blackstone, Commentaries, Jones Ed., p. 25. Can this reason serve as a basis for a constitutional right not to be executed while insane? The possibility that a defendant, sane at the time of his trial, will recall some fact in stay of execution after a period of intervening insanity is remote. The reasoning that would establish a constitutional right to delay on this basis would also serve to postpone the execution of a sane man on the ground that a witness might conceivably be discovered thereafter whose testimony might save him. If the possibility of a subsequently refreshed memory were enough to prevent the execution of an insane man, it would also render unconstitutional any capital punishment, since it is possible to speculate endlessly about the possibilities that would rescue a condemned man from execution provided it were delayed long enough.

Those who would delay capital punishment by questioning the finality of an administrative determination of sanity may in reality be concerned with the finality of capital punishment itself. Is it not an inverted humanitarianism that deplores as barbarous the capital punishment of those who have become insane after trial and conviction, but accepts the capital punishment of sane men, a curious reasoning that would free a man from capital punishment only if he is not in full possession of his senses?

Petitioner can claim at most a privilege, not a constitutional right. The Legislature has qualified this privilege by the condition that the administrative determination of sanity is not subject to judicial review; it has done so to prevent abuses of the privilege to secure delay. It is now contended, however, that the Legislature cannot thus qualify the privilege it has granted; that when the determination of the fact is a matter of life or death, it cannot be left to the ex parte unreviewable decision of an administrative officer.

The misleading implication is that petitioner is condemned by an administrative determination of his sanity. His life was forfeit when a jury found him guilty of first degree murder. His temporary release from punishment was a reprieve, not an absolution. His plea is now but to the mercy of the state.

The Legislature can properly leave to an administrative officer the final determination as to whether a condition exists that justifies extending a privilege. United States ex rel. Johnson v. Shaughnessy, 336 U.S. 806, 69 S.Ct. 921; St. Joseph Stockyards Co. v. United States, 298 U.S. 38, 77, 56 S.Ct. 720, 80 L.Ed. 1033; Dismuke v. United States, 297 U.S. 167, 171–172, 56 S.Ct. 400, 80 L.Ed. 561; Work v. Rives, 267 U.S. 175, 182, 45 S.Ct. 252, 69 L.Ed. 561; United States v. Babcock, 250 U.S. 328, 331, 39 S.Ct. 464, 63 S.Ct. 1011; United States v. Ju Toy, 198 U.S. 253, 261–262, 25 S.Ct. 644, 49 L.Ed. 1040; Carmichael v. Delaney, 9 Cir., 170 F.2d 239, 243–244; United States ex rel. Medeiros v. Watkins, 2 Cir., 166 F.2d 897, 899; United States ex rel. Lapides v. Watkins, 2 Cir., 165 F.2d 1017. When there is merely a question of the regulation of a privilege, the validity of final administrative decisions under the due process clause does not require that notice or hearing be given. Oceanic Steam Nav. Co. v. Stranahan, 214 U.S. 320–338, 29 S.Ct. 671, 53 L.Ed. 1013; Perkins v. Lukens Steel Co., 310 U.S. 113, 60 S.Ct. 869, 84 L.Ed. 1108; Origet v. Hedden, 155 U.S. 228, 15 S.Ct. 92, 39 L.Ed. 130; Passavant v. United States, 148 U.S. 214, 13 S.Ct. 572, 37 L.Ed. 426; Decatur v. Paulding, 14 Pet. 497, 499, 10 L.Ed. 559; United States v. Ju Toy, 198 U.S. 253, 261–262, 25 S.Ct. 644, 49 L.Ed. 1040.

The present case is analogous to those involving indeterminate sentence laws that give administrative agencies exclusive power to reduce the maximum sentences imposed by law. Upon conviction the defendant forfeits his liberty for the maximum term specified by statute. Thereafter the appropriate administrative body may reduce the sentence if it sees fit. These statutes, which allow the defendant's liberty to turn on the ex parte unreviewable decision of administrative officers, have been uniformly upheld on the ground that they violate no provision of the United States Constitution. Ughbanks v. Armstrong, 208 U.S. 481, 28 S.Ct. 372, 52 L.Ed. 582; Dreyer v. Illinois, 187 U.S. 71, 84, 23 S.Ct. 28, 47 L.Ed. 79; United States ex rel. Palmer v. Ragen, 7 Cir., 159 F.2d 356, certiorari denied Palmer v. Ragen, 331 U.S. 823, 67 S.Ct. 1311, 91 L.Ed. 1839; People v. Connors, 291 Ill. 614, 126 N.E. 595, affirmed 260 U.S. 695, 43 S.Ct. 11, 67 L.Ed. 468; see also In re Byrnes, 32 Cal.2d 843, 850, 198 P.2d 685. Otherwise it would be unconstitutional to give to the governor of the state the power to commute sentences. Here again the question of life or death turns on the unreviewable decision of a single nonjudicial officer; yet it has never been suggested that his decisions are subject to judicial review. Executive clemency is recognized as an act of mercy. Granting of the privilege of not being executed to one who is insane is likewise an act of mercy. Considerations may be presented to the governor for stay of execution or commutation of sentence that constitute much stronger grounds for mercy than intervening insanity; there may be strong doubts as to defendant's very guilt, or mitigating circumstances that do not warrant judicial intervention but carry a strong appeal to executive clemency. Yet the governor's determination is final even though it may be adverse to the petitioner. It follows that unless the Constitution itself prohibits the execution of a man who has become insane since judgment, the Legislature may well leave to the warden the final determination as to whether there is reason to believe he is insane.

The procedure provided by sections 3700–3704 of the Penal Code to determine when execution shall be stayed because of defendant's intervening insanity is closely akin to that approved by the United States Supreme Court in Nobles v. Georgia, 168 U.S. 398, 18 S.Ct. 87, 42 L.Ed. 515. Under that procedure also the determination of whether there was reason to believe defendant insane was left to the ex parte determination of a single state officer, and there was no hearing on the question. The court held that due process did not require the granting of a hearing on this issue when a state judge had determined after an ex parte examination of the defendant that there was no reason to believe that defendant was insane. It has been suggested that the Georgia procedure was sustained because a judge ruled on the question of fact. As at common law, the person given the discretionary authority was the trial judge, but it is clear, however, that he acted much in the manner of an administrative official or board. "It is rather a perversion of terms to call an inquisition of this kind the act of a court and to exercise in reference to it the writ of certiorari. The whole proceeding is rather an inquiry based on public propriety and decency, than a matter of right. * * *" Spann v. State, 47 Ga. 549, 551. See also Baughn v. State, 100 Ga. 554, 28 S.E. 68, 38 L.R.A. 577, affirmed in Nobles v. Georgia, and Carr v. State, 98 Ga. 89, 27 S.E. 148, holding that under the law of Georgia the decision was not appealable. It is settled, moreover, that the doctrine of separation of powers under the United States Constitution, which requires that certain issues of law or fact be decided by the judicial branch in the federal government, has no application to the states. Claibourne County v. Brooks, 111 U.S. 400, 410, 4 S.Ct. 489, 28 L.Ed. 470; Carfer v. Caldwell, 200 U.S. 293, 297, 26 S.Ct. 264, 50 L.Ed. 488; Consolidated Rendering Co. v. Vermont, 207 U.S. 541, 552, 28 S.Ct. 178, 52 L.Ed. 327, 12 Ann.Cas. 658; Reetz v. Michigan, 188 U.S. 505, 507, 23 S.Ct. 390, 47 L.Ed. 563; Dreyer v. Illinois, 187 U.S. 71, 84, 23 S.Ct. 28, 47 L.Ed. 79. There is nothing in the United States Constitution requiring states to delegate to one branch rather than another the decision on a question of fact. If due process requires notice and hearing, those requirements must be met whether the question is to be decided by a judge or an administrative officer. Honeyman v. Hanan, 302 U.S. 375, 378, 58 S.Ct. 273, 82 L.Ed. 312; Gelfert v. National City Bank of New York, 313 U.S. 221, 235, 61 S.Ct. 898, 85 L.Ed. 1299, 133 A.L.R. 1467. If due process does not require notice and hearing, it is immaterial whether the ex parte determination is made by a judge or a nonjudicial officer of the government. Accordingly, the approval of the ex parte determination of a judge in the Nobles case by the United States Supreme Court would seem to be directed at the validity of the determination itself, not at the fact that it was made by a judge.

Petitioner had the benefit of independent determinations of his sanity by the hospital superintendent and by the warden. The Legislature is entitled to rely upon a presumption that these administrative and executive officers will act honestly and in good faith. There is no reason to believe that a judge could do more.

Petitioner contends, however, that since his insanity was initially determined by a jury in a judicial hearing, that adjudication gave him a vested right to be considered insane. He contends that either the judgment should continue in force or there should be proceedings in a court of competent jurisdiction to annul it or to supersede it with one of equal and later authority. This contention attributes to that adjudication a conclusiveness that it does not have. The judgment did not give petitioner a continuing status of insanity that can only be terminated after another judicial hearing. Kellogg v. Cochran, 87 Cal. 192, 198, 25 P. 677, 12 L.R.A. 104; United States v. Halliday, 4 Cir., 116 F.2d

812; In re Kassler, 173 Misc. 856, 19 N.Y. S.2d 266; Sutton v. Sutton, 222 N.C. 274, 22 S.E.2d 553; Bishop v. Bishop, 40 Ohio App. 493, 179 N.E. 142. The order of commitment stated only that the petitioner was then insane, and, pursuant to Penal Code section 3704, provided expressly "when said William Jerome Phyle recovers his reason, that the Superintendent of the State Hospital in which he is confined certify that fact to the Governor of the State of California for further proceedings as is required by law." The order by its terms recognizes that petitioner was to be confined in the hospital only until the superintendent certified that he had recovered his reason. When that certification is made, the order of commitment and the judgment of insanity no longer bar his recommitment to prison. When a statute such as section 3704 provides that the authorities of an institution shall discharge an inmate upon their determination that he is sane, such a discharge restores the person to a status of sanity. Kellogg v. Cochran, 87 Cal. 192, 198, 25 P. 677, 12 L.R.A. 104; Shaw v. Feehan, 207 Cal. 561, 279 P. 658; People ex rel. De Guiseppi v. Thayer, 229 App.Div. 820, 242 N.Y.S. 293; State ex rel. Connor v. Lamneck, 133 Ohio St. 257, 13 N.E.2d 127; see Smoot, Law of Insanity, § 168, p. 128 and American Law Institute, Code of Criminal Procedure, § 412. The hospital superintendent acted pursuant to the statute and the order of commitment; it cannot reasonably be held that this order precluded his making the determination it prescribed.

This court is here concerned, not with the wisdom of capital punishment or of the statutory procedure attendant upon it, but solely with the validity of that procedure. It may nevertheless be noted that there is sound reason underlying Penal Code section 3700, so long as capital punishment is authorized in this state. If a defendant condemned to death under a valid judgment is allowed recourse to the courts as a matter of right upon his claim to be insane, he may secure an interminable reprieve merely by alleging that he is insane. Even after he is adjudged sane following hearing and appeal, he can allege that he has since become insane. Since the issue is his present insanity, he can thus set in motion an endless procession from trial to appeal to trial to appeal. Such procedure "would make the punishment of a defendant 'depend solely upon his fecundity in making suggestion after suggestion of insanity, to be followed by trial upon trial.'" Phyle v. Duffy, 334 U.S. 431, 68 S.Ct. 1131, 1134. If the warden's decision is subject to judicial review, the way is open for the endless series of trials and appeals that the Legislature sought to prevent by the enactment of section 3700.

[1] Even if it is assumed that mandamus will lie to review the warden's determination, the peremptory writ was properly denied in this case. Petitioner was in fact, although erroneously, accorded a full judicial hearing on the question whether there was reason to believe that he was then insane. As the opinion of Mr. Justice Edmonds sets forth, not only was there ample evidence to support the judgment, but petitioner presented no evidence that might even serve as a basis for a contrary conclusion.

SPENCE, J., concurs.

SCHAUER, Justice (concurring in part and dissenting in part).

Now the error of this court in holding (In re Phyle (1947), 30 Cal.2d 838, 186 P. 2d 134) that habeas corpus was not available as against the ruling of an administrative agent to test the sanity of a person under sentence of death starts to multiply. Its progeny is a *new trial court procedure* (and, originating in a trial court, it carries a right of appeal) whereby the convicted one may invoke mandamus, repeatedly and apparently as often as occasion may arise, to try to compel the warden to exercise discretion to require the district attorney to file proceedings in the trial court, impanel a jury and try anew the question of the defendant's sanity. All this, notwithstanding that the warden has already once so acted, that a trial has been had, a judgment rendered and that the sole question properly to be raised, within the requirements of due process, is whether the original judgment of insanity still is operative. It is still operative if the defendant remains insane and gives him all the protection which a new trial and judgment could give him; but if defendant has recovered his sanity the judgment by its own terms has expired and defendant should be executed. As is hereinafter shown habeas corpus is traditionally, and by earlier decisions of this court, the sole and exclusive remedy to settle the single issue.

In the opinion prepared by Justice Edmonds it is said that "Where a prisoner seeks to invoke the statutory remedy provided by section 3701 of the Penal Code, mandate is the only available proceeding. Thus, upon the assumption that any judicial hearing as to sanity must be afforded one under sentence of death, there are two remedies, each directed to an exclusive form of relief. To acquire a simple judicial determination of the fact of sanity, habeas corpus is the proper and exclusive remedy. But to obtain a jury trial of that issue, as provided by section 3701 of the Penal Code, mandate is the only available and adequate remedy." And that proposition is said to apply here even though defendant has already had the trial as provided for by section 3701. Any one judgment in such a case is said to have no continuing effect because it relates only to sanity as of *its* date and to be immaterial in respect to the claim as of a later date; hence, regardless of the outcome of a first sanity trial under section 3701 et sequitur the defendant as of a later date may invoke mandamus seeking to compel another trial on the same issue and to the same end. Such a procedure bids fair to be a most useful one for those who would seek unwarranted delays in the execution of death sentences.

Because of the deplorably confused state in which several important branches of the law (habeas corpus, mandamus, coram nobis, due process, suspension of the death penalty, conflict of laws, trial for insanity of a condemned person, comparative powers of administrative agents and courts, etc.) are left by the present opinion (or lack of one in which a majority of the court agree), read in conjunction with the majority opinion of this court in In re Phyle (1947), supra, 30 Cal.2d 838, 186 P.2d 134, and the opinions of the justices of the United States Supreme Court in Phyle v. Duffy (1948), 334 U.S. 431, 68 S.Ct. 1131, one who would seek to follow the vagaries of the law through the inconsistencies of this case, with the object of rescuing as much as possible of its integrity, should both concur and dissent.

[4] I should concur in the judgment denying relief in this proceeding because: 1. mandamus is not a proper remedy; 2. the relief sought by mandamus has already been accorded the petitioner and a valid judgment determining the very issues sought to be litigated is presently outstanding;[1] 3. there is available (and at all times concerned there has been) the plain, direct and simple remedy of habeas corpus, expressly provided by statute to try the only issues which can properly now be raised (Pen.Code, §§ 1473, 1487(5), 1493.) But I should dissent from the judgment because, if the novel suggestion that habeas corpus is not the proper or the exclusive remedy to try the legality of one's imprisonment after sentence (particularly the identity of his jailer, Pen.Code, § 1487(5)) is to be followed, as the opinion of Justice Edmonds suggests, and if mandamus is to be substituted for habeas corpus or added as an additional remedy (not to directly determine the legality of the place of detention or identity of the custodian but to compel a third person administrator to exercise discretion to initiate proceedings to cause a district attorney to start proceedings in a trial court to try anew before a jury as of a new date the question of

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[1] This is true unless we are to hold that the mere passage of time alters the issues and consequently entitles a condemned person to repeated trials in a trial court on the same issues as of each new date he may select; or, if the warden or district attorney neglect to suggest or institute such trials then, by the majority opinion, the condemned person, apparently as often as he may ask, is entitled to a trial—*in the trial court*—"labeled mandamus," and, if the judgment be adverse, to an appeal from such ruling.

petitioner's sanity), then it must follow, if we accord any weight at all to the earlier verdict of the jury and outstanding judgment of the superior court, that as a matter of law there is shown "good reason to believe that a defendant, under judgment of death, has become insane" (Pen. Code, § 3701) and the duty of the warden would appear to require the reinitiation of the roundabout and cumbersome procedures above mentioned.

A brief statement of the facts is here pertinent. On February 20, 1946, William Jerome Phyle was convicted of the crime of murder of the first degree and sentenced to death. The judgment of conviction was affirmed (People v. Phyle (1946), 28 Cal.2d 671, 171 P.2d 428). In December of that year, in a proceeding duly instituted by the district attorney at the suggestion of the warden of San Quentin prison under the provisions of section 3701 of the Penal Code, a jury found that Phyle was insane. Our statute prohibits execution of the insane (Pen.Code, § 1367). The judgment of the superior court, following the verdict, determined that Phyle was then insane and adjudged that he be confined in the state hospital for the insane "until his reason be restored." Twenty-five days later (eighteen days after Phyle's admission to the hospital) the superintendent of the hospital, without trial or hearing, without judicial determination that Phyle had become sane, and without any determination upon any prescribed or ascertainable standard, certified to the Governor that Phyle had recovered his sanity and he was returned to the warden of the prison for execution. That is to say, the place of Phyle's confinement and the identity of his jailer were changed; he was transferred from the custody of the superintendent of the state hospital for the criminal insane to the custody of the warden of a state prison. If, in truth, Phyle continued to be insane the judgment of the court required that he be kept in the hospital; as long as he remained insane the judgment remained effective and his imprisonment in any institution other than the state hospital or by any custodian other than the hospital superintendent would be unlawful. Phyle contended that the transfer was unlawful, that his detention by the warden was unlawful, and that the superintendent of the hospital remained his lawful custodian. He sought relief by application for the writ of habeas corpus, alleging the facts as to the jury trial, the rendition of judgment and his commitment to the hospital. *Phyle alleged, and it was not denied by the State, that in truth "said Phyle was, and still is, insane."* Nevertheless, the majority of this court held that the ruling of the sole administrative agent (the hospital superintendent), even though arrived at by no fixed or ascertainable standard, was supreme; that his ruling, regardless of lack of standard, completely and irrevocably terminated the judgment of the court; that Phyle must be executed on the agent's ruling; and that neither this court nor any other had jurisdiction to review the administrative order. (In re Phyle (1947), supra, 30 Cal.2d 838, 186 P.2d 134.) Thereafter the United States Supreme Court issued certiorari but on the hearing accepted a statement of the attorney general of California to the effect that this court did not rule that Phyle was entitled to no judicial review of the administrative agent's order, but held only that habeas corpus was the wrong remedy and that a procedure "labeled mandamus" was the proper, and an available, remedy (whether to review the agent's order or to again try, as of a new date, the issue of Phyle's sanity, is not entirely clear) and upon that novel theory dismissed the certiorari proceeding. (Phyle v. Duffy (1948), supra, 334 U.S. 431, 68 S.Ct. 1131.)

That the attorney general was mistaken in his representation, at least insofar as the intention of this court is concerned, is known to all of us and is apparent from the language used by the majority. They declared that (In re Phyle (1947), supra, 30 Cal.2d 838, 840–841, 186 P.2d 134, 136) "The only question presented is whether a person who has been adjudged insane after conviction, sentence, and delivery to a warden of a state prison for execution, has the right to a judical determination of the question of his restoration to sanity. * * * [30 Cal.2d at pages 842–843, 186 P.2d at pages 136, 137] There is no authority * * * for the proposition that defendant has a right to habeas corpus *or other judicial proceeding* to determine the question of his sanity after his release from the state hospital. In fact, section 3700 of the Penal Code expressly prohibits[2] such a proceeding." (Italics added.) Making their position still more clear, they continued "[30 Cal.2d at page 845, 186 P.2d at page 138] Where there is a statute that declares that the superintendent of the state hospital where the prisoner is confined may declare the prisoner's sanity restored,[3] a person awaiting execution has no right to a [30 Cal.2d at page 845, 186 P.2d at page 139] judicial determination of his restoration to sanity. * * * By adopting section 3700 of the Penal Code prohibiting the courts from suspending the execution of a judgment of death, except on appeal, the Legislature has provided in effect that the courts of this state are without power [regardless of constitutional provisions], except as provided by statute, to determine the sanity of a person who has been sentenced to be executed for a capital offense and is in the custody of the warden * * * for the purpose of execution. * * * Thus, regardless of what the common law powers of a court may be, when the procedure for the determination of the question of sanity of a person who has been sentenced to death is covered by statute, a court has no inherent power to determine that question and such a person has no right to a judicial determination of the question unless the statutes so provide. * * * [30 Cal.2d at page 847, 186 P.2d at page 139] The question remains whether the statutory procedure [as interpreted by the majority] for determining the question of restoration to sanity is constitutional. Petitioner contends that defendant has a right to an adjudication of the question of his sanity, protected by the due process clauses of the Constitution of the United States and the Constitution of California. Const.U.S.Amend. 14; Const. Cal. art. 1, § 13. *There is no such right under either constitution* [italics added]. * * *

"[30 Cal.2d at page 849, 186 P.2d at page 141] The petitioner contends also that the separation of powers provision of section 1 of Article 3 of the California Constitution is violated by leaving the final determination of a prisoner's sanity to administrative officers. * * * [30 Cal.2d at page 850, 186 P.2d at page 141] Even if it is assumed that the power of the superintendent of the state hospital, to whom defendant was delivered, to determine whether defendant has recovered his reason is a judicial power, the foregoing provisions of the California Constitution authorize the delegation of this power. Under the statutes the prisoner is delivered to the custody of the superintendent as a person convicted of a felony, and thereafter, so far as the superintendent's authority over such a person is concerned the superintendent exercises not only the authority of an officer entrusted with the superintendence of an institution for convicted felons but the duties and functions prescribed in Penal Code Section 3704.

"It follows that unless the warden of the prison in which defendant is incarcerated believes that defendant is now insane, no court of this state has jurisdiction to determine the question of his sanity."

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[2] A reading of the statute (Pen.Code, § 3700) discloses that it does *not* "expressly prohibit [ ]" any such proceeding. The context of the statement suggests that it should be understood as argumentum ad auctoritatem praestandam; it argues that since the court itself may not (it assumes or declares as a premise) suspend execution in any case but on appeal, then the power and jurisdiction to review in any case but on appeal are to be understood as *impliedly* prohibited. In other words this argument, sweeping aside without comment all constitutional considerations of due process (see People v. Shorts (1948), 32 Cal.2d 502, 506, 197 P.2d 330; Mooney v. Holohan (1935), 294 U.S. 103, 110, 55 S.Ct. 340, 79 L.Ed. 791, 98 A.L.R. 406; Taylor v. Alabama (1948), 335 U.S. 252, 68 S.Ct. 1415) would completely abolish habeas corpus, coram nobis, and all other judicial remedies in death penalty cases, except appeals from the judgment of conviction.

[3] Our statute purports only to authorize the superintendent to declare the fact when it has been in some way previously ascertained and determined; certainly it does not expressly, and there is at least grave doubt that it does impliedly, authorize the superintendent to himself determine the fact; nor does it establish any standard by which the determination shall be made by court or layman. (See Penal Code, §§ 3701–3704).

That the above quoted views and holdings of this court are irreconcilably inconsistent with the indicated views of the Supreme Court of the United States is apparent from a reading of Phyle v. Duffy (1948), supra, 334 U.S. 431, 68 S.Ct. 1131; such quoted views are likewise, as pointed out in my dissent in In re Phyle (1947), supra, 30 Cal.2d 838, 854, 186 P.2d 134, et seq., squarely contrary to the earlier holdings of this court in Gardner v. Jones (1899), 126 Cal. 614, 615–616, 59 P. 126, and In re Buchanan (1900), 129 Cal. 330, 332–333, 61 P.2d 1120, 50 L.R.A. 378, with which earlier cases the views of the United States Supreme Court appear to be in full accord.

[2] The irreconcilable difference between the United States Supreme Court and our majority is pointed up forcefully by Mr. Justice Frankfurter, concurring in Phyle v. Duffy, supra. (pages 444–445 of 334 U.S. page 1137 of 68 S.Ct.): "The Court now finds that *all that the California Supreme Court did was to hold that as a matter of California procedure* [italics added] the petitioner's claim could not be passed on by the direct remedy of habeas corpus, but that there is available a special local remedy, labeled mandamus, whereby the petitioner can judicially test his present sanity. * * * Whatever may be the elegancies of procedure by which the matter is to be determined, *our decision declining to consider the grave constitutional issues which we thought we had before us, is contingent upon a determination by the Supreme Court of California that the law of that State is what our decision presupposes it to be* [italics added], namely, that California by a remedy which California chooses to call mandamus enables the present petitioner to secure a judicial determination of his present sanity. *This means, of course, not the very restricted scope of relief which is normally associated with the traditional remedy of mandamus.* [Italics added.] It presupposes that California affords petitioner the means of challenging in a substantial way the ex parte finding of the Superintendent of the State Hospital * * * and enables him to secure judicial determination of the claims he has made in his petition for habeas corpus which, so the court now holds, is not the proper way to proceed." The majority of this court now cite and rely on the above quoted proposition yet every member of this court knows that no such idea was considered or intended by this court in In re Phyle. This court did not deny habeas corpus on the ground that simply "as a matter of California procedure" mandamus was the proper—and exclusively the proper—remedy; quite differently, the majority denied habeas corpus solely and exclusively because they intended to hold that the power of the administrative agent was supreme and that petitioner, having been ruled on by the administrative agent, had no right to *any* judicial review. The majority opinion, as already noted, expressly declares (pages 840–841 of 30 Cal.2d, pages 136 of 186 P.2d), "The only question presented is whether a person who has been adjudged insane after conviction * * * has the right to a judicial determination of the question of his restoration to sanity." Since the question stated was the only question which the majority considered to be properly before them it is not surprising that all the discussion in the opinion is directed to the end of supporting their declared conclusion that a person in the position of defendant-petitioner has no right whatsoever to any judicial process.

Certain it is that this court did not intend to rule that defendant-petitioner did have a right to judicial review of the administrative agent's ruling and that, having such right, habeas corpus was an improper, and mandamus the only proper, remedy.

[3] That mandamus is not a proper vehicle here is apparent at once. Mandamus is an extraordinary remedy and "is to be resorted to only in cases where the usual and ordinary forms of remedy are insufficient to afford redress." (16 Cal.Jur. 784, § 17.) Habeas corpus is the usual and ordinary remedy for trying out the legality of the place of one's detention. Our penal code expressly provides for just such situations as that presented here: Section 1473 provides that "Every person unlawfully imprisoned or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus, to inquire in-

to the cause of such imprisonment or restraint"; sections 1486, 1487(5) and 1493 provide that when a person is detained under court commitment but "When the person having the custody of the prisoner is not the person allowed by law to detain him," the court shall exercise the writ and "order such party to be committed to the restraint or custody of such person as is by law entitled thereto." It is, and consistently has been since his adjudication of insanity, the position of defendant-petitioner that the superintendent of the state hospital, not the warden of the prison, is entitled to his custody. That position is correct so long as defendant remains legally insane and the judgment of the superior court perdures. Whether the final judgment of a court of record continues in effect is a question which a court, rather than a layman, should, in the last analysis, determine. Likewise, if rights (to life or death or to property or liberty) depend on it, a person should certainly be entitled to have a judicial determination as to whether he is *legally* insane. Unless the court determines that fact neither the prisoner nor any court can know by what standard the fact has been determined. Our code provides no standard for determining legal insanity; our courts have set one up for their own proceedings but there is none prescribed for administrative agents. Even if we assume that the hospital superintendent has the power to make a prima facie or preliminary determination of restoration to legal sanity his determination must be subject to judicial review. That much seems clear from the United States Supreme Court's language in Phyle v. Duffy and Ng Fung Ho v. White (1921), 259 U.S. 276, 42 S.Ct. 492, 66 L.Ed. 938. The obvious, the direct and the ordinary method for applying the judicial test in such cases is habeas corpus.

The difficulty we are facing stems from the majority holding in In re Phyle (1947), supra, 30 Cal.2d 838, 186 P.2d 134, joined with what appears to have been spur-of-the-moment adroitness of the attorney general in defending the majority opinion before the Supreme Court of the United States. The error of this court lay in holding that the ruling of the administrative agent (the medical superintendent of a hospital) terminating or superceding the judgment of a superior court was not subject to any judicial review in any court. The error of the attorney general, which was accepted and relied upon by the United States Supreme Court as the basis for its decision, lay in interpreting our majority decision not as denying the right to all judicial review but simply as denying habeas corpus as inappropriate, while suggesting mandamus as the appropriate, vehicle for review. But, as previously shown, our court made and intended no such holding. Every member of our court knows that the majority intended to hold that the ruling of the administrative agent was not subject to any judicial review. If our court had intended a contrary holding—that the petitioner was entitled to a judicial review of the administrative agent's holding; i. e., to a judicial determination of the legality of his place of detention and the identity of his jailer (see Pen.Code, §§ 1473, 1487(5), 1493, supra)—I think it is reasonably certain that at that time a majority if not all of the court would have held that habeas corpus was the proper remedy. I am sure that no member of the court, in making his decision, contemplated suggesting that the decision should be sustained on the theory that it admitted of judicial review for the agent's ruling and that mandamus as contradistinquished from habeas corpus was the proper vehicle for that review.

Unless this court is to perpetuate and encourage error, confusion, delays and cumbersome procedural griefs, both in this court and elsewhere, in the administration of criminal law in death penalty cases the correct and exclusive procedure in such cases as this—habeas corpus—should be pointed out and adhered to rather than abandoned or augmented by an additional trial court procedure.

In the previous application for habeas corpus, the rendition and entry of the judgment, after trial by jury, determining petitioner to be insane were alleged and it was further averred *and not denied* that petitioner was still (as of that date) insane. Unless the so-called ruling of the administrative agent that petitioner had been restored to sanity is, as was then held by the majority, entirely beyond judicial reach, then habeas corpus was and still is the proper, the plain, the direct, and the exclusive remedy. Until In re Phyle that had been the law since Kellogg v. Cochran (1890), 87 Cal. 192, 197, 25 P. 677, 12 L. R.A. 104.

It is my view that under the circumstances shown here habeas corpus is the only proper and the most desirable remedy. Petitioner has already had the remedy provided by sections 3701 and 3703 of the Penal Code. The warden did believe that petitioner was insane; he acted on that belief; the question of petitioner's sanity was duly brought to trial before a jury; the jury found petitioner to be insane; judgment so decreeing was duly entered; no motion for new trial was made and no appeal was taken; the judgment remains outstanding, fully valid and operative unless petitioner has recovered his sanity. Whether or not he has recovered his *legal* sanity is the decisive question. That is the fact question for judicial determination; upon that fact depends the legal question as to whether petitioner shall be in the custody of the superintendent of the hospital or that of the warden of the prison. Habeas corpus is the established, convenient, available and ordinary remedy to try out both the factual and legal issues.

On the other hand, if the court is to gore itself on the other horn of its dilemma, then, as heretofore indicated, I think that the original insanity proceedings in themselves (all had "after * * * [petitioner's] delivery to the warden for execution"), particularly in the light of the solemn judgment based on the jury's verdict, constitute, as a matter of law, "good reason to believe that a defendant * * * had become insane" "after his delivery to the warden for execution" and, hence, that if an administrative agent thereupon and thereafter assumes to differ with such judicial determination, one of two things should inevitably follow (at least if his ruling is challenged): Either the judgment should be respected and upheld as against the administrative agent or proceedings should be had in a court of competent jurisdiction to set aside and annul the judgment or to supersede it with one of at least equal and later authority—one which we can know is based on the same standard of legal insanity as was the one to be superseded.

The judgment that had been entered decreed that petitioner was insane, committed him to the state hospital for the criminal insane, and adjudged that he be *there* confined "until his reason be restored." The basic contention of petitioner is that his reason, by legal standards, has not in fact been restored. If in truth his reason, by such standards, has not been restored the judgment already rendered fully protects him against execution while insane; a new judgment to that effect can add nothing; the new one could be set aside as quickly as the old one; it would have no more prima facie or ultimate value than the old one. There is then no occasion for a new trial under section 3701 et sequitur. But if in truth and upon *legal standards* petitioner has recovered his reason, that fact can easily and promptly be ascertained and determined with legal finality in a habeas corpus proceeding. There is no occasion for inviting the uncertainty, circuity, appeals and other delays attendant upon the added trial court procedure here sought to be innovated.

For the reasons stated it seems obvious that at this stage of the prosecution of Phyle and under the circumstances which have been enumerated, the application for mandamus is inappropriate. It is inappropriate because the remedy it seeks has already been accorded to Phyle; he has had the jury trial for which provision is made; he has been adjudged insane and the judgment still stands, as fully efficacious—if Phyle remains legally insane—as a new judgment under new proceedings could be. And the simplest and most direct vehicle for determining whether he is still insane by the judicial standard, the only one which avoids appeal by the petitioner, and other indirection and causes of delay, is the ordinary one of habeas corpus.

The total undesirability of following the newly suggested expedient of substituting mandamus for habeas corpus or of setting it up as an independent and additional procedure (as a method for review of proceedings after trial and judgment of insanity in proceedings pursuant to Penal Code section 3701 et sequitur) is emphasized by the consideration of what must follow if rationality and consistency are to obtain: If we assume that the remedy petitioner seeks here is a proper one, technically, notwithstanding the outstanding judgment, then it would seem to follow that surely such outstanding judgment must be accorded some weight, some prima facie significance; it should be considered as establishing, as a matter of law, that "good reason" exists for believing petitioner to be insane. General legal insanity, once adjudicated, is presumed to continue until the contrary is shown. (14 Cal.Jur. 363, § 19; 28 Am.Jur. 751, § 121; Estate of Baker (1917), 176 Cal. 430, 436, 168 P. 881.) The judgment, itself, constitutes "good reason" for believing Phyle to be insane. As emphasized in the opinion of the United States Supreme Court (page 443 of 334 U.S., page 1136 of 68 S.Ct.) it is not the *belief* of the warden nor the *fact* of insanity which must control the right to a *jury trial* of sanity if the procedure under section 3701 et sequitur be available. The court said: "In considering what the issues may be in a mandamus proceeding, it must be borne in mind that the warden is under a mandatory duty to initiate judicial proceedings, not *when* a defendant is insane, but when *'there is good reason to believe'* he is insane." (Italics are those of court.) And the "judicial proceedings" so made available are by the statute expressly and mandatorily made to encompass a jury trial. "[T]he court must at once cause to be summoned and impaneled, from the regular jury list * * * a jury of 12 persons to hear such inquiry." (Pen.Code, § 3701.) The duty of the warden then would seem obvious: since "good reason" exists for the belief that petitioner is insane, the warden has no power to try out the ultimate fact; that fact must be determined by a jury. If mandamus be available the warden, under the circumstances shown here, has no discretion to do otherwise than again initiate the roundabout proceedings for another jury trial and judgment which could be, according to the majority, at once set aside by the hospital superintendent. But whether the warden initiates such special proceeding or not the petitioner, by this newly suggested procedure, is given a right *to a hearing of some kind in a trial court,* and, since it is in a trial court, he has a right to appeal in the event of an adverse decision. On the other hand, if we adhere to the traditional and statutory remedy of habeas corpus the procedure is well defined and direct. It affords ample protection and expeditious procedure to both the condemned and to the State. The protection of the State (and of the court) against groundless applications is simple; it is that which we use constantly in other applications of the writ. We require a prima facie showing of evidentiary facts and do not issue the writ on the bald allegation of a conclusion or ultimate fact. By way of example, when application for the writ is made on the ground of denial of due process in that the prosecution has introduced and relied upon perjured testimony, with knowledge of its falsity, we require more than the conclusionary averment of the asserted ultimate fact; we require a specification of the evidence in detail and of the circumstances showing knowledge of its falsity by the prosecution. A similar prima facie specification of evidentiary matters should be required in applications for the writ under the circumstances shown here.

The present case is not controlled by Williams v. Duffy (1948), 32 Cal.2d 578, 197 P.2d 341. In that case the question of the sanity of the prisoner condemned to death was raised for the first time by application for the writ of mandate. There was not there, as there has been here, a trial and an existing, at least prima facie-valid, judicial determination that the prisoner was insane. Whether mandamus is, or is not, available as a remedy in an application of first instance as in the Williams case we need not here consider.

For the reasons above stated I would affirm the judgment solely on the ground that under the circumstances shown mandamus is an inappropriate, and habeas corpus is the only appropriate, remedy; but if the majority are to retroactively, as it were, adopt the suggestion of the attorney general and the assumption of the United

States Supreme Court, and now hold that mandamus is an appropriate remedy, whether exclusive or additional, then the judgment should be reversed.

CARTER, J., concurs.

Rehearing denied; CARTER and SCHAUER, JJ., dissenting.

93 Cal.App.2d 90

CINDERS v. LEWIS.

Civ. 17088.

District Court of Appeal, Second District,
Division 1, California.
July 27, 1949.

Rehearing Denied Aug. 18, 1949.

Hearing Denied Sept. 19, 1949.

1. Bastards 🔑3

At common law, the child of a married woman was conclusively presumed to be legitimate if begot while her husband, unless impotent, was "within the four seas"; that is, within the jurisdiction of the kingdom of England.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Within the Four Seas".

2. Bastards 🔑3

The presumption that a child born of a married woman is legitimate may be removed by proper and sufficient evidence showing that husband was incompetent, entirely absent, so as to have no intercourse or communication of any kind with mother; entirely absent at the period during which the child must, in course of nature, have been begotten; or only present under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse. Civ.Code, § 193; Code Civ.Proc. § 1962 and subd. 5; § 1963.

3. Bastards 🔑65

Evidence supported finding that defendant was father of illegitimate child born to plaintiff, in wedlock, so as to justify order requiring defendant to provide support for child. Civ.Code, § 193; Code Civ. Proc. § 1962 and subd. 5; § 1963.

4. Bastards 🔑55, 57

In action to have defendant found the father of illegitimate child born to plaintiff, in wedlock, where evidence showed that plaintiff at time child was conceived was cohabiting with defendant rather than with her husband, admitting testimony by plaintiff and her husband to effect that there had been no intercourse after separation and that husband was not father of child born to plaintiff was not error. Civ.Code, §§ 193, 194; Code Civ.Proc. § 1962 and subd. 5; § 1963.

◆

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Action by Catherine Cinders against Clyde N. Lewis to have defendant declared to be father of illegitimate child born to plaintiff, in wedlock, and to order defendant to provide support for the child. From judgment for plaintiff, the defendant appeals.

Affirmed.

Courtney A. Teel, Los Angeles, for appellant.

Christy J. Nelson, Los Angeles, for respondent.

DORAN, Justice.

As set forth in the appellant's brief, "This is an appeal from the judgment of the trial court wherein and whereby the defendant, Clyde N. Lewis, was found to be the father of an illegitimate child born to plaintiff, in wedlock, and which child was ordered to be supported by said defendant, as the father thereof, until the further order of this court." The material facts, according to said brief, are briefly stated as follows: "(a) plaintiff was a married woman, the wife of one Frank Cinders; (b) while purportedly separated, which frequently occurred, plaintiff and her said husband lived in the same neighborhood of Los Angeles at all essential periods; (c) that plaintiff obtained an interlocutory decree of divorce from her said husband on April 1, 1946, * * * (d) that the conception admittedly occurred in March, 1946, at which time plaintiff and her husband remained friendly, and he frequently visited her home; (e) that the only evidence of non-intercourse is that given by husband and wife, over objections."

"Plaintiff testified that she became intimate with the defendant on October 3, 1945; * * * that she became pregnant and a daughter was born on December 11, 1946"; that the defendant promised to pay $20.00 per month on the hospital and doctor bills; that on the official birth certificate plaintiff gave the husband's name, Frank Cinders, as being the child's father; that plaintiff and defendant had intercourse from October, 1945 to February 17 or 18, 1946; that plaintiff "started a calendar" on defendant in February, 1946, which was later destroyed; that intercourse between the parties also occurred on March 7 or 8, 1946. The divorce action was filed by plaintiff on January 4, 1946. Plaintiff had three other children by Frank Cinders.

The husband testified that separation occurred in January, 1946, and that no sexual relations were had between husband and wife after the separation, and that Cinders was not the father of the child. The defendant Clyde Lewis testified that no intercourse occurred with the plaintiff in March or April, 1946, but "I might have had the first day or two of February", 1946; that in March, 1947, the husband told Lewis, "My wife and I are going back together".

The appellant contends that the trial court "erred in the admission of evidence" by the husband and wife to the effect that there was no intercourse after separation and that the husband was not the father of the child born to Mrs. Cinder. In this connection are cited In re Estate of Walker, 180 Cal. 478, 181 P. 792, and Dazey v. Dazey, 50 Cal.App.2d 15, 122 P.2d 308. These cases deal with Sections 193 and 194 of the Civil Code; Section 193 stating that "All children born in wedlock are presumed to be legitimate"; and Section 194 providing that "All children of a woman who has been married, born within ten months after the dissolution of the marriage, are presumed to be legitimate children of that marriage."

[1, 2] In the case of Dazey v. Dazey just cited, the syllabus reads as follows: "At common law the child of a married woman was conclusively presumed to be legitimate if begotten while her husband was within four seas—that is, within the jurisdiction of England—unless the husband was impotent. Under the modern rule, applicable in America as well as England, this presumption may be removed by proper and sufficient evidence showing that the husband was (1) incompetent; (2) entirely absent, so as to have no intercourse or communication of any kind with the mother; (3) entirely absent at the period during which the child must, in the course of nature, have been begotten; or (4) only present under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse."

In the respondent's brief, attention is also directed to the Dazey opinion, 50 Cal.App. 2d at page 17, 122 P.2d at page 308, thereof, where the court says: "Our codes (Civil Code, Section 193; Code of Civil Procedure, sections 1962, 1963) set forth an indisputable presumption that a child born in lawful wedlock of a wife cohabiting with her husband is legitimate. In construing these code sections our courts have held that there are certain exceptions manifestly proper to be made", thereafter mentioning, as before stated, such exceptions. Also cited by respondent, is the case of Winsette v. Winsette, 47 Cal.App.2d 308, 309, 117 P.2d 897, not unlike the present litigation. The court there said: "Defendant had the benefit of the presumptions (Civ.Code, secs. 193, 194) as well as his own testimony. But neither was conclusive upon the trial court in the face of contradictory proof."

[3, 4] Section 1962(5) upon which the appellant relies, provides that "The issue of a wife *cohabiting* with her husband, who is not impotent, is indisputably presumed to be legitimate". (Italics added.) In this connection, however, it must be noted that in the instant case, according to evidence in the record, the plaintiff wife was not "cohabiting" with the husband, but with the

defendant. The trial court's finding that Clyde N. Lewis is the father of plaintiff's child is supported by substantial evidence, and as set forth in the respondent's brief, is "well within the principles as laid down in the case of Dazey v. Dazey, 50 Cal.App. 2d p. 15 [122 P.2d 308], and Winsette v. Winsette, 47 Cal.App.2d 308 [117 P.2d 897] and Serway v. Galentine, 75 Cal.App.2d 86 [170 P.2d 32]". The Serway case holds in the language of the headnote, that "The presumption of Civ.Code, § 193, that a child is legitimate when born in wedlock, is negated by the testimony of the mother of a child, in an action to determine the parental relationship, that she had no sexual relations with her husband for more than a year prior to the birth of said child, and also that during that time she was intimate with another man who now claims to be the father of the child".

The record discloses no reversible error either in the admission of evidence or otherwise, and the judgment is supported by the evidence.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

93 Cal.App.2d 96

In re DARBY'S ESTATE.

MARK et al. v. STATE CONTROLLER.

Civ. 16550.

District Court of Appeal, Second District, Division 3, California.

July 28, 1949.

Hearing Denied Sept. 19, 1949.

1. Taxation 🔑879(1)

Where mother conveyed realty to third person who simultaneously reconveyed realty to the mother and her two daughters as joint tenants in 1929, and on March 21, 1946 mother and one of the daughters conveyed their interests to the other daughter who on March 25, 1946, reconveyed an undivided one-third interest to the mother, the other daughter, and herself as tenants in common, and mother died on September 10, 1946, conveyance was not a taxable "transfer" within meaning of inheritance tax statutes. Revenue and Taxation Code, §§ 13304, 13641, 13642, 13648, 13671.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Transfer".

2. Taxation 🔑881

The law does not forbid the minimization of inheritance tax liability by legal means.

◆

Appeal from Superior Court, Los Angeles County; Harold B. Jeffery, Judge.

Proceeding in the matter of the estate of Mellie M. Darby, deceased. From an order overruling the objections of Natalie D. Mark and Louine D. Boyer, legatees and devisees of the deceased, to the report of the Inheritance Tax Appraiser, and fixing the amount of an inheritance tax due and payable from them, Natalie D. Mark and Louine D. Boyer, opposed by the State Controller of the State of California, appeal.

Order reversed.

Conroy, Conroy & Light, Los Angeles, for appellants.

James W. Hickey, Chief Inheritance Tax Attorney, J. D. Lear, Assistant Inheritance Tax Attorney, Sacramento, Morton L. Barker, Deputy Inheritance Tax Attorney, Los Angeles, for respondent.

SHINN, Presiding Justice.

This is an appeal from an order overruling the objections of Natalie D. Mark and Louine D. Boyer, legatees and devisees of decedent Mellie M. Darby, to the report of the Inheritance Tax Appraiser, and fixing the amount of an inheritance tax due and payable from them.

The facts are not in dispute. By deed dated August 14, 1924, deceased acquired real property which is the subject of the tax here in controversy for a consideration of $28,500 furnished entirely by her. She was the mother of three children. In 1929 she conveyed the property to a third party, who simultaneously reconveyed to her and her two daughters, Natalie and Louine (appellants here), as joint tenants. The one-third interest thus transferred to each of the daughters was intended as a gift for the purpose of equalizing a gift of $10,000 previously made to their brother James.

The property was held by the mother and two daughters as joint tenants for nearly 17 years. On March 21, 1946, Natalie and her mother conveyed their interests therein to Louine; and on March 25, 1946, Louine reconveyed an undivided one-third interest to her mother, Natalie, and herself, respectively, as tenants in common. These conveyances were made upon the advice of counsel that if upon the date of death of the deceased the property stood in joint tenancy, it was likely that the entire value thereof would be included in the estate of the deceased for inheritance tax purposes. The purpose of these transfers was to destroy the joint tenancy and create a tenancy in common, in order to reduce the potential inheritance tax liability. At the time of the transfers, in March, 1946, decedent had been ill for some time but was not critically ill. She died on September 10, 1946.

After a hearing the court made findings that the transfers in March, 1946, had been made in contemplation of death with the intent and purpose of avoiding the payment of an inheritance tax which would become due from appellants by reason of their survivorship as joint tenants; and that on the date of Mellie M. Darby's death, appellants were each vested with an undivided one-third interest in said real property, which interests were derived from the decedent without a valuable or adequate consideration. Upon these findings the court confirmed and approved the report of the Inheritance Tax Appraiser assessing a tax upon the value of the one-third interest transferred to each of appellants.

The sole question for our determination is whether the evidence supports the conclusion that the conveyances of March, 1946, were taxable transfers, within the meaning of sections 13641 and 13642 of the Revenue and Taxation Code. Those sections read: "Sec. 13641. Transfers without consideration. Any transfer specified in this article made during lifetime by a resident or, if the property transferred is within this State, by a nonresident, by deed, grant, bargain, sale, assignment, or gift, without a valuable and adequate consideration, is a transfer subject to this part. * * * 'Valuable and adequate consideration' is a consideration equal in money or in money's worth to the full value of the property transferred." "Sec. 13642. Same: Transfers made in contemplation of death. A transfer conforming to Section 13641 and made in contemplation of the death of the transferor is a transfer subject to this part. 'Contemplation of death' includes that expectancy of death which actuates the mind of a person on the execution of his will. The term is not restricted to that expectancy of death which actuates the mind of a person making a gift causa mortis."

[1] Upon the face of the quoted provisions, it is evident that taxability thereunder depends upon the concurrence of three essential elements: (1) a transfer (2) without a valuable and adequate consideration (3) made in contemplation of death. It is conceded that the evidence sufficiently shows the 1946 conveyances to have been made in contemplation of death; and we may assume, without deciding, that they constituted a "transfer" within the meaning of the Inheritance Tax Law. (Rev. & Tax. Code, sec. 13304.) The record contains no evidence, however, which supports the court's finding of a want of a valuable and adequate consideration. The only evidence in point is directly to the contrary. The conveyances in 1929 from mother to daughters were unquestionably valid gifts. Thenceforth, each was the vested owner, in joint tenancy, of an undivided one-third interest in the property. Their mutual conveyances in March, 1946, were in consideration of reciprocal reconveyances to each of a one-third interest in the property as tenants in common. That such consideration was "valuable and adequate" cannot be questioned. Not only was the quantum of interest received identical with that conveyed, but the relinquishment by the daughters of their right to

succeed to the entire property on decedent's death was manifestly of greater detriment to them than the relinquishment by decedent, who was much older and in poor health, of her reciprocal right of survivorship. In fact, respondent's brief concedes that appellants "suffered a much greater detriment than did decedent in relinquishing her reciprocal right to succeed to the property upon their deaths" and that "if we were here dealing with an ordinary case, such consideration would appear to be more than adequate."

Respondent contends that in determining the taxability of the 1946 transfer, ordinary concepts of consideration may not be applied. With reference to transfers in contemplation of death, it is argued that the term, consideration, takes on added meaning due to the State's interest in the potential taxable estate of the transferor. The purpose of the consideration requirement, so it is said, is to ensure that the *taxable value* of the decedent's estate remains unimpaired by inter vivos transfers in the nature of testamentary dispositions. Since the entire property, if it had remained in joint tenancy, would have been subject to tax (Rev. & Tax. Code, sec. 13671), and the present transfer admittedly reduced decedent's taxable estate by two-thirds, the consideration received is claimed to be inadequate, and the transfer accordingly taxable, to an equivalent extent. The argument gives an artificial meaning to the requirement for consideration. The consideration consisted of the interests that passed between the parties, irrespective of the manner in which the tax liability was affected. Respondent may not engraft a supposed legislative intent upon its own interpretation of the term consideration, where to do so would vitiate the clear and unambiguous statutory requirement that the consideration received be "equal in money or money's worth to the full value of the property transferred." (Rev. & Tax. Code, sec. 13641.) As we have seen, the interest received by decedent fully satisfied this test. Respondent's reasoning, moreover, would apply equally to a case where the deceased, in contemplation of death, had conveyed her one-third joint tenancy interest to a disinterested purchaser, receiving in return the full cash value thereof. An identical reduction in the taxable estate would result notwithstanding the receipt of full consideration; yet clearly, such a transfer would not be taxable.

[2] Furthermore, respondent's argument assumes the present transfer to have been "made in lieu of or to avoid the passing of property by will or the laws of succession" (Rev. & Tax. Code, sec. 13648), and hence to be taxable within the intention of the legislature. The assumption is contrary to fact. By the transfer, as made, one method of succession was merely substituted for another. At their mother's death, appellants would no longer succeed to her interest by right of survivorship, and they could acquire that interest only by will or the laws of intestate succession. The transfer was not made to avoid the passing of decedent's interest by will or by the laws of succession, as in the case of the 1929 transfer, but to minimize inheritance tax liability by resorting to one form of succession rather than another. Under no reasonable interpretation does the purpose of the act, as declared in section 13648, extend to the taxation of such a transfer. The law does not forbid the minimization of tax liability by legal means. In re Hayes' Estate, 161 Or. 1, 86 P.2d 424, 432, 87 P.2d 766; Gregory v. Helvering, 293 U.S. 465, 469, 55 S.Ct. 266, 79 L.Ed. 596, 97 A.L.R. 1355; Pacific Southwest Realty Co. v. Commissioner, 9 Cir., 128 F.2d 815, 818.

Finally, respondent's argument is opposed to the only reported case directly in point, where with relation to transfers of real property in California, the identical contention, as applied to the Federal Estate Tax Law, 26 U.S.C.A. § 811(c), was squarely rejected. Sullivan v. Commissioner of Internal Revenue, 9 Cir., 1949, 175 F.2d 657, reversing, May 27, 1948, 10 T.C. 961. Our consideration of the instant appeal has been deferred, awaiting a decision of the Sullivan case, which, the parties agree, is "on all fours" with our own.

The order is reversed.

WOOD and VALLÉE, JJ., concur.

93 Cal.App.2d 66

PEOPLE v. MOODY.

Cr. 803.

District Court of Appeal, Fourth District, California.

July 22, 1949.

1. Automobiles ⚷355(8)

To sustain conviction under provisions of the Vehicle Code, penalizing the failure to render reasonable assistance to persons injured by defendant's automobile, defendant's knowledge that someone was injured may be shown by surrounding circumstances, and direct testimony is not essential. Vehicle Code, § 480.

2. Criminal law ⚷1159(3)

In prosecution of motorist for failure to render reasonable assistance to persons injured by his automobile, where there is a conflict in evidence occasioned by defendant's denial that defendant knew of the injury of the persons, and the circumstances sufficiently indicate that he did know that persons were injured in the accident, determination of the jury is conclusive on appeal. Vehicle Code, § 480.

3. Automobiles ⚷355(8)

Evidence sustained conviction of motorist for wilfully and feloniously failing to render reasonable assistance to persons injured by his automobile including making arrangements for carrying them to physician or hospital for medical treatment, notwithstanding there was no direct testimony that defendant had knowledge that someone was injured at the time because no one informed him of the fact. Vehicle Code, § 480.

4. Automobiles ⚷357

Instruction that wilful failure of motorist to perform any one of the duties required by the Vehicle Code after a motor vehicle accident is a criminal offense but before jurors could return the verdict of guilty, they not only must agree that motorist failed to perform a duty imposed by law but must also agree on at least one particular duty that he failed to perform was not too broad and misleading under the evidence. Vehicle Code, §§ 480, 482.

5. Criminal law ⚷351(1, 3)

Any conduct of the defendant subsequent to the commission of a crime tending to show consciousness of guilt is relevant and flight is a circumstance to be considered by jury in determining if there is a consciousness of guilt.

6. Criminal law ⚷778(11)

An instruction on flight is always proper where there is evidence indicating such conduct. Pen.Code, § 1127c.

7. Criminal law ⚷778(11)

In prosecution of motorist for failure to render reasonable assistance to persons injured by his automobile, instruction on flight substantially in the language of the penal code was proper under the evidence. Vehicle Code, § 480; Pen.Code, § 1127c.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Arnold Moody was convicted of violating the provisions of section 480 of the Vehicle Code, in that he failed to render reasonable assistance to persons injured by his automobile and he appeals.

Affirmed.

J. M. Lopes, John A. Chase, Visalia, for appellant.

Fred N. Howser, Atty. Gen., Dan Kaufmann, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendant was charged in an amended information with violating the provisions of section 480 of the Vehicle Code, which was set forth in three separate counts. Count one charged that he was the driver of an automobile involved in an accident with another vehicle which resulted in the injury of two persons, Rebecca Blacksher and Rose Mary Turner, and that he did wilfully and feloniously fail and omit to immediately stop the vehicle driven by him. Count two charges that in so driving said vehicle, he did wilfully and feloniously fail and omit to give his name, address and registration number of his vehicle and the name of the owner of the vehicle, and to exhibit his operator's license to the driver or the occupants of the other automobile.

The third count charges that in so driving said vehicle he injured the above-named parties and that he did wilfully and feloniously fail and omit to render them reasonable assistance, including the carrying or making arrangements for the carrying of such persons to a physician or hospital for medical treatment. Defendant entered a plea of not guilty to each count. After trial by jury the verdict rendered was not guilty of counts one and two, but guilty of count three. Defendant, on appeal, complains first that the evidence does not support a conviction on count three.

According to Mr. Blacksher, in the afternoon of September 7, 1948, he was driving south of Tulare on Highway 99 (two-lane) at about 45–50 miles per hour. His car had five passengers in addition to Rebecca Blacksher and Rose Mary Turner. The car driven by defendant was proceeding in the same direction but faster, and was attempting to overtake and pass the Blacksher car when a truck appeared ahead of him which was proceeding northerly. To avoid colliding with it defendant turned back into the west lane and ran into the side of Blacksher's car and crowded it off of the highway. It ended up about 80 yards from the point of collision. Although other evidence does not so indicate, the prosecuting witness testified that his car was "upset". Defendant's car remained on the westerly edge of the highway. Both cars were so damaged that neither could be driven away. After the collision Blacksher went back to defendant's car. Blacksher knew him. Defendant accused him of "sitting still" in the road. Blacksher denied the accusation. Defendant failed to go over to the Blacksher car, did not talk to any of the other passengers, and did not inquire if anyone was hurt. He cursed Blacksher, and he and two women who were with him, left the scene in a car belonging to an acquaintance of defendant who happened to pass by at that particular time.

While defendant was standing near his car, the passengers of the Blacksher car got out. Rebecca Blacksher was pregnant at the time and had her hand on her back. She was sitting on the running board of the Blacksher car. She was in pain, acted very nervous, and told every member of her family that she was hurt. Blacksher testified that he could tell that she was hurt or injured. Rose Mary Turner's arm was injured. After defendant left the scene the two injured persons were taken to a doctor and it was discovered that Rebecca had three bones dislocated in her neck and two in her back, and it was five or six weeks before she was "able to do anything".

Defendant and his companions proceeded to Tipton. Defendant gave a tow-car attendant the keys to his damaged car and told him to pick it up and bring it in and "don't talk to anybody". In the meantime, the highway patrol had been notified of the accident. They conducted a search for defendant. Defendant, his brother, and a Mrs. Aaron, owner of the car, were at a bar in Tipton. They observed the traffic officer passing by but made no effort to contact him. Mrs. Aaron signed a statement that just as the officers came in the front door of a bar defendant Moody went out the side door and she knew that defendant saw them. Defendant admittedly had been drinking prior to the accident. He later called a constable and they proceeded back to the scene of the accident and en route met a highway patrol officer who took charge of the defendant.

Defendant's witnesses contradicted the People's testimony in reference to the speed of the Blacksher car and indicated that it was traveling at about 10 miles per hour just before the accident and that defendant did make inquiry of the occupants of the Blacksher car as to their injuries, if any, and was informed that no one was injured; that defendant told Blacksher his name and that he lived in Tipton; that he did not exhibit his driver's license because he "didn't have any".

A Mrs. Price, one of the occupants of defendant's car, testified that she did not see defendant go and ask the occupants of the Blacksher car if any of them were injured. In rebuttal Blacksher insisted that Moody spoke to no other member of his party than himself at the scene of the accident; that Moody never told him his name although he asked him for it; that he never showed his driver's license nor gave him the registration number of the car he was driving, and never made any inquiry of him or anyone else in his presence as to whether anyone was injured, and that no other passenger in his car went back to talk to the defendant.

[1-3] The uncontradicted testimony shows that the vehicle driven by defendant was involved in an accident with another vehicle; that two of the occupants of the other car were in fact injured as a result thereof and that defendant did not render any assistance to them. The claim is that there is no showing that defendant had knowledge that someone was injured at the time and that no one informed him of that fact. The trial judge read count three to the jury as charged, and the jury was properly instructed that "The driver of any vehicle knowingly involved in an accident resulting in injury * * * to any person shall * * * etc." Secs. 480 and 482 of the Vehicle Code were then read to the jury which, when read together, require the driver of any vehicle involved in an accident resulting in injury to any person to render "reasonable assistance, including the carrying or the making arrangements for the carrying of such person to a physician, * * * or hospital for medical * * * treatment if it is apparent that such treatment is necessary". Other instructions as to the necessity of knowledge on the part of defendant of such resulting injuries were given, and the jury, apparently, decided the issue of knowledge against defendant's claim. While there is no direct testimony on the part of the defendant that would show he knew someone was injured as a result of the accident, it could not be expected that direct testimony could be obtained in such a case as this. Two persons were in fact injured. One sat in a position which indicated some pain and suffering which was apparent to Mr. Blacksher and should have been apparent to the defendant, after such a serious collision. Defendant's conduct in leaving the scene and endeavoring to escape apprehension from the highway patrol officer and his statement to the tow-car attendant about remaining silent, tended to indicate some consciousness of guilt. From the nature of the case it was only necessary to prove knowledge, as here indicated, by showing the surrounding facts and circumstances. People v. Henry, 23 Cal.App.2d 155, 159, 72 P.2d 915; People v. Dallas, 42 Cal.App.2d 596, 109 P.2d 409. Where, as here, there is a conflict in the evidence occasioned by the defendant's denial that he knew of the injury, and the circumstances sufficiently indicate that he did know that persons were injured in the accident, the determination of the jury is conclusive on appeal. People v. Libhart, 79 Cal.App. 291, 293, 249 P. 211; People v. Kaufman, 49 Cal.App. 570, 573, 193 P. 953; People v. Roche, 49 Cal.App. 2d 459, 121 P.2d 865.

[4] Defendant next maintains error in the giving of instruction No. IX, which informed the jury that the wilful failure of the driver to perform any one of the duties required by secs. 480 and 482 of the Vehicle Code is a criminal offense but before the jurors may return a verdict of guilty, they not only must agree that defendant failed to perform a duty imposed by law but they must also agree on at least one particular duty that he failed to perform. The error claimed is that the instruction is too broad and misleading, citing People v. Scofield, 203 Cal. 703, 711, 265 P. 914. The particulars as to why the instruction is claimed to be too broad and misleading are not set forth. Suffice to say it is adopted from CALJIC No. 974, 203 Cal. page 711, 265 P. 914, and we perceive nothing in the instruction opposed to the holding in the Scofield case. The facts in that case were entirely different and the instruction criticized likewise is not comparable.

[5] It is next urged that the trial court should not have instructed the jury on "flight of a person immediately after the commission of a crime", which was given substantially in the language of sec. 1127c of the Penal Code, since the evidence does not support such an instruction. Any conduct of a defendant subsequent to the commission of a crime tending to show "consciousness of guilt" is relevant and admissible, and flight is a circumstance to be considered by the jury in determining if there is a consciousness of guilt. People v. Gryszkiewicz, 88 Cal.App.2d 230, 198 P. 2d 585.

[6, 7] An instruction on flight is always proper where there is evidence in the case indicating such conduct. People v. Gregoris, 70 Cal.App.2d 716, 161 P.2d 568.

The abrupt departure of the defendant from the scene of the accident, the existence of the facts from which the jury could have inferred that the defendant was seeking to keep away from the state highway patrol, and the manner in which he finally gave himself up, together with his statement to the tow-car operator to bring in the car but not to talk to anybody, were all such facts as would justify the trial court in giving the jury an instruction on flight. No error appears in this respect.

We have examined the questioned instructions, together with all other instructions given. As a whole, the jury was fairly advised as to the elements of the offense necessary to be proved before they could convict the defendant on count No. 3. It was likewise fully instructed concerning the burden of proof, presumption of innocence, and the doctrine of reasonable doubt. No prejudicial error appears. People v. Henry, 23 Cal.App.2d 155, 72 P.2d 915.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

93 Cal.App.2d 190

WEBER et ux. v. SCHULTZ et al.

Civ. 16782.

District Court of Appeal, Second District, Division 3, California.

July 29, 1949.

Landlord and tenant 🔑180(3)

In tenants' action landlord and broker for damages for alleged wrongful eviction, evidence justified denial of recovery on ground that tenants voluntarily surrendered premises to landlord and broker.

◆

Appeal from Superior Court, Los Angeles County; Philip H. Richards, Judge.

Action for damages for alleged wrongful eviction by Theodore R. Weber and Mary Weber, husband and wife, against Ruby F. Schultz, also known as Ruby F. Moore, and W. Finley. From the judgment and from an order denying motion for new trial, the plaintiffs appeal.

Judgment affirmed and appeal from order dismissed.

Edward S. Cooper, Los Angeles, for appellants.

W. L. Pollard, Los Angeles, and John E. Prater, Los Angeles, for respondents.

WOOD, Justice.

In this action for damages for alleged wrongful eviction, judgment was for defendants. Plaintiffs appeal from the judgment and from the order denying their motion for a new trial.

In 1942 plaintiffs rented an unfurnished dwelling house from defendant Finley, who is a real estate broker and the son of defendant Mrs. Schultz, the owner of the property. The court found that on December 3, 1946, plaintiffs voluntarily abandoned and surrendered said premises to defendants; that about November 15, 1946, defendants advertised the property for sale; that plaintiff Mrs. Weber stated to defendant Finley that if he would endeavor to sell her furniture for the sum of $1,000 she would surrender and abandon the premises on or about November 28, 1946; that the said Finley agreed to sell the furniture and "that thereafter on or about the 2nd day of December, 1946 the said Mary Weber agreed to abandon and deliver up to the defendant Finley the possession of said premises on the 3rd day of December, 1946, leaving in said premises all the furniture to be sold, and taking from said premises all her personal belongings and likewise taking the refrigerator which she was not selling."

Appellants contend that the evidence does not support the finding that there was an abandonment of the premises by agreement. There was evidence as follows: The property was listed for sale with Mr. Finley in the early part of November, 1946, and he put a "for sale" sign on the premises. On November 15, 1946, Mrs. Weber called him by telephone and asked if he would sell her furniture if she gave immediate possession of the house. Mr. Finley replied that he would sell her furniture because that would help him sell the house. Mrs. Weber replied that she wanted about $1,000 for the furniture. On November 28, 1946, Mrs. Weber rented a room in a hotel. She told the owner of the hotel that she would be a permanent guest; that her landlord was selling the house where she was "staying," and she had agreed to give possession of the house provided he would sell her furniture for her; that she would have her refrigerator moved into the hotel; and that she had a telephone at the house which she would like to have moved into her room at the hotel. On that same day (November 28th) she called Mr. Finley by telephone and told him that she had found a place to which she could move, and that she thought she would give him possession of the house "over the week-end." On December 2, 1946, Mrs. Weber called Mr. Finley by telephone and said she had been unable to move during the week-end but that he could have possession of the house on the following day. On December 3, 1946, she called Mr. Finley by telephone and told him that she was leaving the house key in the light well by the front door. Plaintiffs moved into the hotel about December 3rd, taking with them clothes, sheets, blankets, pillows, draperies, dishes, knives and forks. A few days later the refrigerator was moved into a room or "community kitchen," which adjoined plaintiffs' room in the hotel, and the telephone was moved and installed in the house of Mrs. Weber's sister. Plaintiffs left a few cups, saucers and pans in the house, but they left no clothing. Mr. Finley inspected the house on December 3, 1946, and found that the plaster was chipped, that there were holes in the bathroom wall and an oily substance on another wall. On December 8, 1946, he showed the house to prospective buyers in an attempt to sell it "as is." That night he made arrangements with a painter to paint the interior of the house. On December 10th Mrs. Weber came to the house and told the painter "to cover up her furniture"—that Mr. Finley was going to sell it with the house, and she did not want the furniture damaged. (Mrs. Weber testified at the trial that Mr. Finley was going to redecorate the interior of the house and that the agreement [relative to moving] was that she was to be out of the house while the painting was being done.) On December 11th Mr. Weber took Mrs. Weber in an automobile to Mr. Finley's home, and Mr. Weber remained outside while Mrs. Weber went into the house. She offered a check to Mr. Finley for rental of the house (where she had lived), saying that since her furniture was in the house "she felt that she should pay something." Mr. Finley refused to accept the check. In a telephone conversation the next day (December 12th), Mrs. Weber told Mr. Finley that she was going to advertise her own furniture for sale and she would be at the house all the time so she could sell it. Mr. Finley replied that he was selling the house any way and it would be no trouble for him to try to sell her furniture. Mrs. Weber then told him that she intended to move back into the house that night, and he could do what he wanted about it. Mr. Finley thereupon had the lock on the front door changed.

The evidence was sufficient to support the findings that Mrs. Weber had agreed to abandon the premises, and that plaintiffs voluntarily abandoned and surrendered the premises to the defendants. Appellants assert that there is nothing in the record to show an abandonment on the part of Mr. Weber. He moved from the house into the hotel. Although Mrs. Weber rented the hotel room and made all the arrangements with the owner of the hotel relative to living there, it does not appear that he objected in any manner to the arrangements which she had made. He accompanied her to the home of Mr. Finley but he remained outside when she went in and offered to pay rent. It could be inferred from the evidence that, in the matters pertaining to moving from the house, Mrs. Weber acted with the knowledge and consent of Mr. Weber.

The judgment is affirmed, and the appeal from the order denying the motion for a new trial is dismissed.

SHINN, P. J., and VALLÉE, J., concur.

ROUCHLEAU v. SILVA.

Civ. 3920.

District Court of Appeal, Fourth District, California.

July 29, 1949.

Rehearing Denied Aug. 25, 1949.

Hearing Granted Sept. 26, 1949. *

1. Seamen 🔑29(5.12)

In action under the Jones Act for death of seaman, burden is on plaintiff to prove that defendant was negligent, and that such negligence was a proximate cause of the injury. Jones Act, 46 U.S.C.A. § 688; Federal Employers' Liability Act, § 1, 45 U.S.C.A. § 51.

2. Seamen 🔑29(5.14)

Liability of an employer under the Jones Act for the death of a seaman cannot be predicated on mere speculation. Jones Act, 46 U.S.C.A. § 688; Federal Employers' Liability Act, § 1, 45 U.S.C.A. § 51.

3. Seamen 🔑29(2)

"Negligence" as used in the Jones Act, is the violation by the owner of a boat of his duty to furnish his employees with a safe place to work and safe tools and appliances to work with. Jones Act, 46 U.S.C.A. § 688; Federal Employers' Liability Act, § 1, 45 U.S.C.A. § 51.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Negligence".

4. Seamen 🔑29(2)

The owner of a vessel has no duty under the Jones Act to anticipate the misuse of equipment by seamen, or to guard against consequences of misuse. Jones Act, 46 U.S.C.A. § 688; Federal Employers' Liability Act, § 1, 45 U.S.C.A. § 51.

5. Seamen 🔑29(5.12)

Where an otherwise sufficient piece of equipment has been rendered insufficient and dangerous to a seaman, plaintiff in action under the Jones Act for death of seaman must prove actual or constructive notice of such condition to the owner of the vessel before recovery can be had. Jones Act, 46 U.S.C.A. § 688; Federal Employers' Liability Act, § 1, 45 U.S.C.A. § 51.

6. Seamen 🔑29(2)

An employer is under a duty under the Jones Act to use reasonable care to furnish a reasonable safe appliance in event seaman, is required to use such appliance for purposes of his employment, and not otherwise. Jones Act, 46 U.S.C.A. § 688; Federal Employers' Liability Act, § 1, 45 U.S.C.A. § 51.

7. Seamen 🔑29(2)

Under the Jones Act, the owner of a vessel is not held absolutely responsible to furnish seamen with a safe place in which to work, but is bound only to exercise reasonable care to see that the place is reasonably safe. Jones Act, 46 U.S.C.A. § 688; Federal Employers' Liability Act, § 1, 45 U.S.C.A. § 51.

8. Seamen 🔑29(4)

Where owner and captain of fishing boat was injured, and member of crew was appointed captain in his place, and substitute captain was fatally injured while using a cat walk, which was not in its usual place, for an unintended purpose and in an unauthorized, unnecessary, careless, and improper manner, owner was not liable under the Jones Act for the death of the substitute captain. Jones Act, 46 U.S.C.A. § 688; Federal Employers' Liability Act, § 1, 45 U.S.C.A. § 51.

9. Seamen 🔑29(4)

The rule under the Jones Act imposing liability on employers for not providing safe places for seamen to work, can only have a modified application, if, indeed, any at all, where a seaman who is injured is himself required to make his place safe or is engaged in putting it in proper repair or is the agent through whom the employer undertakes to see that the place is kept in good repair. Jones Act, 46 U.S.C.A. § 688; Federal Employers' Liability Act, § 1, 45 U.S.C.A. § 51.

◆

Appeal from Superior Court, San Diego County; Robert B. Burch, Judge.

Action under the Jones Act by Edith G. Roughleau, as administratrix of the estate of James Louis Rouchleau, also known as

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* Subsequent opinion 217 P.2d 929.

Jim L. Rouchleau, deceased, against Guy H. Silva to recover for fatal injuries sustained by the deceased when he was injured on defendant's fishing vessel. From a judgment for plaintiff, the defendant appeals.

Judgment reversed.

Lasher B. Gallagher, Los Angeles, for appellant.

Harold P. Lasher, Don L. Yale, San Diego, for respondent.

MUSSELL, Justice.

This is an appeal from a judgment in favor of plaintiff in an action for damages. Plaintiff is the surviving widow and administratrix of the estate of James Louis Rouchleau, also known as Jim L. Rouchleau, and as such administratrix commenced this action against Guy H. Silva, owner of a fishing vessel known as the Emma R. S., for damages for fatal injuries sustained by Jim L. Rouchleau when he fell from a plank on the vessel and into an empty "fish hold."

The cause was filed pursuant to what is commonly known as the Jones Act, 46 U.S.C.A. § 688, which provides that in the case of death of any seaman as the result of personal injuries suffered in the course of his employment, the personal representative of such seaman may maintain an action for damages * * * and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. The statutes referred to are the sections of the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq. Section 51 provides in substance, paraphrased to fit a maritime case, that the employer of a seaman shall be liable in damages to the personal representative of such seaman, for the benefit of the surviving widow and children of such seaman, in the event that his death results in whole or in part from the negligence of any of the employer's agents or employees or by reason of any defect or insufficiency, due to the employer's neglect, in his appliances, boats or other equipment.

The "Emma R. S." was a tuna boat. It left San Diego on or about October 4, 1945, on a commercial fishing trip off the coast of Mexico. The decedent, James L. Rouchleau, was employed as a seaman. The crew members were to be paid on a share basis. The defendant was master of the vessel and while on the trip he sustained a severe injury to one of his fingers and it was necessary that he be taken by plane to San Diego for medical treatment. About four hours after the injury and while waiting for the plane to arrive, defendant and all the members of the crew signed a "paper" authorizing the decedent to take command of the vessel. It was agreed by decedent and the crew that the arrangement was satisfactory and it was understood that decedent was to be the acting captain in the absence of defendant Silva and until such time as he was physically able to go back on the boat.

On November 13, 1945, the Emma R. S. was returned to San Diego partially loaded with fish. The vessel was tied up at the Custom House for about an hour and then was docked by decedent at the Van Camp Dock and the fish were unloaded the following day. The arrangements for the unloading were made by decedent and the operations were in his charge and performed under his directions. Defendant came aboard the boat late in the afternoon of November 14, 1945, just after the fish had been unloaded, and observed decedent on top of the bait tank "performing the necessary work involved after the unloading had been completed." At that time one of the members of the crew wished to talk with defendant personally and the two men went into the pilot house where they engaged in conversation when they were informed that decedent had been injured.

At the time of the accident Jim Rouchleau and a man named Anderson were on top of the bait tank washing up the debris, "all the slime and stuff" off the top of the bait tank. Rouchleau had rubber hip boots on and stepped up onto a plank extending from the bait box to the raised deck forward when he fell, sustaining injuries which resulted in his death two days later.

Plaintiff's contention is that the decedant's injuries were proximately caused by the negligence of the defendant in providing and maintaining the plank from or over which decedent fell.

The evidence is that the plank in question was about four feet long, twelve inches wide and three inches thick. It had cleats on the bottom side to hold it between the bait tank and the raised deck, which deck was about twelve inches higher than the bait box. This plank was movable and it was necessary that it be removed to unload the fish, after which the plank was intended to be put back in its original place adjoining a skiff which was kept on the raised deck, and close to and adjoining a net box also on the raised deck, all as shown in defendant's exhibit "B".

When the skiff was in place it extended part way across the opening between the bait box and the raised deck and could be used as a railing while crossing on the plank here involved. The plank was used as a "cat walk" when the equipment was all in place, including the skiff, and was not placed on the boat for the purpose of being used during the unloading operations. Its principal use was to enable the captain to get to the bait tank quickly when fish were being caught. A six foot ladder was maintained and kept on the "after end" of the bait tank with four or five steps by which members of the crew could get down to the main deck from the top of the tank. In order to get to the top of the tank from the raised deck, without using the plank, it was necessary to go down a companionway or stairway onto the main deck and up the six foot ladder.

At the time the defendant came on board the boat at the dock, he immediately went to the end of the raised deck, looked down into the well and saw that it was empty and completely unloaded. He did not remember seeing the "plank" at all, it was not "in place" and defendant did not know where it was.

Plaintiff's witness, Bryson, was standing on the raised deck at the time of the accident and saw the "plank" in the position shown in plaintiff's exhibit #5. In this connection, an examination of the two photographs, plaintiff's exhibit #5 and defendant's exhibit "B" shows that at the time of the accident the plank was not in its usual or intended place but had been placed approximately two feet away from the net box which it adjoined when in place. Mr. Bryson testified that he saw the decedent and another man "washing down with a hose and scrubbing the top of the bait boxes;" that he saw Rouchleau leave the bait tank and that "he stepped up on this plank with his right foot, a very short stride, and was just raising the left to go up on it when all of a sudden went overboard, down the well. It happened so quickly that it was almost impossible to see all of the details;" that the plank was smooth and wet as they had been washing it down. It was not covered, had no cleats on it except underneath and there was no railing within reach of it at the time of the accident.

There is no direct evidence as to who put the plank across the open space, or when it was done. Defendant did not see it when he came aboard, and since the cleaning up operations on the boat were under the direction and control of Rouchleau, he was responsible for its proper placement. It is quite probable that he placed the plank in the position it was in at the time of the accident.

Under the circumstances here shown we do not think there is any substantial evidence of negligence on the part of defendant Silva proximately causing the injuries and death of James L. Rouchleau.

[1-4] The burden of proof in cases of this kind is upon plaintiff to prove that the defendant was negligent, and that such negligence was a proximate cause of the injury and liability cannot be predicated on mere speculation. Tennant v. Peoria & P. U. Ry. Co., 321 U.S. 29, 32, 64 S.Ct. 409, 88 L.Ed. 520; Eckenrode v. Pennsylvania R. R. Co., 3 Cir., 164 F.2d 996. "Negligence", as used in the statute, is the violation by the owner of the boat of his duty to furnish his employees with a safe place to work and safe tools and appliances to work with. Bailey v. Central Vermont R. Co., 319 U.S. 350, 352, 63 S.Ct. 1062, 87 L.Ed. 1444, 1447. There is no duty on the part of the defendant to anticipate the misuse of equip-

ment or to guard against the consequences of misuse. Brady v. Southern R. Co., 320 U.S. 476, 64 S.Ct. 232, 88 L.Ed. 239, 243.

[5] It is also the rule that where an otherwise sufficient piece of equipment has been rendered insufficient and dangerous to an employee, the plaintiff must prove actual or constructive notice of the condition to the employer before he can recover damages. Matthews v. Southern Pacific Co., 15 Cal.App.2d 36, 42, 59 P.2d 220.

[6] An employer is under a duty to use reasonable care to furnish a reasonably safe appliance in the event the employee is required to use such appliance for the purposes of his employment, and not otherwise. Albert v. McKay & Co., 174 Cal. 451, 454, 163 P. 666.

[7] Under the provisions of the Jones Act an employer is not held absolutely responsible to furnish employees with a safe place in which to work but is only bound to exercise reasonable care to see that the place is reasonably safe. Vojkovich v. Ursich, 49 Cal.App.2d 268, 273, 121 P.2d 803.

[8, 9] There is no evidence that Rouchleau was required to use the plank, from which he fell, for the purpose of performing any duty. Defendant had furnished a fixed and permanent appliance consisting of a ladder attached to the after end of the bait tank down which Rouchleau could easily and safely have gone to the main deck. If he was required to be on the raised deck there was a stairway leading up to it from the main deck. The evidence is that the plank was not in its usual place and was not being used for its intended purpose. The plank was to be used as a "cat walk" only when the boat equipment was all in place and that equipment included the small skiff, which when in place was used as a hand rail. If as is here apparent the deceased was using the plank in an unauthorized, unnecessary, careless and improper manner, without the knowledge of defendant, there can be no liability on the part of the owner of the vessel. 56 C.J.S., Master and Servant, § 251, p. 1005. Moreover, the evidence is that decedent was master or captain of the vessel at the time of the accident. He was general agent for its owner in all matters concerning the vessel. Harbors & Navigation Code, Sec. 810. He is appointed by and holds his appointment at the pleasure of the owner. Harbors & Navigation Code, Sec. 800. While the owner came aboard a few minutes before the accident, there is nothing in the record to indicate that he was acting as master, and no indication that he in any way directed the work then being done. Rouchleau as master could have prohibited the use of the plank for any purpose. He had authority to cover the plank, nail cleats on it, or, if necessary, to build a railing on it. He was in full charge of the unloading operations and the replacing of all equipment. The negligence was his and defendant owner can not be held liable therefor. Duffy v. Hobbs, Wall & Co., 166 Cal. 210, 214, 135 P. 1093, L.R.A.1916F, 806. As was said in 35 Am.Jur., page 615:

> "It is obvious that the rule imposing liability on employers for not providing safe places to work can have only a modified application, if, indeed, any at all, where the employee who is injured is himself required to make his place safe or is engaged in putting it in proper repair or is the agent through whom the employer undertakes to see that the place is kept in good repair."

Since our conclusion is that plaintiff has failed to establish liability for negligence on the part of the owner by substantial evidence, Showalter v. Western Pac. R. R. Co., 16 Cal.2d 460, 471, 106 P.2d 895, it is unnecessary to decide the other points raised in this appeal.

Judgment reversed.

BARNARD, P. J., concurs.

HARD v. COUNTY OF PLUMAS et al.

Civ. 7598, Sac. 5976.

District Court of Appeal, Third District, California.

July 26, 1949.

Subsequent Opinion Sept. 27, 1949.
See 210 P.2d 58.

1. Highways ⚷93

County board of supervisors has authority under statute to employ a road commissioner to supervise work of repairing and resurfacing county roads at a cost in excess of $3,000, regardless of whether commissioner is a licensed and registered civil engineer, provided board first determines that he is qualified and competent to handle the road and highway work of the county. Streets and Highways Code, § 2006.

2. Statutes ⚷231

Sections of Streets and Highways Code relating to authority of county board of supervisors to purchase material and have repair work on county roads done by day labor must be read together to determine the conditions under which board is authorized to purchase materials and perform such work by day labor. Streets and Highways Code, §§ 1071–1073, 1075.

3. Highways ⚷113(3)

County board of supervisors may have work on county roads at a cost in excess of $3,000 done by day labor only after it has adopted specifications therefor, advertised for bids and rejected such bids, regardless of whether county road commissioner under whose supervision such work is to be done is a registered civil engineer or an unlicensed commissioner. Streets and Highways Code, §§ 1071–1073, 1075, 2006.

4. Highways ⚷113(2)

That road commissioner appointed by county board of supervisors and found by board to be qualified and competent to handle road work of county was not a registered and licensed civil engineer did not affect the statutory authority of board to have work of repairing and resurfacing county road at a cost in excess of $3,000 done by day labor under supervision of road commissioner. Streets and Highways Code, §§ 1071–1073, 2006.

5. Highways ⚷96(1)

"Road commissioner" is a mere employee under immediate supervision of county board of supervisors, his duties are prescribed by Streets and Highways Code and he is not necessarily expected to lay out, design or construct roads, bridges, etc., for which the scientific training and skill of a civil engineer are required. Streets and Highways Code, §§ 1024, 2006; Business and Professions Code, §§ 6701, 6704, 6730, 6731.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Road Commissioner".

6. Licenses ⚷40

For county road commissioner who was not a registered civil engineer to supervise the work of repairing and resurfacing three miles of county roadway did not constitute practicing or offering to practice "civil engineering" without a license in violation of Business and Professions Code. Streets and Highways Code, §§ 1024, 2006; Business and Professions Code, §§ 6701, 6704, 6730, 6731.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Civil Engineering".

◆

Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

Action by Chester Hard against the County of Plumas, a political subdivision of the State of California, and others to enjoin defendants from proceeding to repair and resurface county road under supervision of a road commissioner who was not a registered civil engineer. Defendants' demurrer to complaint was sustained without leave to amend and from a judgment that plaintiff take nothing by his complaint, plaintiff appeals.

Judgment affirmed.

Gardiner Johnson, Thos. E. Stanton, Jr., San Francisco, for appellant.

Frank H. McAuliffe, Quincy, McAllister & Johnson, Sacramento, Walter C. Frame, Sacramento, for respondents.

THOMPSON, Justice.

Chester Hard, a citizen and taxpayer of the County of Plumas sought an injunction to restrain the Board of Supervisors and other officers from proceeding to repair and resurface three miles of county roadway at a cost in excess of $3,000, under the supervisions of a Road Commissioner appointed pursuant to the provisions of Section 2006 of the Streets and Highways Code, Stats. Ex.Sess.1947, ch. 11, sec. 1, p. 3788, for the reason that said commissioner is not a registered civil engineer. The trial court sustained defendants' demurrer to the complaint without leave to amend the pleading, and rendered judgment that plaintiff take nothing by his complaint. From that judgment this appeal was perfected.

The appellant asserts in his opening brief that: *"The sole issue to be decided is whether section 1075 of the Streets and Highways Code authorizes a county board of supervisors to have county road work done under the supervision and direction of an unregistered person appointed as road commissioner pursuant to the proviso to section 2006 of that Code."* (Italics appear in brief.)

The complaint alleges that, on December 2, 1947, the Board of Supervisors of Plumas County, by resolution duly adopted, appointed E. G. McLain Road Commissioner of that county, and determined that he is "qualified and competent to handle the road and highway work of said county;" that McLain is not a licensed or registered civil engineer; that the cost of the proposed work of repairing and resurfacing three miles of roadway in that county will exceed the sum of $3,000; that, unless restrained, the board of supervisors will purchase materials and perform the work by day labor under the supervision of said road commissioner without first adopting plans and specifications therefor, and without advertising for bids on the contract.

It will be observed that while the complaint alleges that plans and specifications for the proposed repairs were not adopted, and that bids for a contract therefor were not advertised, the appellant relies solely on one stated issue on appeal as to whether such repairs of a roadway in the county may be performed under the supervision of a duly appointed road commissioner who has been determined by the board to be "qualified and competent to handle the road and highway work of the county", in spite of the fact that he is not a registered and licensed civil engineer. The appellant asserts that it is unlawful to perform such road work except under the supervision of a licensed and registered civil engineer. Streets and Highways Code, sec. 1075.

We assume from the briefs in this case that the appellant has waived the question as to whether a contract for the road work, which will cost in excess of $3,000, was advertised for bids pursuant to Sections 1071–1073 of said code.

[1] We are of the opinion the statutes of California authorize the board of supervisors of a county to employ a road commissioner to supervise such road work in the county regardless of whether he may be a licensed and registered civil engineer, provided it is first determined by the board, pursuant to Section 2006 of the code, that he is "qualified and competent to handle the road and highway work of the county." The complaint in the present case alleges that was done.

Section 2006, which was adopted in 1947, and pursuant to which the road commissioner in this case was appointed on December 2, 1947, after having been determined by the board to be "qualified and competent to handle the road and highway work of the county", reads:

"The board of supervisors of each county shall, prior to January 1, 1948, appoint a single road commissioner for all road districts in the county. The road commissioner shall be a registered civil engineer *except that an unregistered person may be employed as road commissioner if approved by the board of supervisors as qualified and competent to handle the road and highway work of the county.* Nothing herein shall preclude one such person from serving two or more counties. The county surveyor may be appointed, if a registered civil engineer, *or if found by the board of supervisors to be properly qualified.* The road commissioner shall at all times be under the direction and supervision of the board of supervisors.

"Each county shall furnish evidence to the State Controller that it has complied with the provisions of this section.

"After January 1, 1948, neither the State Controller nor any other state officer shall make any allocations or payments to any county from the Highway Users Tax Fund until such county has complied with the requirements of this section." (Italics added.)

It will be observed this section of the code *requires* the appointment of a road commissioner, and notice of compliance therewith to the State Controller before funds may be allocated or payments made from the Highway Users Tax Fund. The statute specifically provides that the road commissioner so appointed may be either a registered civil engineer, or other "unregistered person." A clearer authorization to appoint as such road commissioner an *unregistered person* who is found by the board to be qualified and competent to handle the work could scarcely be expressed. To reinforce that conclusion the statute further provides that *a county surveyor* may be appointed as such road commissioner, "if a registered civil engineer," or "if found by the board of supervisors to be properly qualified", even though he may not be a licensed or registered civil engineer.

The appellant assumes that Section 1075 of the Streets and Highways Code contains the only authorization for the board of supervisors to perform county road work by day labor, and that it may be done under that section without adopting plans and specifications and without first advertising for a contract for bids therefor. He relies on that section of the code and assumes such work may be done without bids, regardless of the cost therefor, provided only that the county has employed "a competent engineer" under whose supervision the work is to be performed. That section reads in part:

"In any county employing a competent engineer as road commissioner, the board may have any work upon county highways done under the supervision and direction of such engineer. Such work may be done:

"(a) * * *

"(b) * * *

"(c) By purchasing the material and having the work done by day labor."

[2, 3] The foregoing section is based on former section 2640 of the Political Code, which specifically provided that where the proposed work or repairs exceeded a cost of $2,000, plans and specifications therefor must be first adopted. The last-mentioned proviso is now required by Sections 1071 to 1074, inclusive, of the Streets and Highways Code, which provide that where the cost exceeds $3,000 the board of supervisors shall adopt plans and specifications and advertise for bids. But if the board determines that the "bids are too high, and that the work can be done more cheaply by day labor", Sec. 1073, "the board shall reject the bids and order the work to be done *by the road commissioners* * * *." Or the board may then readvertise for new bids. Clearly, the sections of the code upon that subject must be read together to determine the conditions under which the board is authorized to purchase materials and perform the work by day labor. We are convinced the proper construction of those statutes authorizes the work to be done by day labor when the cost exceeds $3,000, only after the adoption of plans and specifications and the advertising for a contract for bids have been made and the bids rejected by the board as provided by Section 1073. Sittig v. Raney, 53 Cal.App. 709, 713, 200 P. 824. We think those provisions apply regardless of whether the duly appointed and qualified road commissioner is a registered civil engineer, or an unlicensed commissioner. That construction is not in conflict with Section 1075, which fails to mention the maximum cost of work which may be done by day labor without adopting plans and specifications or advertising for bids.

[4] In view of our conclusion that the work may be done by the board of supervisors by day labor, independently of Section 1075, it is immaterial whether the language of that section which reads, "In any county employing a competent engineer as road commissioner, the board may have any work upon county highways done under the supervision and direction of such

engineer", by day labor, also includes an unregistered road commissioner who has been found to be qualified and competent. Since Section 1073 authorizes the board to do the work under supervision of "the road commissioners by day labor," and Section 2006, adopted in 1947, authorizes the appointment of an unregistered person as such road commissioner when he has been found to be qualified and competent, we conclude that the court properly determined in this case that the complaint fails to state a cause of action in that respect.

The appellant argues that it is contrary to the provisions of Section 6730 of the Business and Professions Code, and unlawful, for a road commissioner to superintend the work on highways or roads if he is not a registered civil engineer because he is thereby practicing civil engineering without a license so to do. That section provides in part:

> "* * * It is unlawful for any person to practice or offer to practice as a civil engineer in this State, unless such person has been duly registered as required by the provisions of this chapter or specifically exempted therefrom."

Section 6704 of the last-mentioned code provides that:

> "Any person practices civil engineering when he professes to be a civil engineer or is in responsible charge of civil engineering work."

[5, 6] The articles and chapter of that code respecting civil engineers contain several specific exemptions from the requirement regarding the registration of civil engineers, among which county road commissioners are not mentioned. Architects, surveyors, employees of civil engineers, and certain contractors are specifically exempted from that act. The term "civil engineer" is defined as "one who practices or offers to practice civil engineering in any of its branches." Business and Professions Code, sec. 6701. It is defined in Funk & Wagnall's New College Standard Dictionary as "A professional engineer trained to design and build roads, bridges, tunnels, harbors, canals, docks, irrigation systems and other public works." See, also, Business and Professions Code, sec. 6731. We may concede that a road commissioner who is not a registered engineer is not necessarily trained, skilled or scientifically proficient in laying out, designing or constructing roads, bridges, structures or public works. But we do not assume a road commissioner is presumed or expected to perform such scientific work. A road commissioner is a mere employee and under the immediate direction and supervision of the board of supervisors. Streets and Highways Code, sec. 1024; Couts v. County of San Diego, 139 Cal.App. 706, 712, 34 P.2d 812. His duties are prescribed by Section 1024 of the Streets and Highways Code. If the board of supervisors proposes to lay out, design or construct public roads, bridges or structures requiring plans and specifications and special scientific knowledge or skill, we assume it is authorized by law to employ engineers, surveyors or other proficient workmen for that purpose. But such employment will in no way conflict with the duties of the road commissioner as prescribed by statute. The policy of authorizing a road commissioner to perform such duties as are prescribed by our statutes is within the province of the legislature. We conclude that the road commissioner of Plumas County, under the circumstances disclosed by the pleadings in this case, is neither practicing nor offering to practice civil engineering, and that he is qualified and competent to perform the duties prescribed by law, regardless of the fact that he is not a registered civil engineer.

Since the question of the regularity of adopting plans and specifications and advertising for a contract for bids for repairing and resurfacing the three miles of roadway in Plumas County is not an issue on this appeal, and we are satisfied the duly appointed and qualified road commissioner is authorized by law to perform the work, the judgment should be affirmed. It is so ordered.

ADAMS, P. J., and PEEK, J., concur.

SMITH et al. v. ROCK CREEK WATER CORPORATION et al.

Civ. 16894.

District Court of Appeal, Second District, Division 2, California.
July 21, 1949.

Rehearing Denied Aug. 9, 1949.
Hearing Denied Sept. 15, 1949.

1. Waters and water courses 🔑247(1)

In suit to quiet title, for injunction and other relief, evidence sustained findings that water corporation within one year prior to filing of complaint had entered upon lands of plaintiffs and destroyed ornamental shade trees which derived water for growth from water ditch of corporation, that debris was not removed from plaintiffs' property, that excavations were made and debris therefrom was piled near plaintiffs' dwellings, and that footbridges of plaintiffs were destroyed.

2. Public lands 🔑114(4)
Waters and water courses 🔑244

Patentees took title subject to existing easement to maintain water ditch, and water corporation could not increase burden of easement or change mode of its enjoyment without consent of the patentees or their successors in interest.

3. Easements 🔑2, 38

Owner of servient estate may grant an easement to a third person similar to that held by another if it does not unreasonably interfere with the latter's operations and may use his property in any manner that is not inconsistent with the easement and does not unreasonably impede the dominant tenant in the exercise of his rights.

4. Easements 🔑41

Right of the owner of a prescriptive easement is measured by and limited in its use to the nature of the enjoyment by which it was acquired.

5. Waters and water courses 🔑244

Secondary easement which accompanied principal easement in the form of right to maintain water ditch was no more than the right to make repairs and to do such things as were necessary to exercise of the primary right and to do them only when necessary and in such reasonable manner as not to increase the burden on the servient estate needlessly or to enlarge it by alteration in mode of operation.

6. Waters and water courses 🔑244

Owner of a prescriptive right to conduct water in an open ditch may not change location of the ditch, or lay a pipe line along the course of the ditch nor construct aprons for the passage of storm waters over ditch.

7. Easements 🔑41, 42

Dominant tenant had no right to increase burden of easement regardless of whether the easement had been acquired by prescription or by grant.

8. Waters and water courses 🔑247(1)

Water corporation with easement in form of right to maintain water ditch was liable in damages to servient tenants for unauthorized destruction of trees, footbridges and other property.

◆

Appeal from Superior Court, Los Angeles County; Leo Freund, Judge.

Suit by Donald E. Smith and others against the Rock Creek Water Corporation and others to quiet title and for other relief. Judgment for plaintiffs and the named defendant appeals.

Affirmed.

Oliver O. Clark, Los Angeles, for appellant.

Gwyn S. Redwine, Los Angeles, Churchill, Teague & Romney, Ventura, for respondents.

WILSON, Justice.

Defendant Rock Creek Water Corporation, a mutual water company, has appealed from a judgment quieting plaintiffs' title to real property, defining and limiting the extent of defendant's easement over such property for the maintenance of its water ditch, and enjoining defendant from damaging or destroying trees, shrubbery and vegetation along and footbridges across the ditch, and from other activities in connection with its maintenance.

The court found the following facts: During the time when the lands now owned by plaintiffs were public lands of the United States defendant's predecessors in interest had constructed an open, unimproved, unlined earthen ditch across such property for the purpose of transmitting water from Rock Creek and had maintained the same for more than twenty years prior to the commencement of the instant action. The ditch had never been lined with cement or otherwise but had been maintained in its natural earthen condition. Defendant had removed obstructions therefrom, including debris, vegetation, rocks and tree roots, and had exercised the right of ingress and egress over the lands now owned by plaintiffs to obtain access to the ditch for the purpose of maintaining it. At no time prior to 1946 did defendant or its predecessors in interest destroy shrubbery or trees growing on plaintiffs' lands adjacent to the ditch or footbridges across the same. Defendant did not, prior to a five year period immediately preceding the commencement of this action, change the course of the ditch on plaintiffs' lands, construct sluiceways across the open ditch for the purpose of diverting the flow of water from such property, cause surface waters during rainfall to accumulate, or leave debris taken from the ditch upon plaintiffs' premises, nor did they assert the right to do any of such acts. Within one year prior to the filing of the complaint defendant entered upon such lands and destroyed ornamental shade trees thereon by felling some and ringing or girdling others in such manner as to destroy the life of the trees. Water for the growth and maintenance of the trees and shrubbery was derived from the seepage from the ditch. The debris resulting from the felling of the trees was not removed from plaintiffs' property; some of it was burned on the land without their permission; unsightly tree stumps were left; excavations were made and debris therefrom was piled near plaintiffs' dwellings; plaintiffs' footbridges were destroyed.

The court adjudged (1) that defendant has no right, title or interest in plaintiffs' lands except an easement, which it had obtained by possession and enjoyment, to maintain an open earthen ditch over such lands along the course of the ditch as it existed at the time of filing the complaint and to convey water through the ditch for defendant's needs, and the right to enter upon such lands for the purpose of maintaining and repairing the ditch, including the removal of debris, tree roots and other obstructions to the flow of water, providing the same be removed from plaintiffs' property; (2) that defendant be enjoined from cutting down, girdling or otherwise damaging or destroying trees on such lands or footbridges across the ditch, excavating on plaintiffs' property, causing surface waters to accumulate, constructing sluiceways, changing the course of the ditch or the nature of the easement from that of an open earthen ditch, or diverting waters from the ditch onto plaintiffs' lands.

[1] The findings are sustained by the evidence. Defendant's contention to the contrary ignores the familiar conflict of evidence rule. Estate of Pohlmann, 89 Cal.App.2d 563, 201 P.2d 446, 449–450; Buckhantz v. R. G. Hamilton & Co., 71 Cal.App.2d 777, 779, 163 P.2d 756; Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689.

Defendant contends that its right to use and maintain the ditch rests upon an implied grant as an incident to the appropriation of water upon the federal public domain and that "every easement carries with it the right, sometimes called a secondary easement, of doing whatever is reasonably necessary for the full enjoyment of the easement itself." It further maintains that the acts complained of were reasonably necessary for the full enjoyment of its easement; that it has a duty to do whatever may be reasonably required to conserve the water and that there are no restrictions in its grant which would require it to maintain the ditch in its present location or to confine it to the existing roads which are now apparent and visible as a means of access to the ditch for the purpose of repair and maintenance. It is defendant's contention that the manner in which the grant has been or is enjoyed does not measure or limit the way in which it may be enjoyed and that under what it defines as "the broad grant of this easement" the line of the ditch may be changed whenever reasonably required; that its agents and employees may travel anywhere at any time upon lands adjacent to the ditch and are not limited to roads now in being; that the servient estate must bear the burden without cost to defendant of whatever detriment may result from the operations of the dominant tenant upon the lands adjacent to the ditch or may be reasonably required for the full enjoyment of the easement.

[2] Defendant's contentions find no support in the law. When patents were issued by the United States for the lands in question the patentees took title subject to the easement then existing, and defendant was without power or right to increase the burden of the easement thereafter or to change the mode of its enjoyment without the consent of the patentees or their successors in interest. Oliver v. Agasse, 132 Cal. 297, 300, 64 P. 401; Felsenthal v. Warring, 40 Cal.App. 119, 127, 180 P. 67.

[3, 4] The owner of the servient estate may grant an easement to a third person similar to that held by another if it does not unreasonably interfere with the latter's operations, City of Pasadena v. California-Michigan L. & W. Co., 17 Cal.2d 576, 579, 110 P.2d 983, 133 A.L.R. 1186, and may make ordinary use of his property beneath electric power wires for the maintenance of which he has granted an easement. Lozano v. Pacific Gas & El. Co., 70 Cal.App.2d 415, 421, 161 P.2d 74. In short he may use his property in any manner that is not inconsistent with the easement and does not unreasonably impede the dominant tenant in the exercise of his rights. Dierssen v. McCormack, 28 Cal.App.2d 164, 170, 82 P.2d 212. The right of the owner of a prescriptive easement is measured by and limited in its use to the nature of the enjoyment by which it was acquired. Joseph v. Ager, 108 Cal. 517, 520, 41 P. 422; Allen v. San Jose L. & W. Co., 92 Cal. 138, 141–142, 28 P. 215, 15 L.R.A. 93; North Fork Water Co. v. Edwards, 121 Cal. 662, 665–666, 54 P. 69.

[5] Defendant contends that the secondary easement which accompanies the principal easement entitles it to do the acts which the court has enjoined. The secondary easement is no more than the right to make repairs and to do such things as are necessary to the exercise of the right and to do them only when necessary and in such reasonable manner as not to increase the burden needlessly on the servient estate or to enlarge it by alteration in the mode of operation. North Fork and Joseph cases, supra.

[6] The use of the easement may not be changed in such manner as to make it either more or less burdensome to the servient estate. The owner of a prescriptive right to conduct water in an open ditch is not entitled to change the location of the ditch, Felsenthal v. Warring, 40 Cal.App. 119, 128, 180 P. 67; Vestal v. Young, 147 Cal. 715, 718, 82 P. 381; Joseph v. Ager, supra; to lay a pipe line along the course of the ditch, cover the pipe line with dirt, and convey water through it, Allen v. San Jose L. & W. Co., supra; Oliver v. Agasse, 132 Cal. 297, 299, 64 P. 401; or to construct aprons for the passage of storm waters over a ditch. North Fork Water Co. v. Edwards, supra.

[7] At the trial defendant's attorney stipulated that its "claim to the use of this ditch arises by prescription * * * no deed of easement but only [its] prescriptive rights." But it would make no difference whether the easement had been acquired by prescription or by grant, since the former is an implied grant and the limitations are the same whether the easement has been conveyed by deed or acquired by use. Felsenthal v. Warring, 40 Cal.App. 119, 127, 180 P. 67.

[8] Defendant is liable in damages for its unauthorized destruction of plaintiffs' trees, footbridges and other property. The amounts awarded by the court to the respective plaintiffs are sustained by the evidence.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

93 Cal.App.2d 182

GETZ v. WHISENANT (WILLIAMS et al., third-party claimants and respondents).

Civ. 16787.

District Court of Appeal, Second District,
Division 3, California.
July 29, 1949.

1. Attachment 🔑308(4)

Third party claimants' automobile ownership certificate and registration card made prima facie case for third party claimants of attached automobile. Vehicle Code §§ 177, 178, 186.

2. Appeal and error 🔑934(1)
Trial 🔑388(2)

Written findings are not required in third party claim proceedings, and all intendments are in favor of judgment in such proceeding. Code Civ.Proc. §§ 549, 689.

3. Automobiles 🔑19

Automobile owners' notice to Department of Motor Vehicles of their sale or transfer of automobile to building contractor's salesman did not estop owners from asserting title to automobile which had been attached while in salesman's possession, and owners could assert that salesman held automobile in trust for owners pursuant to agreement to sell automobile to raise money for construction of building by contractor for owners, where Department had thereafter issued ownership certificate and registration card to owners and salesman had not complied with agreement. Vehicle Code, §§ 177, 178, 186.

4. Judgment 🔑675(1)

A judgment in prior proceeding on another third party's claim to attached automobile was not res judicata in proceeding on different third parties' claim, notwithstanding that the other third party instituted prior proceeding on request of instant third parties.

5. Attachment 🔑309

Third party claim proceedings were not arbitrarily closed to prejudice of appellant's rights before appellant had completed his case, where appellant commenced allegedly "short case" without presence of two witnesses and without having subpoenaed them and appellant did not state what testimony he proposed to offer by either of them and there was ample opportunity to call appellant as witness.

Appeal from Superior Court, Los Angeles County; C. C. McDonald, Judge assigned.

Attachment proceeding by John M. Getz against Robert Whisenant, wherein Kenneth F. Williams and another instituted third party claim proceedings. From a judgment in favor of the third party claimants, the plaintiff appeals.

Affirmed.

Joseph Shane, Los Angeles, for appellant.

Frederick G. Stoehr, Robert J. Johnston, Pasadena, for respondents.

WOOD, Justice.

By virtue of a writ of attachment issued in this action, the sheriff took possession of a 1948 Hudson automobile. Kenneth F. Williams and Violet E. Williams instituted third party claim proceedings, asserting ownership and right of possession of the automobile. Judgment was in their favor, and plaintiff appeals therefrom.

Appellant asserts that the evidence does not support the judgment.

Defendant Whisenant was a salesman for Mr. Van Norman, who was a building contractor. On March 29, 1948, Mr. and Mrs. Williams, after having had negotiations with defendant as such salesman, entered into a written contract with Mr. Van Norman whereby he agreed to construct a building for them for $54,400—it being provided therein that $3,500 should be paid upon the signing of the contract. On said March 29th the defendant brought the contract, which had been signed by Mr. Van Norman, to the home of Mr. and Mrs. Williams and gave it to them. Mrs. Williams testified that during the negotiations regarding the contract the defendant (salesman) told the claimants that he had a deal on for the sale of their 1948 Hudson automobile, that he was going to sell it for $3,500 and turn the money back into their construction job. The automobile was new; it had been purchased by claimants in February, 1948, and the certificate of ownership (pink slip) which had been applied for in the names of both claimants had not been received from the Department of Motor Vehicles at the time of the transaction herein. When the contract was signed on March 29th the defendant gave the claimants a document as follows:

"C. H. Van Norman Construction Co.
14348 Bessemer Street, Van Nuys, California
Receipt ________ Date 3/29/48
Plan 8 units
Buyer Kenneth F & Violet E Williams
Address 760 El Mira Pasadena
Phone Sy 42118
411 Magnolia So Pasadena
Lot ________ Block ________ Tract ________
Sale Price $54,400
Deposit Hudson Sedan as $ 3,500
Amount to be financed $50,900
To be financed by FHA
Representative Robert Whisenant
This is not a contract"

The claimants then gave the automobile keys to the defendant, and he drove the automobile away from their house. Mrs. Williams testified that since she had not received the pink slip, and in order to be relieved of liability for accidents while the automobile was being driven by defendant, she went to the Pasadena office of the Department of Motor Vehicles on March 28th and told a representative of that department "about the transaction"; that the representative gave her a slip of paper or printed form, and told her that in order "to relieve me of any liability while he had the car, to send that in, to show he had it in his possession." The claimants signed that paper on March 29th and then sent it to the Department of Motor Vehicles. Said document was as follows: "This is to advise you that on 3-29-48, I, as registered owner of the vehicle described below, sold or transferred my interest in and possession of said vehicle to Robert Whisenant." Mrs. Williams wrote on the back of said document as follows: "Have told the new owner I will give him the pink slip as soon as you send it to me."

On April 5, 1948, while the automobile was in the possession of defendant Whisenant it was attached by the sheriff by virtue of a writ of attachment issued in this action.

The certificate of ownership and the registration card of the automobile were issued in June, 1948, by the Department of Motor Vehicles in the names of Mr. and Mrs. Williams. They did not endorse or transfer or deliver said certificate or card to the defendant.

On April 21, 1948, at the request of Mr. and Mrs. Williams, Mr. Van Norman instituted third party claim proceedings asserting ownership and right of possession of the automobile. In his claim, he stated that he acquired the automobile from Mr. and Mrs. Williams as a down payment on a construction contract; that Whisenant, acting as agent for him, took legal title in his own name without the consent of Mr. Van Norman; that Whisenant was holding such title in trust for Mr. Van Norman; and that the automobile was of the value of $3,500. At the hearing in those proceedings, on May 14, 1948, the claim of Mr. Van Norman was denied, and it was decided that Whisenant had legal title to the automobile.

The present third party claim proceedings were instituted by Mr. and Mrs. Williams on June 9, 1948, and the hearing thereon was had on July 2, 1948. As above stated, the judgment herein was that Mr. and Mrs. Williams were the owners and entitled to the possession of the automobile.

Prior to signing the contract on March 29th, the claimants herein opened an escrow at a mortgage company where they were to obtain a loan through the Federal Housing Administration. On April 13th, after the contract had been made, Mr. Van Norman went to the mortgage company and entered into the escrow. The automobile which had been taken by Whisenant was not received or accepted by Mr. Van Norman as the down payment under the contract or as any payment. About April 21, 1948, Mr. and Mrs. Williams paid $3,500 in cash as the down payment.

[1] At the hearing herein the claimants introduced in evidence the ownership certificate and the registration card which stated that the claimants were the legal

and registered owners of the automobile. This made a prima facie case for claimants. Section 186 of the Vehicle Code provides: "* * * No transfer of the title or any interest in or to a vehicle registered hereunder shall pass and any attempted transfer shall not be effective unless and until the parties thereto have fulfilled either of the following requirements: (1) * * * The transferor shall have made proper endorsement and delivery of the certificate of ownership and delivery of the registration card to the transferee as provided in this code and the transferee has delivered to the department or has placed in the * * * mail, addressed to the department, such certificate and card when and as required under this code with the proper transfer fee and thereby makes application for a transfer of registration except as otherwise provided in Section 180 [Section 180 relates to a transfer to a dealer], or (2) * * * The transferor shall have delivered to the department or shall have placed in the * * * mail addressed to the department the appropriate documents for the registration or transfer of registration of such vehicle pursuant to such sale or transfer except as provided in Section 178." Section 178 provides as follows: "An owner who has made a bona fide sale or transfer of a vehicle and has delivered possession thereof to a purchaser shall not by reason of any of the provisions of this code be deemed the owner of such vehicle so as to be subject to civil liability for the operation of such vehicle thereafter by another when such owner in addition to the foregoing has fulfilled either of the following requirements: (1) * * * When such owner has made proper indorsement and delivery of the certificate of ownership and delivered the certificate of registration as provided in this code. (2) * * * When such owner has delivered to the department or has placed in the * * * mail, addressed to the department, either a notice as provided in Section 177 or appropriate documents for registration of such vehicle pursuant to such sale or transfer." Said section 177 is to the effect that whenever the owner of a vehicle sells or transfers his title or interest in said vehicle to another, said owner shall immediately notify the department of such sale or transfer giving the date thereof, the name and address of such owner and of the transferee and such description of the vehicle as may be required in the appropriate form provided by the department.

[2, 3] Appellant (plaintiff Getz) contends that, by reason of the document which claimants sent to the Motor Vehicle Department stating they had sold or transferred the automobile to Whisenant, the claimants are estopped to assert title to the automobile. Appellant argues that the receipt which Whisenant gave claimants for their automobile was not only a legal consideration for their automobile but was full consideration for it; that from a legal standpoint Mr. Van Norman could not successfully deny that the claimants were entitled to a credit of $3,500 on the contract, since the automobile had been transferred to Whisenant; that apparently "the loan people or the escrow people" demanded $3,500 in cash instead of accepting the receipt for the automobile; that if claimants paid $3,500 in cash they did so as a matter of expediency and not as a matter of legal obligation; that claimants should have insisted on their right to a credit of $3,500 on their contract and should have made Mr. Van Norman stand back of the receipt of his agent Whisenant. There were no written findings herein, and they were not required under the provisions of sections 549 and 689 of the Code of Civil Procedure. All intendments are in favor of the judgment. The evidence would have supported findings: that possession of the automobile and the notice of sale or transfer of it were given for the purpose of affording Whisenant an opportunity to sell it for $3,500 and to credit that amount on claimants' construction contract; that it was intended by the giving of such notice that the claimants should not be subject to civil liability for the operation of the automobile while it was in the possession of Whisenant for said above-mentioned purpose; and that it was not intended that title to the automobile should pass from the claimants unless and until Whisenant complied with his agreement regarding the sale of the automobile. Whisenant had not paid anything for the

automobile, and the claimants had not received any consideration for it. Appellant asserts that Whisenant's commission for obtaining the contract for Mr. Van Norman was $3,500, and that he was entitled to keep the automobile as payment of such commission. There was no evidence before the trial court that his commission was that amount or any amount. It appears, however, from the reporter's transcript of the proceedings in the third party claim of Mr. Van Norman that plaintiff Getz testified therein that Whisenant told him, about a month before the construction contract was made, that he (Whisenant) expected a big deal to come up where he would get a Hudson automobile as his commission. It is also to be noted from that transcript that Mr. Van Norman testified that the commission would have been $500. (The parties herein stipulated that said transcript in the former proceeding might be a part of the record on this appeal, subject to any objections regarding materiality.) Even if the transcript of the former proceedings were to be regarded as a part of the record on this appeal, it appears from the evidence therein that Whisenant's commission, if any, might not have been more than $500. With reference to appellant's argument that the claimants should have compelled Mr. Van Norman to accept the automobile as the down payment, it is to be noted that the contract between the claimants and Mr. Van Norman provided that $3,500 should be paid upon the signing of the contract; and it is to be noted that the document, signed only by Whisenant, reciting "Deposit Hudson Sedan as $3,500," also stated thereon, "This is not a contract." The ownership certificate and the registration card were issued in the names of claimants in June, 1948, even though the said notice of sale or transfer had been given by the claimants on March 29, 1948. Under some circumstances it may be shown that a person in whose name an automobile ownership certificate is issued holds the legal title to the automobile in trust for another. See Henry v. General Forming, Ltd., 33 Cal.2d 223, 200 P.2d 785. In the case just cited the ownership certificate had been issued in the name of the person who had applied for registration of the new automobile, but that person had not paid any part of the purchase price and had permitted another person, the third party claimant therein, to pay the purchase price upon the understanding that the third party should own and possess the automobile. It was held therein that the person in whose name the ownership certificate had been issued held the legal title in trust for the third party claimant. As above stated, Whisenant had not paid anything for the automobile involved herein, and he had failed to comply with his agreement to sell it. The claimants herein, in whose names the ownership certificate was issued, did not hold the legal title in trust for Whisenant. Even if the notice of sale or transfer, which the claimants sent to the Department of Motor Vehicles, should be regarded as a transfer of the legal title to Whisenant, then under the evidence here he held that title in trust for the third party claimants. The claimants herein are not estopped to assert title to the automobile.

[4] Appellant contends further that the issue as to Whisenant's title to the automobile is res judicata by reason of the judgment in the proceedings on the third party claim of Mr. Van Norman. This contention is not sustained. The claimants were not parties to that proceeding. The fact that Mrs. Williams requested him to institute those proceedings does not make the judgment binding upon her or Mr. Williams.

Appellant contends that the trial judge arbitrarily, and to the prejudice of appellant's rights, closed the hearing before appellant had completed his case. The attorney for appellant called Mrs. Williams as a witness, under section 2055 of the Code of Civil Procedure, and after an examination covering 30 pages of the transcript he said that he had no further questions. Then there was a discussion of the theories of the case and the law, by the attorneys and the judge, covering 9 pages of the transcript. After the judge had asked the witness a few more questions he said that judgment would be for the claimants. Appellant's attorney said he had not completed his case. The judge said: "I beg your pardon, I withdraw my decision. Go right ahead, * * * I thought you were both through." After a further extended discussion of the case and the law by the attorneys and the judge, the attorney for appellant said, "I think we ought to have the testimony of both Whisenant and Van Norman." He had not subpoenaed either of them, and neither one was present. In reply to the judge's question as to how long it would take to get them, he replied that he did not know where they were. The judge asked to see the transcript of testimony of Mr. Van Norman, given in the former hearing, and without objection thereto by either attorney the judge read that testimony. Then after some comments he said, "if you have any other proof I will hear it. If not, I am going to have to rule." The judge had said previously that he had been assigned to another department of the court commencing the next court day, and that the present case "was scheduled to be a short case, supposed to last an hour." The judge stated that he could not see from the testimony of Mr. Van Norman, in the former hearing, where his testimony would do appellant any good if he were present. After further discussion the judge declared "the evidence closed" and ruled in favor of the claimants. The attorney for appellant said, "My client wanted to say something." The appellant said, "I know a little bit about the case."

[5] Appellant commenced the allegedly "short case" without the presence of those two witnesses and without having subpoenaed them. He did not state what testimony he proposed to offer by either of them. The transcript of the previous testimony of Mr. Van Norman was read by the judge, apparently for the purpose of considering whether there should be a continuance. There was ample opportunity to call appellant as a witness, especially during the extended discussions regarding the witnesses who were absent. There was no offer to prove anything by testimony of appellant. The contention that the trial judge erred in closing the case is not sustained.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

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93 Cal.App.2d 146

SLAUGHTER et al. v. MEROFF et al.

Civ. 16922.

District Court of Appeal, Second District, Division 1, California.

July 29, 1949.

Venue ⚷7

Where contract for doctor's professional services was made and the services were performed and the obligation to pay for was incurred in Los Angeles County such county was the proper place of trial of action to recover for such services. Code Civ.Proc. § 395(1).

Appeal from Superior Court, Los Angeles County; Stanley N. Barnes, Judge.

Action by J. A. Slaughter and L. S. Trigg, partners under the firm name and style of the Doctors Business Bureau, against June Meroff and others to collect an unpaid doctor's bill which had been assigned to plaintiffs for collection. From an order denying motion for change of place of trial, the named defendant appeals.

Order affirmed.

Paul Gordon, Melvin E. Fink, Los Angeles, for appellant.

Herbert Gall, Los Angeles, for respondents.

DRAPEAU, Justice.

This is an appeal from an order denying motion for change of place of trial.

The complaint alleges an unpaid doctor's bill for $2,500.00, assigned to the plaintiff for collection. Three counts are averred in the complaint: debt, account stated, and work, labor, and services.

Motion for change of place of trial was made. In support of the motion an affidavit by one of the defendants was filed, averring that the defendants were residents of Riverside County.

Counter-affidavit was filed on behalf of the plaintiff, averring that the action is for payment for doctor's professional services rendered to the father of one of the defendants; that the contract for said services was made, the services were rendered, and the obligation to pay for them was incurred in Los Angeles County.

The latter affidavit brings the case within the provisions of subsection (1) of Section 395, Code of Civil Procedure, and the proper place of trial in such circumstances is the county of Los Angeles. Pacific Const. Finance Co. v. Kramer, 42 Cal.App.2d 190, 108 P.2d 723; Turner v. Simpson, 91 Cal.App.2d 590, 205 P.2d 423.

The order is affirmed.

WHITE, P. J., and DORAN, J., concur.

93 Cal.App.2d 208

In re WALTERS' ESTATE.

SACKS et al. v. RAUCH.

Civ. 17167.

District Court of Appeal, Second District, Division 3, California.

July 30, 1949.

Rehearing Denied Aug. 15, 1949.

Hearing Denied Sept. 26, 1949.

1. Courts 🔑202(5)

Order directing guardian of an incompetent to take possession of incompetent's property was an appealable order. Probate Code, § 1630.

2. Courts 🔑202(5)

Guardian ad litem appointed for purpose of prosecuting an appeal from an order appointing a guardian of an alleged incompetent could appeal from a subsequent order instructing the guardian to take possession of incompetent's property. Probate Code, § 1630.

3. Courts 🔑202(5)
Insane persons 🔑33(2)

Person adjudged to be an incompetent could herself appeal from an order appointing a guardian of her property and also had right to appeal from incidental and related order directing guardian to take possession of her property. Probate Code, § 1630.

4. Courts 🔑202(5)

A writ of supersedeas issued pending an appeal from an order directing a guardian of an alleged incompetent to take possession of all real and personal property of incompetent would operate to require guardian to surrender to alleged incompetent all property taken into his possession and retained under order and to refrain from interfering with management of property by incompetent and her agents. Probate Code, § 1631.

5. Courts 🔑202(5)

Where realty of person adjudged to be an incompetent was under first class management of realty agents, and purpose of application for an order directing guardian to take possession of realty was made for purpose of replacing realty agents as managers of incompetent's realty, and no showing was made that incompetent's personalty was in danger of being wasted or dissipated, writ of supersedeas would be issued staying proceedings under order directing guardian to take possession of property of incompetent until final determination of appeal from order appointing guardian. Probate Code, § 1631.

◆

Proceeding in the matter of the estate and guardianship of Allie Walters, also known as Allie Walters Sacks. From an order directing L. C. Rauchas guardian of the estate of Allie Walters, also known as Allie Walters Sacks, to take possession of all property of the ward, Allie Walters Sacks and Allie Walters Sacks by and through her guardian ad litem, Morris Lavine, appealed. On a petition for a writ of supersedeas to stay proceedings under the order and on motion to dismiss the appeal.

Motion to dismiss denied, writ of supersedeas issued.

See also Cal.App., 199 P.2d 396.

S. V. O. Prichard, Bodkin, Breslin & Luddy, Morris Lavine, Los Angeles, as guardian ad litem, in pro. per., for petitioner and appellant.

R. R. Sleeper and Harold A. Slane, Los Angeles, for respondents.

SHINN, Presiding Justice.

On March 3, 1949, Allie Walters Sacks was adjudged to be incompetent, L. C. Rauch was appointed as the guardian of her estate and John C. Packard guardian of her person. Thereafter, Morris Lavine was appointed as guardian ad litem for the purpose of prosecuting an appeal from the order. Such an appeal has been taken and is now pending. L. C. Rauch, having qualified as guardian, petitioned the court for instructions that he take possession of the property of the estate for the purpose of preventing injury and loss thereto. Mrs. Sacks opposed the application, requesting that her property be allowed to remain in the management of her agents, R. A. Rowan & Company.

The matter was heard upon the verified petitions and affidavits and on April 22nd the court decided that certain powers of the guardian should be exercised for the purpose of preventing injury or loss. L. C. Rauch was then directed "to take possession of all of the property of said ward, both real and personal, in the State of California"; to collect rents and manage the rental property of the estate "but not to make any improvements or substantial repairs without first reporting to the court on notice to the other interested parties, and receiving instructions therefor"; to pay a monthly allowance for the support of the ward; to pay the costs of the pending appeal; to inventory the property of the estate and all claims against the ward; and to prepare a schedule of all pending litigation to which the ward is a party with recommendations to the court as to what steps should be taken therein. John C. Packard, guardian of the person of the ward was directed to receive the monthly allowance from the guardian of the estate and use it to maintain and support the ward.

A notice of appeal was given by Lavine as guardian ad litem and another, signed by Mrs. Sacks, appealing "from that portion of the order of directions subsequent to appeal, directing L. C. Rauch as Guardian of the estate of Allie Walter Sacks to exercise his powers of guardianship, as follows: To take possession of all property, real and personal, of said ward, in the State of California."

Rauch gave notice of a motion to dismiss the appeal from the order of April 22nd. Mrs. Sacks filed a petition for a writ of supersedeas to stay proceedings under the order. A demurrer to the petition for writ of supersedeas having been filed by Rauch, the motion to dismiss and the application for the writ were heard and submitted.

[1] In support of the motion to dismiss it is contended that the order is not one from which an appeal is allowed. The point is not well taken. An appeal may be taken from an order instructing or directing a guardian. Sec. 1630, Probate Code.

[2] It is urged that Lavine under his appointment as guardian ad litem to appeal from the order appointing a guardian did not have authority to appeal from the subsequent order instructing the guardian. This point also is unsustainable. The order of appointment carried with it authority to take whatever steps were necessary to make the appeal effective. The later order was in such broad terms as to vest in the guardian practically complete powers over the estate of Mrs. Sacks notwithstanding the pending appeal from the order of appointment. If the later order was deemed by the guardian ad litem to be an improper one and if it was detrimental to the interests which he was bound to protect he had not only the authority but the duty to appeal from it. It was clearly the right of Mrs. Sacks to have the status quo maintained if it could be done without detriment to her estate.

[3] Moreover Mrs. Sacks could, herself, appeal from the order appointing a guardian, see Matter of Moss, 120 Cal. 695, 53 P. 357; Sacks v. Superior Court, 31 Cal.2d 537, 190 P.2d 602; In re Guardianship of Gilman, 23 Cal.2d 862, 147 P.2d 530, and undoubtedly had a right to appeal from the incidental and related order directing the guardian to take possession of her property. See Coburn v. Hynes, 161 Cal. 685, 120 P. 26. The appeal is properly before us and the motion to dismiss should be denied.

The application for a writ of supersedeas presents the question whether conditions were shown to exist which justified the order placing the guardian in possession of the real and personal property. The authority of the court to make such orders is derived solely from section 1631 of the Probate Code which reads as follows: "Effect of appeal. An appeal from an order appointing a guardian for an insane or incompetent person shall stay the power of the guardian, except that, for the purpose of preventing injury or loss to person or property, the court making the appointment may direct the exercise of the powers of the guardian, from time to time, as though no appeal were pending, and all acts of the guardian pursuant to such directions shall be valid, irrespective of the result of the appeal." It is clear to us that there was no showing of reasonable necessity for an order directing the guardian to take possession of the property. We think this appears from the order itself, considered with the reasons that were urged for the order. The petitions and affidavits which were before the trial court are set forth in the petition for writ of supersedeas. In brief they are the following: Mrs. Sacks is possessed of a considerable amount of real property, much of which is rental property located in the beach area. Her estate is of the value of some $400,000; she is married and residing with her husband, whose willingness and competency to assist in the management of her affairs is not here questioned; since on or about August, 1947, R. A. Rowan & Company has acted as her agent in the management and operation of her real estate, collecting her rent, making repairs and paying the necessary expenses. Under the firm's management the income from rentals has increased from $2,044.50 to $2,682.00 per month. The firm admittedly is reliable, experienced, and competent to manage the properties, has done so efficiently, and has made use of available funds to conserve and protect the same. The charges for these services are 5 per cent of the gross rentals collected and 3 per cent for negotiation of leases. The appointment of the Rowan firm as agent and cooperation by Mrs. Sacks with the firm over a two year period is an exhibition of good business judgment on her part. So far as disclosed by the petition and affidavits of Rauch the principal purpose of the application for the order appears to have been the desire to replace Rowan & Company as the managers of Mrs. Sacks' real property. No showing whatever was made or attempted to be made that Mrs. Sacks has acted or is likely to act in an improvident manner, or that she is likely to be imposed upon. No evidence was produced that her personal estate is in danger of being wasted or dissipated. In the petition and affidavits of Rauch it was represented to the court that numerous of the houses of Mrs. Sacks located in the beach area were in need of repairs and alterations. It was also shown that notices had been received from the Health Department demanding the correction of some of these conditions. It was not shown, however, that loss or injury has been or is about to be sustained by reason of the conditions described through loss of rentals or otherwise. It is evident that the court did not believe that any emergency repairs were required since none were ordered to be made. It was shown without dispute that repairs have been made to the buildings by Rowan & Company to the extent that funds have been available therefor and that the demands of the Health Department have been met from time to time. In short, the uncontradicted showing was that Mrs. Sacks' real properties are, and for almost two years last past, have been under first-class management.

The petition of Rauch listed items of indebtedness for taxes, assessments, and upon other accounts but there was no showing whatever that these would not be taken care of in due course or that the estate was threatened with loss or injury by reason thereof. It was alleged in the petition that Mrs. Sacks is prosecuting two actions for the recovery of real and personal property and that she was then defendant in three other actions, one, for the foreclosure of a trust deed of $22,000, another for the recovery of $15,000 as attorneys' fees, and a third, a suit for attorneys' fees. It was also alleged that Mrs. Sacks was interested in a certain estate in course of probate and the petition contained general allegations to the effect that it was necessary that a guardian be substituted as a party to each of said actions in the place of Mrs. Sacks and that he employ attorneys to prosecute and defend said actions. It was not alleged that Mrs. Sacks is not represented by competent attorneys, satisfactory to her, nor has any reason been advanced why her attorneys should be replaced with others selected by the guardian. It may also be mentioned that at the hearing before us it was stated and not questioned that the three actions against Mrs. Sacks have been disposed of, the first two by dismissal, and the third by judgment. It was alleged in the affidavit of Mrs. Sacks that Rauch acted as her guardian for a period of a year under an invalid appointment; that he has an action pending against her for the recovery of $60,000 and that she has an action pending against him for the recovery of approximately $365,000 upon claims for money and other claims arising out of his former activities as guardian. The allegations in the petitions of Rauch and in his affidavit of threatened injury and loss to the estate of Mrs. Sacks consist of mere assertions that injury and loss will result unless he is authorized to take over the management and control of Mrs. Sacks' affairs. These allegations are not borne out by the facts disclosed at the hearing.

[4] The further contention is made that since the appeal has been taken only from that part of the order which directs the guardian to take possession of the real and personal property, all other provisions of the order remain in full force and effect and that therefore it would be an idle act to stay enforcement of the order. The line of argument appears to be that even though the portion of the order appealed from should be rendered inoperative by reason of a stay the remainder of the order would nevertheless be complied with by the guardian. Obviously, the reverse is true with respect to the collection and disbursement of money by the guardian. Without authority to take possession of either the real or personal property he would neither collect money nor disburse it. A writ of supersedeas will operate so as to require the guardian to surrender to Mrs. Sacks all real and personal property which he has taken into his possession and retained under the order in question and to refrain from interfering with the management of the real property by Mrs. Sacks and her agents.

[5] We think it is clearly a situation in which a writ should issue. It appears from a reading of section 1631 that its purpose is to insure to one who has been declared incompetent the right to manage his own property pending an appeal from the order unless he is proven incompetent to do so during that period and that, even then, control of his estate will not be taken from him and vested in a guardian except to the extent that the same is shown to be necessary in order to avoid loss or injury. If the evidence is insufficient to support a finding of probable loss or injury to the estate pending the appeal, the court is without authority to place the management of the estate in the hands of the guardian. To do so without sufficient showing, or any showing of necessity, would defeat the statutory right of the alleged incompetent to maintain his affairs in status quo until the determination of his appeal from the order of appointment. We conclude that there was no basis in fact disclosed by the evidence to justify the order directing the guardian to take possession of Mrs. Sacks' real and personal property. The validity of the terms of the order which direct the guardian to inventory the property and the claims against the ward, and to prepare a schedule of all pending litigation is not now in question. A writ of supersedeas will issue as prayed. It will operate to stay all action by L. C. Rauch, as guardian, to take or to retain possession of real or personal property of Mrs. Sacks until the final determination of the appeal from the order appointing a guardian and from the order of April 22, 1949, or until the further order of the court.

Motion to dismiss denied; demurrer overruled. Let the writ issue.

WOOD and VALLÉE, JJ., concur.

93 Cal.App.2d 72

PEOPLE v. GIN HAUK JUE.

Cr. 807.

District Court of Appeal, Fourth **District**, California.

July 22, 1949.

1. Criminal law 🔑706

In prosecution for illegal possession of opium, where defendant on direct examination denied having admitted ownership of articles found in search, denied knowledge of the contents of containers discovered, and stated that he did not know what hypodermic needles were, asking defendant on cross-examination if it were not true that he was and had been a user of narcotics, to which defendant answered in the affirmative, was not objectionable. Pen.Code, § 1323.

2. Criminal law 🔑1169(3)
Poisons 🔑9

In prosecution for illegal possession of opium, where chief of police testified that he found needles, opium and pipes in premises occupied by defendant, and that defendant denied ownership of them, the chief's further testimony that he then rolled up defendant's sleeves and found both arms full of puncture marks, apparently made by hypodermic needles, was admissible as a circumstance showing possession by the defendant of the opium found in 1949 by the officers, and such further testimony was not prejudicial in any event where defendant later admitted on the stand that he had been a user of narcotics since 1940.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Gin Hauk Jue was convicted of the illegal possession of opium and he appeals.

Affirmed.

J. M. Lopes, Visalia, for appellant.

Fred N. Howser, Atty. Gen., Howard S. Goldin, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendant was charged with and convicted by a jury of the crime of possession of opium in violation of sec. 11500 of the Health and Safety Code.

He lived by himself in Room 29 at a hotel in Visalia. On the night of January 12, 1949, the chief of police, accompanied by narcotic agents, encountered defendant at an address on Center Street. They suspicioned him as being a user of opium. At the time he insisted he did not live in that city. He was taken to his hotel and the landlady pointed out his room (No. 29) to the officers. They obtained a key and found papers bearing defendant's name and also found on defendant's dresser two whiskey glasses containing a brown liquid which appeared to be an opium solution. Directly across the hall from defendant's room was the shower room and toilet which was used by defendant as well as other guests. Under the sink in that room, in the presence of defendant, the agents found a paper-wrapped package containing a spoon, a hypodermic syringe, and a small bindle which appeared to be opium. The chief reached up through an attic opening above the shower and found three additional packages. One contained opium pipes, another needles, and a third contained a brown substance which appeared to be opium. Defendant was asked about the several articles. He admitted that the solution on the dresser was his. Analysis showed it contained about 20 c. c. of Yen Shee Suey (described as a solution containing 6½ milligrams of opium and alkaloids which contained about ⅔ of an ounce of narcotics). According to the testimony of the officers, defendant admitted that the articles found under the sink in the shower belonged to him but denied ownership of the articles found in the attic. The bindle found under the sink contained "Sam Low" which was described as "Yen Shee" with water strained through it many times, and was generally used in hypodermic form. The spoon, cotton and pipe stems contained traces of opium alkaloids. The opium found in the attic was described as a "good * * * grade of opium". Defendant was asked by the officers as to the source of his supply. He answered that he was "afraid to tell". He denied that these hypodermic needles were his. The officers pulled up his sleeves and found that both of his arms were "full of puncture marks" apparently made by hypodermic needles.

Defendant, testifying on his own behalf, admitted he deceived the officers by first stating that he did not live in Visalia; that he did so because he had not wanted any one, including his landlady, to go into his room. He denied any knowledge of the presence of the material found in the shower room.

Defendant does not question the sufficiency of the evidence to support the conviction but presents two specifications of error: (1) that the deputy district attorney was guilty of prejudicial misconduct; and (2) that the court prejudicially erred in its rulings on the admissibility of certain testimony.

[1] While on the witness stand, defendant, on direct examination, denied stating to the officers that the articles found in the shower belonged to him, denied knowledge of the contents of the packages and containers discovered, and specifically stated that the liquid found on his dresser was given to him by a friend, for pain caused by an operation on his throat; that he set it there, forgot about it, and "I didn't even touch it"; and that he didn't know what hypodermic needles were. On cross-examination the prosecutor then asked the defendant if it were not true that he was and had been since 1940, a user of narcotics. The court overruled the objection and refused to assign the remarks of the district attorney as prejudicial error. The defendant answered in the affirmative. It cannot be said, particularly in view of the testimony given by defendant on direct examination, that the ruling of the trial court was improper. Sec. 1323, Penal Code; People v. Noland, 61 Cal.App.2d 364, 143 P.2d 86.

[2] During the direct examination of the chief of police, the prosecutor asked if he rolled up the defendant's sleeves and examined his arms. Objection was made to the questions propounded on this subject as being immaterial. In answering these general questions, the chief testified, over objections, that he found both arms were full of puncture marks, apparently made by hypodermic needles. Defendant's objection is that he was charged only with possession of narcotics and to inject this testimony into the case was highly prejudicial, citing People v. Duvernay, 43 Cal. App.2d 823, 111 P.2d 659; and People v. Gilliland, 39 Cal.App.2d 250, 261, 103 P.2d 179.

This testimony was given after the chief had testified that he found the needles, opium and pipes in the opening to the attic, and after defendant denied ownership of them. He then rolled up defendant's sleeves and found evidence of the use of such needles. This evidence was clearly admissible as a circumstance showing "possession" by defendant of the opium there found by the officers. People v. Casas, 77 Cal.App.2d 255, 175 P.2d 19.

In People v. Noland, supra, it was held that in a prosecution for unlawful possession of narcotics, proof of the possession of a syringe and hypodermic needle, which are customarily used in the administration of the drug, and which were found concealed with the drug, were relevant to the main issue of possession of the narcotics. Moreover, defendant, while on the witness stand, finally admitted that he had been a user of narcotics since 1940. It does not appear that he was erroneously prejudiced by the testimony produced. People v. Noland, supra; People v. Booth, 72 Cal.App. 160, 166, 236 P. 987; People v. Bennett, 65 Cal. 267, 3 P. 868; People v. Ives, 17 Cal.2d 459, 465, 110 P.2d 408.

Judgment and order affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

93 Cal.App.2d 201

GOLDSTEIN v. ROGERS (CITY OF LOS ANGELES, Intervenor).

PAGH v. ROGERS (CITY OF LOS ANGELES, Intervenor).

Civ. 16750, 16751.

District Court of Appeal, Second District,
Division 3, California.
July 30, 1949.

1. Automobiles 🔑175(4), 210

A finding of negligence in operation of authorized emergency vehicle cannot be predicated upon violations of speed regulations alone, where required warning has been given. Vehicle Code, §§ 454, 510.

2. Appeal and error 🔑1064(1)
Automobiles 🔑246(23)

In actions to recover for injuries sustained by driver and occupant of authorized emergency vehicle when it collided with defendant's automobile at intersection controlled by traffic signals, instructions which authorized jury to predicate finding of contributory negligence merely upon determination that plaintiffs drove at speed greater than would have been reasonable under circumstances for a non-exempt vehicle, or at a speed which, if maintained by ordinary vehicle, would have been dangerous to safety of persons or property, constituted prejudicial error. Vehicle Code, §§ 454, 510.

3. Trial 🔑253(4)

In actions to recover for injuries sustained by driver and occupant of authorized emergency vehicle when it collided with defendant's automobile at intersection controlled by traffic signals, instructions which left to jury, without qualification, issue whether plaintiffs were precluded from recovering from defendant because of failure to drive "with due regard for safety of all persons using the highway" or because their conduct amounted to an "arbitrary exercise of the privileges" conferred by statute upon operators of authorized emergency vehicles, was erroneous. Vehicle Code, § 454.

4. Automobiles 🔑175(5), 210

Duty of operator of authorized emergency vehicle to drive with due regard for safety of others, is met when a suitable warning of his approach is given by siren and red light, thereby affording to others a reasonable opportunity to yield right of way. Vehicle Code, § 454.

5. Automobiles 🔑210

Driver and occupant of authorized emergency vehicle which collided with another automobile at intersection controlled by traffic signals could not have been found guilty of contributory negligence unless jury determined from evidence that they had failed to sound siren in a manner that would have afforded others a reasonable opportunity to yield right of way, or that they had maintained speed which under circumstances constituted arbitrary exercise of their right of way privilege. Vehicle Code, §§ 454, 476, 510.

6. Automobiles 🔑210

If siren on authorized emergency vehicle was sounded in manner which afforded others a reasonable opportunity to yield right of way, driver and occupant of authorized emergency vehicle which collided with another automobile at intersection controlled by traffic signal could not be held negligent because of their speed alone, nor because of their failure to drive on right-hand half of highway or to stop at intersection because traffic signal was against them. Vehicle Code, §§ 454, 476, 510, 525(a).

7. Automobiles 🔑210

If driver of authorized emergency vehicle observed that motorist was not yielding right of way when he approached intersection with traffic signal against him and that a collision would probably result unless he slackened his speed, failure to slacken speed would amount to arbitrary exercise of the right of way privilege and a failure to drive with due regard for the safety of others. Vehicle Code, §§ 454, 476, 510, 525(a).

◆

Appeal from Superior Court, Los Angeles County; Wilbur C. Curtis, Judge.

Consolidated actions by Arthur Goldstein and Merle Pagh against Andrew Gibbs Rogers for injuries sustained in automobile collision, wherein the City of Los Angeles, as employer of plaintiffs, filed complaints in intervention for recovery of medical expenses, disability compensation paid, and property damage. From adverse judgments, the plaintiffs and intervenor appeal.

Reversed.

Cantillon & Glover, Los Angeles, for appellant Merle Pagh.

Walter H. Young, Los Angeles, for appellant Arthur Goldstein.

Ray L. Chesebro, City Attorney, Edwin F. Shinn, Deputy City Attorney, Los Angeles, for intervenor.

Jones, Thompson & Kelly, Los Angeles, for respondent.

SHINN, Presiding Justice.

Plaintiffs, Merle Pagh and Arthur Goldstein, appeal from separate and adverse judgments rendered in their consolidated personal injury actions upon a jury verdict in favor of defendant Andrew Gibbs Rogers. The City of Los Angeles, which, as employer, filed complaints in intervention for the recovery of medical expenses, disability compensation paid, and property damage, likewise appeals from the separate adverse judgments rendered against it. Plaintiff Pagh incidentally attempts to appeal also from the court's non-appealable order denying a new trial.

On the morning of April 2, 1946, plaintiffs, who are Los Angeles police officers, were assigned to general traffic and traffic investigation duty in a Los Angeles police car. The car was distinctively painted in black and white, and was equipped with a siren and red light in good working condition, as well as a two-way radio. Pagh was driving, with Goldstein riding beside him on the front seat. Shortly before 8:00 A.M. they received a radio call from the police dispatcher, directing them to proceed to "83rd and Sepulveda, traffic accident, call ambulance if needed. Code 3." The official instructions of the Police Department defined the phrase "Code 3" as follows: "A call accompanied by the statement 'Code Three' is an emergency call and is to be answered immediately and in a manner which will enable the officer to get to the scene as quickly as possible with safety. When the call is assigned to a vehicle equipped with a red light and siren such equipment shall be used to obtain the right-of-way." Upon receiving the call, Pagh immediately started for 83rd Street and Sepulveda, turning on his siren and red light. While proceeding south on Sepulveda, as he approached the intersection of National Boulevard Pagh swung over to the left side of the road to go around several southbound cars stopped there waiting for the red traffic signal to change. A gas station partially obstructed his view to the left from which direction defendant's car was approaching. Pagh testified that he first saw defendant's car about 60 or 70 feet away as he, Pagh, was about to enter the intersection. He applied his brakes and there was evidence that his car was traveling at a slow speed when the cars collided near the center of the intersection. At the time of the collision, the signal was green for traffic on National Boulevard. Rogers testified that he was driving west on National Boulevard with his windows rolled up and the radio playing; he didn't see the police car or any cars at all on Sepulveda Boulevard prior to the accident; and he made no effort to stop his car at any time before the actual collision because he "saw no reason to." It was admitted in defendant's answer that at the time of the collision, plaintiff Pagh was responding to an emergency ambulance call in the performance of his duties as police officer.

At the outset, we may put to one side respondent's contention that the jury might have based its verdict on a finding that plaintiffs did not have a siren and red light operating, and hence were not entitled to the privileges attaching by statute to operators of emergency vehicles. Vehicle Code, sec. 454. The testimony of both plaintiffs that the light and siren were on was corroborated by that of several eye-witnesses. Mrs. Grasmehr, a housewife, heard the siren from two blocks away. Carl Hunter, who was stopped at the intersection facing north on Sepulveda, saw the red light and heard the siren clearly when the police car was 400 or 500 feet away. Raymond Swayze and Frank Hillyer, who were also stopped at the traffic signal, heard the siren clearly even before they saw the police car itself, although the latter had his auto radio playing. Merton Overturf, a police mechanic, found the red light still burning when he arrived at the scene of the accident. Clyde Dugger, a police sergeant, saw the red light still burning after the accident, from a half mile away, as he approached the scene. William J. Calder, defendant's witness, heard the siren "faintly" before he saw the police car, and testified that the red light was burning. Although witness Swayze made no observation as to whether there was a red light on plaintiffs' car, and Hillyer couldn't recall whether he saw a red light or not, neither testified that there was no such light. Although defendant stated he did not see the police car, he was not asked and did not testify as to whether or not he heard the siren. It is apparent that the evidence would not have supported a finding, if one were made, that plaintiffs did not have the siren and red light in operation prior to the accident.

As grounds for reversal, appellants claim prejudicial error in the giving of certain instructions and in the court's refusal to give other instructions requested by them. In the course of the charge to the jury, the court gave the following instruction based on section 510 of the Vehicle Code: "The basic speed law of this state is as follows: 'No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent, having due regard for the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property.' A violation of this basic rule is negligence." The jury was next instructed as to the meaning of traffic signals and the duties of motorists in connection therewith, Vehicle Code, sec. 476; and as to the requirement that vehicles be driven on the right half of the roadway, Vehicle Code, sec. 525(a). The court then gave an instruction requested by appellants, but modified by the court to read as follows: "The Court Instructs You: Section 454 of the Vehicle Code of the State of California provides as follows: 'The driver of an authorized emergency vehicle shall be exempt from those provisions of this code herein set forth under the following conditions: (a) Said exemptions shall apply whenever any said vehicle is being driven in response to an emergency call or when used in the immediate pursuit of an actual or suspected violator of the law, or when responding to but not upon returning from a fire alarm. (b) Said exemptions shall apply only when the driver of said vehicle sounds a siren as may be reasonably necessary and the vehicle displays a lighted red lamp visible from the front as a warning to others. Under the circumstances hereinabove stated, any such driver shall not be required to observe those regulations contained in Chapter 3 or in Chapters 6 to and including Chapter 13 of Division 9 of this code, but said exemptions shall not relieve the driver of any said vehicle from the duty to drive with due regard for the safety of all persons using the highway, nor shall the provisions of this section protect any such driver from the consequences of an arbitrary exercise of the provisions as declared in this section.' The provisions from which an authorized emergency vehicle is exempt include sections 476 and 525 (a) of the Vehicle Code, just read to you and relating to obedience to traffic signals and driving on the right half of the highway." As requested by appellants, the last paragraph of this instruction would have read as follows: "The provisions from which an authorized emergency vehicle is exempt cover the following laws: These in connection with signals, basic speed laws, driving on the righthand side of the highway and overtaking and passing cars, turning and starting and signals on stopping, rules on right-of-way, pedestrians' rights, rules in regard to safety zones, special stops at railroad crossings, etc. Thus, while operating said emergency vehicle with light and siren operating plaintiffs were not obligated by law to comply with the above named provisions." Appellants claim the instruction given, as modified by the court, was prejudicially erroneous in that it omitted to inform the jury that plaintiffs were exempt from the provisions of the basic speed law. Although plaintiffs' proposed instruction was objectionable, since it introduced several immaterial matters having no relation to the evidence, the objection to the court's modification is well taken.

[1, 2] Section 454 of the Vehicle Code expressly relieves the operator of an emergency vehicle being driven in response to an emergency call from compliance with the regulations contained in Chapter 6 of Division 9 of the Code, where, as a warning, a siren is sounded and a red lamp is displayed. Chapter 6 is entitled, "Speed Laws," and includes section 510, the basic speed law of the state. Since the decision in Lucas v. City of Los Angeles, 10 Cal.2d 476, 75 P.2d 599, it must be considered as settled law that a finding of negligence in the operation of an emergency vehicle cannot be predicated upon violations of speed regulations alone, where the required warning has been given. See also, Reed v. Simpson, 32 Cal.2d 444, 450–451, 196 P.2d 895; Coltman v. City of Beverly Hills, 40 Cal.App.2d 570, 573, 105 P.2d 153. The error in the instructions is apparent. They authorized the jury to predicate a finding of contributory negligence merely upon a determination that plaintiffs drove at a speed greater than would have been reasonable under the circumstances for a nonexempt vehicle, or at a speed which, if maintained by an ordinary vehicle, would have been dangerous to the safety of persons or property. By its instructions, the court denied plaintiffs the benefit of a privilege expressly conferred upon operators of emergency vehicles by the legislature. Similar instructions were held to be erroneous in Raynor v. City of Arcata, 11 Cal.2d 113, 117–118, 77 P.2d 1054. That the error was prejudicial cannot be doubted. There was a conflict in the evidence as to the speed of the police car as it entered the intersection. Several witnesses estimated it at 20 to 25 miles per hour, and one at 40 or 50 miles per hour. The jury could have inferred that the speed with which plaintiffs' emergency vehicle entered the intersection against the red traffic signal exceeded the limits prescribed by the basic speed law, and hence was negligent, despite the operation of a siren and red light.

[3, 4] Appellants contend further that the instructions were erroneous in that they left to the jury, without qualification or explanation, the issue whether plaintiffs were precluded from recovering from defendant because of a failure to drive "with due regard for the safety of all persons using the highway" or because their conduct amounted to an "arbitrary exercise of the privileges" conferred by the section. This contention is likewise tenable. It has been held that the operator's duty to drive with due regard for the safety of others is met when a suitable warning of his approach is given by siren and red light, thereby affording to others a reasonable opportunity to yield the right-of-way. Lucas v. City of Los Angeles, supra, 10 Cal.2d at page 483, 75 P.2d at page 602; Balthasar v. Pacific Elec. Ry. Co., 187 Cal. 302, 311, 202 P. 37, 19 A.L.R. 452. On the other hand, as the Lucas case points out, an "arbitrary exercise of the privileges" of the statute refers to instances of conduct falling clearly without the scope of the statutory purpose, and which, for that reason, is not within its protection. Among other examples there suggested, are cases where, having discovered the peril in which another has unknowingly become involved despite the operation of the required warning devices, the operator fails to act to avoid the otherwise inevitable collision; or where the operator is guilty of wilful misconduct.

[5-7] Under the facts of the present case plaintiffs could not have been found guilty of contributory negligence unless the jury determined from the evidence that they had failed to sound a siren in a manner that would have afforded others a reasonable opportunity to yield the right-of-way, or that they had maintained a speed which under the circumstances constituted an arbitrary exercise of their right-of-way privilege. If the siren was sounded in a manner which afforded others a reasonable opportunity to yield the right-of-way plaintiffs were not to be held negligent because of their speed alone, nor their failure to drive on the right-hand half of the highway, or to stop at the intersection because the traffic signal was against them. In such circumstances they would not have been guilty of driving without due regard

for the safety of others nor of an arbitrary exercise of their right-of-way privilege. If, however, the plaintiff driver had observed that defendant was not yielding the right-of-way, and that a collision would probably result unless plaintiff driver slackened his speed, the failure to slacken speed would have amounted to the arbitrary exercise of the right-of-way privilege, and a failure to drive with due regard for the safety of others.

By its failure to instruct the jury as to the proper scope of section 454 the court, in effect, permitted them to find plaintiffs contributorily negligent for driving with what the jury, in its own discretion, might determine to be a lack of due regard for public safety or an arbitrary exercise of the right-of-way privilege. The absence of such qualifying instructions, explaining the restricted meaning to be ascribed to the "due regard" and "arbitrary exercise" phrases, rendered the instruction as given highly prejudicial to plaintiffs. Although neither of the two explanatory instructions requested by plaintiffs on this point is entirely free from criticism as to form, and may have been rejected on that ground, some appropriate instructions thereon should have been given. The mentioned errors in the instruction require a reversal of the judgments.

The attempted appeal from the order denying a new trial is dismissed. The judgments are reversed.

WOOD and VALLÉE, JJ., concur.

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93 Cal.App.2d 253

CASEY v. BONELLI et al.

Civ. 13989.

District Court of Appeal, First District, Division 2, California.

Aug. 5, 1949.

1. Declaratory judgment 🔑216

Statutory provision that no injunction, writ of mandate, or other legal or equitable process shall issue to prevent or enjoin collection of any sales or use taxes, prevents resort to a declaratory judgment to determine that such taxes should not be collected. Revenue and Taxation Code, §§ 6561, 6562, 6931.

2. Declaratory judgment 🔑215

Former president of dissolved corporation was not entitled to a declaratory judgment in action against state board of equalization that board had no claim for sales and use taxes against corporation, that any judgment obtained by board against dissolved corporation would be void, and that former president was not required to object to determination of board that corporation was liable for sales and use taxes. Revenue and Taxation Code, §§ 6561, 6562, 6931.

◆

Appeal from Superior Court, City and County of San Francisco; Edward P. Murphy, Judge.

Action by George W. Casey against William G. Bonelli and others, as members of the State Board of Equalization, and the State Board of Equalization, for a declaratory judgment that defendants have no claim which can be asserted for sales and use taxes against a dissolved corporation of which plaintiff had been the president, that plaintiff be instructed that he is not required to defend and object to determination of the board that corporation was liable for sales and use taxes, and for general relief. From an adverse judgment, the plaintiff appeals.

Judgment affirmed.

Athearn, Chandler & Farmer, Hoffman & Angell, F. G. Athearn, Leigh Athearn, San Francisco, for appellant.

Fred N. Howser, Atty. Gen., James E. Sabine, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

Plaintiff appeals from a judgment for defendants entered after sustaining a demurrer to his complaint without leave to amend. The complaint alleges that on December 23, 1943 plaintiff was president and a member of the board of directors of United Parcel Service of San Francisco, a California corporation; that on that date by voluntary proceedings the corporation was dissolved; that on April 7, 1948 the defendants issued a notice of determination under the Sales and Use Tax Law directed to said corporation purporting to determine that between January 1, 1935 and December 15, 1943 said corporation became liable for a sales and use tax in a specified amount; and that plaintiff is informed and believes that said determination is in error and that said corporation has no unpaid sales or use tax liability to the State of California. The complaint then alleges that: "(P)laintiff is unable to determine whether his fiduciary duty as a director and officer of said dissolved corporation requires him to take steps on its behalf, under sections 6521 (6561) and 6562 of the Revenue and Taxation Code, to establish before the defendants that said determination is erroneous and incorrect, or whether he can, consistent with such fiduciary duty, permit such determination to become final and rely upon the fact that any judgment obtained by defendants against said dissolved corporation would be void."

The complaint alleges that by reason of the foregoing an actual controversy exists between the parties as to their legal rights and duties and asks for declaratory relief:

"1. * * * that the defendants have no claim * * * which can be asserted against said dissolved corporation.

"2. That plaintiff be instructed that he is not required * * * to * * * defend and object to said determination before the defendants."

3. For general relief.

[1] Under section 6931 Revenue and Taxation Code no injunction, writ of mandate or other legal or equitable process shall issue to prevent or enjoin the collection of any sales or use tax. The decisions are explicit that this and similar provisions prevent the resort to a declaratory judgment to determine that such tax should not be collected. Louis Eckert Brewing Co. v. Unemployment Reserves Comm., 47 Cal.App.2d 844, 119 P.2d 227; In re Estate of Schneider, 62 Cal.App.2d 463, 145 P.2d 90; cf. Modern Barber Colleges v. California Emp. Stab. Comm., 31 Cal.2d 720, 192 P.2d 916.

The allegation of the complaint quoted above makes it clear that plaintiff is seeking a judicial determination that he is under no fiduciary duty to take the steps provided for in secs. 6561 and 6562 Rev. & Tax. Code based on a further adjudication that "any judgment obtained by the defendants against said dissolved corporation would be void."

[2] Appellant argues that the question is not one of tax law but of corporate law and that the adjudication is necessary for his protection. However rationalized the fact cannot be disguised that appellant seeks a binding adjudication against the Board of Equalization and its members that he need take no steps because the tax cannot be legally collected from the dissolved corporation. Faced by such an adjudication respondents would be effectively barred from collecting the tax.

Judgment affirmed.

GOODELL, J., concurs.

93 Cal.App.2d 54

PEOPLE v. WALKER.

Cr. 2098.

District Court of Appeal, Third District, California.

July 22, 1949.

Rehearing Denied Aug. 6, 1949.

1. Criminal law 🔑1023(9, 13)

Where defendant was found guilty of libel and judgment was suspended, purported appeal from judgment would be dismissed, and only appeal from order denying defendant's motion for a new trial would be considered. Pen.Code, § 1237.

2. Criminal law 🔑1156(1)

Function of an appellate court on an appeal from an order either granting or denying motion for a new trial in a criminal prosecution is limited to a review of record to determine whether trial court abuses discretion.

3. Criminal law ⚷641(1)

Where four different attorneys were appointed by trial court to represent defendant in prosecution for libel and in each instance defendant became dissatisfied with attorneys appointed to represent him and made no protest to their withdrawal, coupled with expression of desire to handle case in his own fashion, defendant was not deprived of right to counsel but waived his right thereto by his own conduct. Pen. Code, § 686, subd. 2; Const. art. 1, § 13.

4. Libel and slander ⚷145

Circular addressed to voters of county requesting that voters not vote for certain candidate for public office followed by accusations of criminal acts was libelous per se. Pen.Code, §§ 248, 249; Civ.Code, § 45a.

5. Criminal law ⚷1172(1)

Erroneous instruction in prosecution for libel would not be prejudicial in view of constitutional provision that jury have right to determine law and facts in cases of criminal libel. Pen.Code, §§ 249, 251; Const. art. 1, § 9.

6. Libel and slander ⚷159

In a prosecution for libel, jury is not bound to follow trial court's instructions. Pen.Code, §§ 249, 251; Const. art. 1, § 9.

7. Libel and slander ⚷156

Evidence was sufficient to sustain conviction for libel. Pen.Code, §§ 249, 251.

8. Libel and slander ⚷148

Where defendant did not act in good faith but from spirit of revenge in publishing libelous circular, defendant could not avail himself of privilege under statute providing that if matter charged as libelous is true and was published with good motives and for justifiable ends, party may be acquitted. Pen.Code, §§ 249, 251.

9. Criminal law ⚷1037(2)

Alleged objectionable remarks of prosecuting attorney in prosecution for libel would not be considered on appeal where defendant did not request that such statement be stricken and jury was admonished to disregard it. Pen.Code, § 249.

10. Criminal law ⚷1042

Defendant who failed to exercise right to reject terms of probation which were granted in accordance with his request and to demand that judgment be entered and sentence imposed, waived his objections thereto and was foreclosed from raising them on appeal.

Appeal from Superior Court, Sonoma County; Lilburn Gibson, Judge.

C. R. Walker was prosecuted for libel. Verdict of guilty, and from a motion denying a new trial, defendant appeals.

Affirmed.

W. R. Walker, Santa Rosa, for appellant.

Fred N. Howser, Atty. Gen., Doris H. Maier, Deputy Atty. Gen., for respondent.

PER CURIAM.

Defendant C. R. Walker was indicted by the grand jury of Sonoma county on two counts of violation of section 249 of the Penal Code. Count one alleged that on November 1, 1947, the defendant wilfully, unlawfully and maliciously and with intent thereby to injure the persons therein named and expose them to public hatred, contempt and ridicule, published and circulated the following circular:

"To the Citizen Voters and Honest People of Sonoma Co., Calif.

"Greetings:

"On Nov. 4, 1947, You Will be Called Upon to Select a Person to Replace the Late Senator Slater. This, You Surely Know is a Post of High Trust and Responsibility and Should be Filled by a Person of Unquestionable Reliability, I Decline to Support or Aid C. J. Tauzer to Secure His Election to This or Any Other Post of Trust or Confidence, for, Reasons, To Wit:—

"1—I Again Openly Accuse C. J. Tauzer of Criminal Conspiracy to Defraud: Perjury: Falsification of Public Records, Etc.

"2—C. J. Tauzer Has Been Arrested According to Law, But Due to His Trickery and Assistance of Certain Officials, He Has Avoided Prosecution and is Now a Practical Fugitive From Justice. To Avoid Error, I Name:—Judge Fulwider, Judge Comstock, Judge Geary, the District Attorney's Office, Sheriff Patteson, Chief Flohr of Santa Rosa, as a Group Directly Concerned in the C. J. Tauzer Case, and Further Operate in Such a Manner, Together With the County Probation Office, as to Furnish Practical If Not Actual Protection to Criminal Law Violators.

"I Welcome Honest, Open, Grand Jury Investigation.

"Please Vote Against C. J. Tauzer
"C. R. Walker"

Count two accused the defendant of violating section 249 of the Penal Code by the wilfull and malicious publication and circulation of the foregoing circular on November 6, 1947, with the intent of thereby injuring the persons named therein and exposing them to public hatred and ridicule.

The defendant pleaded not guilty to each of the counts set forth in the indictment. The case came on regularly for trial by jury which returned a verdict of guilty on both counts. Defendant's motion for a new trial was denied. Thereupon the court suspended judgment and sentence and granted defendant probation for a period of three years. The defendant then filed a timely notice of appeal which specified that the appeal was taken from the "judgment" and from the order denying his motion for a new trial.

[1] Preliminarily, it should be observed that no judgment of conviction was rendered against the defendant. The record discloses that judgment and sentence were suspended and the defendant granted probation. Under these circumstances the purported appeal from the "judgment" must be dismissed, People v. Guerrero, 22 Cal.2d 183, 137 P.2d 21, which leaves only the appeal from the order denying defendant's motion for a new trial, Section 1237 Penal Code.

[2] The function of an appellate court upon an appeal from an order either granting or denying a motion for a new trial is limited to a review of the record to determine whether the trial court abused its discretion. As this court stated in MacKenzie v. Angle, 82 Cal.App.2d 254, 186 P.2d 30, 32, "It is settled that a motion for a new trial is, to a large extent, addressed to the sound legal discretion of the court to which the application is made; and it has often been said that its action will not be disturbed on appeal in the absence of a clear and affirmative showing of a gross, manifest or unmistakable abuse of discretion." A review of the record in the light of the rule as stated fails to disclose such an abuse of discretion by the trial court and hence the order denying said motion must be affirmed.

[3] Appellant's contention that he was deprived of the right to counsel in violation of Article 1, section 13 of the Constitution of the State of California and section 686, subdivision 2 of the Penal Code likewise cannot be sustained. The record discloses that four different attorneys were appointed by the trial court to represent the defendant. In each instance the defendant became dissatisfied with the counsel so appointed to represent him. Subsequently when each of said counsel requested permission to withdraw from the case defendant made no protest. In fact upon the occasion of the withdrawal of the last appointed counsel he expressed his desire to handle the case in his own fashion. Under such circumstances it cannot be said that the defendant was deprived of counsel, but that by his conduct he waived his right thereto. In re Connor, 15 Cal.2d 161, 99 P.2d 248; People v. O'Neill, 78 Cal.App. 2d 888, 179 P.2d 10. The defendant displayed marked ability in conducting his own defense and the record does not warrant any inference other than that the waiver was an intelligent one by a person possessing the requisite capacity to waive such right.

[4–6] Appellant's contention that the judge erred in instructing the jury that the message to the voters and honest people of Sonoma county is libel per se, is devoid of merit. Section 248 of the Penal Code provides that "A libel is a malicious defamation, expressed either by writing, printing, or by signs or pictures, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue, or reputation, or publish the natural or alleged defects of one who is alive, and thereby to expose him to public hatred, contempt, or ridicule." Section 45a of the Civil Code provides in part that "a libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact, is said to be a libel on its face." It is apparent from the face of the circular distributed by the defendant that it contains defamatory matter concerning the individuals therein named. Moreover, even if it be conceded that the foregoing instruction was erroneous we cannot presume that the defendant was prejudiced thereby in view of the provisions in the Constitution that in cases of criminal libel "the jury shall have the right to determine the law and the fact." Cal. Const. Art. I, sec. 9; Penal Code, sec. 251. In the early case of People v. Seeley, 139 Cal. 118, 72 P. 834, it was held that although the judge may instruct the jurors on the law, they are not bound to follow his instructions.

[7, 8] Appellant's attack upon the sufficiency of the evidence to sustain the verdict of the jury is likewise without merit. A detailed summary of the evidence can serve no purpose other than to perpetuate the libelous matter in the reports and for that reason is omitted. It is sufficient to note that the entire record has been carefully considered and that such record amply supports the verdict of the jury in each instance. The defendant admitted the publication of said circular as charged, and while he believed the matters therein set forth to be true such belief has no foundation in fact. It further appears that defendant was not acting in good faith but from a spirit of revenge nursed over a period of years induced by his belief that his legal rights had been imposed upon. Under such circumstances the defendant cannot avail himself of the privilege contained in section 251 of the Penal Code.

The defendant further complains that prosecution witnesses were withdrawn before he could cross-examine them and that other witnesses were withdrawn during the course of their cross-examination. Such contention is not sustained by the record nor is the similar contention that defendant's witnesses were prevented from testifying.

[9] During the course of his argument to the jury the prosecutor in substance informed the jury that an acquittal of defendant would in effect amount to a conviction of the libeled officials. The defendant asserts that such argument constituted prejudicial misconduct. The record discloses that the defendant did not request that such statement be stricken and the jury admonished to disregard it. Furthermore, the defendant attempted to prove the truth of his publication and thereby put the integrity of the officials in issue. Such statement would therefore seem justified and in any event the defendant waived his objection to it by failing to assign it as error and requesting the court to instruct the jury to disregard it. People v. Hunter, 49 Cal.App.2d 243, 121 P.2d 529; People v. Codina, 30 Cal.2d 356, 181 P.2d 881.

[10] Also without merit is the defendant's attack upon the terms of his probation. The terms thereof are reasonable and under the circumstances presented herein, liberal and lenient. Moreover, the defendant had the right to reject the terms of the probation which was granted in accordance with his request, and to demand that judgment be entered and sentence imposed. Lee v. Superior Court, 89 Cal.App.2d 716, 201 P.2d 882. Having failed to do so he may be deemed to have waived his objections and is foreclosed from raising them on appeal.

The remaining contentions of the defendant are not such as to warrant consideration by a reviewing court.

The order appealed from is affirmed.

93 Cal.App.2d 59

SANBORN et al. v. FEDERAL CROP INS. CORPORATION.

Civ. 3799.

District Court of Appeal, Fourth District, California.
July 22, 1949.

1. Insurance 🔑13½

In action against Federal Crop Insurance Corporation, evidence sufficiently established that the damage to the crop resulted from causes insured against.

2. Insurance 🔑13½

In action against Federal Crop Insurance Corporation, evidence was sufficient to support implied finding that plaintiffs had substantially complied with the requirements of the contract with respect to notice, except as to probable loss from worm damage which jury had apparently failed to include in its verdict against defendant.

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Appeal from Superior Court, Kings County; Clark Clement, Judge.

Action by Caryl C. Sanborn and F. R. Squire, against Federal Crop Insurance Corporation. From a judgment for plaintiffs, the defendant appeals.

Judgment affirmed.

James M. Carter, United States Atty., Ernest A. Tolin, Chief Asst. United States Atty., Clyde C. Downing, Chief, Civil Division, Office of U. S. Atty., Herschel E. Champlin, Asst. United States Atty.; John S. Griffin, Atty. U. S. Department of Agriculture, Los Angeles, for appellant.

David S. Folsom, Corcoran, for respondents.

BARNARD, Presiding Justice.

This is an action to recover on an insurance contract covering a cotton crop to be grown by the plaintiffs on 70 acres of land during the 1946 season. The contract insured the plaintiffs, on an average yield basis, against loss due to unavoidable causes including damage resulting from frost, insect infestation and failure of the water supply. The contract also excepted from its coverage any loss caused by neglect of the insured, including failure to follow good farming practices or failure to properly apply irrigation water if available.

There was an admitted partial crop failure, and there is no dispute as to the extent or value of the shortage as compared with the average yield. The plaintiffs sued for $9,005.20, alleging that this shortage was due to unavoidable causes, and that they had done everything required of them by the contract and the rules and regulations of the defendant and United States Department of Agriculture. The answer denied these allegations and alleged that any loss resulted from a failure to follow good farming practices. It was further alleged that if any loss occurred through unavoidable causes, the plaintiffs had failed to give a written notice of probable loss immediately thereafter and before the crop was harvested. A jury returned a verdict in favor of the plaintiffs for $6,104.40, less $511.94 which was admittedly due to the defendant upon its counterclaim. Judgment was entered accordingly, and the defendant has appealed.

The insurance contract provided, as a condition precedent to any liability, that the insured should establish that any loss claimed was directly caused by one or more of the hazards insured against, and was not caused by any of the hazards not insured against. The appellant first contends that the respondents did not sustain the burden of proof thus resting upon them. In effect, it is contended that the evidence is not sufficient to support the implied finding that the amount of loss or damage to this crop, found by the jury, was caused by hazards insured against and was not caused by hazards not insured against.

[1] The appellant contends that the evidence shows that this cotton was planted too late; that the land was infested with Johnson and Bermuda grass; that respondents did not follow good farming practices in attempting to keep these grasses down; that they did not properly irrigate the land; that their failure to obtain water for another irrigation during August was caused by their own act, and not by an inability to secure water; and that they did

not establish that their loss did not result from their own careless farming. While a part of the evidence is to that effect, the evidence as a whole is sharply conflicting in this regard. It rather conclusively appears that there was an acute shortage of water during the whole of August. There is evidence that the respondents tried to get water for an irrigation in August and that water was unavailable until August 29 and then not in sufficient quantity. There is also evidence that the land was properly farmed in the usual manner. This entire question was one of fact for the jury. There was evidence of damage to the crop from lack of water, from wire worms or cut worms earlier in the season, and from a heavy frost early in November; that this frost resulted in severe damage throughout that area; and that this fact was known to the appellant's local representatives. While the percentage of loss attributable to each of the three causes above named was estimated differently by various witnesses at various times, the evidence as a whole is amply sufficient to establish that the damage to the crop resulted from these causes, taken together, and not from causes which were not insured against, and is sufficient to support the verdict of the jury insofar as those questions are concerned. Nothing more than a conflict in the evidence appears in this connection.

It is next contended that no oral notice of probable loss was ever given to the corporation and that, in any event, it was not notified of any probable loss until after the cotton had been harvested and removed from the land. One paragraph of the insurance contract reads:

"Unless otherwise provided by the Corporation, if a loss is probable, notice in writing shall be given the Corporation at the office of the county association immediately after any material damage to the insured crop and before the crop is harvested, removed or any other use is made of it. Any such notice shall be given in time to allow the Corporation to make proper inspection."

The cotton crop insurance regulations of 1946, which were admittedly a part of the contract, included an instruction manual. One paragraph of this manual reads:

"The insured is to notify the county committee of damage to, or probable loss of, his cotton crop. For the protection of the insured it is desirable that such notice be given in writing. However, any manner or form of notice acceptable to the county committee will be accepted by the Corporation. When such notice is received, the county committee should advise the insured that acreage of cotton must not be put to another use without the written consent of an authorized representative of the Corporation if the damage occurred after it was too late to replant. The county committee should likewise advise the insured that they will inform the Director of the report of damage to the insured's crop."

Written notice of probable loss to be given at the office of the county association before the crop is harvested and in time to allow a proper inspection to be made is thus provided for "unless otherwise provided by the Corporation." Such other provision is made by the part of the regulations above quoted. A large measure of authority is thus delegated to the county committee with a corresponding duty on its part, and the question here is whether the evidence supports the implied finding that the respondents gave such a notice of probable loss as to substantially and sufficiently comply with these provisions.

One of the respondents testified that there was a shortage of water about the first of August; that they asked the irrigation district for water for the final irrigation on or about the first part of August; that water was not available for them until about the first of September, and then in such a small volume that it was impossible to do any irrigating; that "I notified the Triple AAA office"; and that he talked to the secretary at the local office on August 29 and "told him the circumstances." He further testified that he asked the secretary's advice as to whether it would do more harm than good to irrigate at that late date. The appellant now seeks to interpret this evidence as a mere asking for advice, but the jury was entitled to consider it as a notice of probable loss from water shortage.

Of course, at that time, no one could know or estimate the extent of the probable loss from that cause. This witness further testified that he first discovered that frost damage was likely to occur early in November; that he was not sure but he thought that he talked to the secretary at the local office about this matter at that time; that the frost damage was noticeable late in the year; that everyone in the area had considerable frost damage; that he talked to the secretary at the local office about this loss to "that crop and all other crops combined"; that the adjuster later came into the field where he could "look at the bolls on the crop that had turned black from frost damage"; and that the adjuster made his own estimate "of the crop that was lost by water, by frost and by worms." The other respondent testified that this adjuster went to the field with him and asked him many questions but not about percentages, and that he did not remember whether the adjuster asked him what he thought about the frost damage but that "You could plainly see it. The bolls were all standing on the cotton, rotted."

This adjuster testified that he went out and looked over the ranch in the latter part of December and that he prepared the first proof of loss, which is dated January 7, 1947. He also testified that he made a written report to the appellant in which he stated that he had checked the acreage; that all cotton was picked; that the respondents were very short on water; that the wire worms did a lot of damage; that the early frost did some damage; and that "No damage due to causes not insured against." The secretary of the local office testified that he made out a notice of probable loss about Christmas time. The harvest was completed on December 24. The state director for the appellant testified that he received from the county office some time during the latter part of the year a notice of probable loss to the plaintiffs, made out on the regular form provided and used to report "losses or probable damage to crops."

The claim under the first proof of loss dated January 7, 1947, was rejected and the appellant sent another adjuster to the respondents with a revised proof of loss, prepared by the appellant, wherein the percentages as to the amount of loss from these three causes were considerably changed, and in which it was provided that the claim of loss be reduced 25% because of "failure to properly irrigate the crop." This adjuster was told to obtain the respondents' signature to this new proof of loss and testified that he understood the claim would be paid if it was signed. The respondents refused to sign this changed proof of loss whereupon the adjuster assisted them in preparing a third proof of loss, which was forwarded to the appellant. In March the respondents received notice of final rejection of their claim, "because of failure to comply with (the regulations) in that proper farming practices were not followed."

The claims were rejected because of the amounts claimed for the different causes of damage and the relative damage attributable to the various causes. No objection was made as to the form of the notice of probable loss, or to the fact that no such notice had been given. This point was first raised after this action was filed. With respect to the damage from lack of water, the evidence is sufficient to sustain the implied finding that a notice of probable loss was given in a "manner or form" which was "acceptable to the county committee" and which it accepted and acted upon. If no notice was given, as appellant now contends, it seems strange that the local office sent in a form giving notice of probable loss and the state office sent out an adjuster with instructions to investigate and report on the amount of the loss. While the evidence of notice with respect to damage by frost is less definite it is not entirely lacking. One of the respondents talked to the secretary about the frost damage both to this crop and other crops. This seems to have been a sufficient notice to have been accepted and acted upon by the appellant over a period of several months before the claim was finally rejected for other reasons.

[2] The appellant argues that any such notice was not received in time to allow it to make a proper inspection before the crop

was harvested and removed. Not only was this a matter which could be "otherwise provided by the Corporation" but the evidence, as a whole, indicates that such other provision was here made. This is indicated not only by the actions of the county committee as above noted, but the local committee did not advise the respondents that the crop should not be harvested or that any other action should be taken by them. While the good cotton had been removed before an inspection was made, the black cotton bolls disclosing the frost damage were still there and could be and were inspected. A further consideration is that aside from the matter of frost damage the nature of the damage was such that the extent of the damage could only be determined after the crop was harvested, and no prejudice appears. The entire question was one of fact and we think the evidence as a whole, with the reasonable inferences therefrom, is sufficient to support the implied finding that the respondents substantially complied with the requirements of the contract in this respect.

There is no evidence that notice of probable loss from worm damage was ever given to the appellant. There was evidence that such damage would amount to 15 or 20% of the total damage to the crop. The jury, in its verdict, allowed only two-thirds of the respondents' claim, although there was evidence which would otherwise have sustained a finding in the full amount. A part of this reduction may have been made by the jury because it found that no notice of the probable loss from the worm damage was given. There is nothing in the record which would justify this court in reducing the judgment because of this matter.

The appellant strenuously insists that under the decisions of federal courts this insurance contract must be strictly interpreted in its favor. Conceding this, the only questions here involve the weight of the evidence, rather than the meaning of the contract, and the usual rules apply.

The judgment is affirmed.

MUSSELL, J., concurs.

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93 Cal.App.2d 87

WINTERS et al. v. STATE BOARD OF EQUALIZATION.

Civ. 7590, Sac. 5973.

District Court of Appeal, Third District, California.

July 26, 1949.

1. Automobiles ⟾102

Under the motor vehicle transportation license tax statute providing that after payment under protest, taxpayer may bring action against Board of Equalization for recovery of tax, burden of proving tax was illegally collected is shifted to taxpayer. Revenue and Taxation Code, §§ 9601 et seq., 9876, 9929.

2. Automobiles ⟾73

Provision of the motor vehicle transportation license tax statute that no action to recover tax paid under protest may be instituted more than 60 days after last day on which payment is due without penalty, does not violate provision of the constitution that after payment, an action may be maintained to recover any tax claimed to have been illegally collected. Revenue and Taxation Code, §§ 9601 et seq., 9876, 9926, 9929, 10277, 10278; Const. art. 13, § 15.

◆

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by W. F. Winters, and others, against the State Board of Equalization to recover a refund of moneys paid defendant as motor vehicle transportation license tax. From the judgment, plaintiffs appeal.

Judgment affirmed.

A. G. Bailey, John A. Young, Woodland, for appellants.

Fred N. Howser, San Francisco, James E. Sabine, San Francisco, Irving H. Perluss, Sacramento, for respondent.

PEEK, Justice.

By their complaint plaintiffs sought a refund of monies paid defendant Board as motor vehicle transportation license tax under the provisions of Revenue and Taxation Code, section 9601 et seq. The defendant's general demurrer upon the ground that the action was barred by section 10278 of said code, was sustained without leave to amend, and the present appeal followed.

From the record before us it appears without contradiction that plaintiffs are farmers in Yolo county; that during 1945 and 1946 they transported in their own vehicles certain farm produce owned by them; that on December 15, 1947 the defendant Board levied a deficiency determination against plaintiffs which determination alleged that certain vehicle transportation license tax was due by reason of the hauling of said farm products. Said determination further stated that January 5, 1948 would be the last day upon which said tax so levied could be paid without penalty; that on March 22, 1948 defendant made demand upon plaintiffs for said tax; that on April 1, 1948 plaintiffs paid under protest the tax so levied together with penalties and interest thereon, and on April 10, 1948 filed their action against the Board.

Two contentions are made by appellants. The first will not be considered since it is predicated upon the merits of the controversy, and which by reason of the court's order sustaining the demurrer are not before us. Therefore only appellants' second question remains, that the statute in question contravenes Article XIII, section 15, of the Constitution of this state.

Section 10278 of the Revenue and Taxation Code in regard to actions for refund of such taxes provides:

"No action may be instituted more than 60 days after the last day prescribed for the payment of the license tax without penalty. Failure to bring suit within the 60 days constitutes a waiver of any demand against this State on account of alleged overpayments."

Thus it is apparent that if the 60 day period provided for in said section is valid, March 6, 1948 would terminate the period during which the action could be instituted, and that therefore plaintiffs' complaint, which was filed on April 10, 1948, would be barred by said section. The applicability of the section to the facts shown by the record before us is not challenged. Plaintiffs sole complaint is directed at the validity of said section in view of the provision of Article XIII, section 15, of the Constitution of this state, providing that

"No injunction or writ of mandate or other legal or equitable process shall ever issue in any suit, action or proceeding in any court against this State, or any officer thereof, to prevent or enjoin the collection of any tax levied under the provisions of this article; but after payment thereof action may be maintained to recover, with interest, in such manner as may be provided by law, any tax claimed to have been illegally collected."

Appellants' contention in this regard is that the foregoing provision gives the taxpayer a right "after payment" to recover a tax claimed to have been illegally collected. Thus appellants argue that if said section 10278 barred any action after March 6, and as they made no payment until April 1, they have been deprived of the right to contest the imposition of the tax before, in fact, the tax was paid. In other words, the procedure followed is the very thing prohibited under the foregoing provision of the Constitution.

[1] With such contention we cannot agree. The fact that the payment of the deficiency tax levied herein preceded any defense by plaintiffs is not controlling. The courts of this state have approved enforcement measures providing for summary methods of ascertaining and collecting taxes unless expressly forbidden by constitutional provision. People v. Skinner, 18 Cal.2d 349, 357, 115 P.2d 488, 149 A.L.R. 299; Mudd v. McColgan, 30 Cal.2d 463, 183 P.2d 10. The procedure prescribed by the legislature in said motor vehicle transportation license tax act is usual in the field of tax legislation, that is, payment precedes defense and the burden of proof, normally on the claimant,

is shifted to the taxpayer. People v. Skinner, supra.

[2] An examination of the applicable statutes shows that the legislature has established an orderly procedure both for the state in its ascertainment and collection of the tax, and for the taxpayer who desires to pursue a claim for refund. By section 9876 of the Revenue and Taxation Code the State Board of Equalization mails a deficiency notice to the taxpayer. He may petition for a redetermination within 15 days after the date of mailing of the notice. (Revenue and Taxation Code, sec. 9926.) If a petition for a redetermination is not filed within the 15 day period, the determination becames final at the expiration of the period. (Sec. 9926.) Such determination becomes due and payable at the time it becomes final and a penalty attaches if it is not paid on or before that date. (Sec. 9929.) After payment under protest the taxpayer may bring an action against the Board for recovery of the tax (Sec. 10277), but no action may be instituted for the payment of the tax without penalty. (Sec. 10278, supra.)

Additionally it appears that the constitutional provision invoked by appellants has no application to the motor vehicle transportation license tax or any of the provisions thereof. Said constitutional provision, by its specific terms, is applicable only to taxes levied under the provisions of said Article XIII. Southern Service Co., Ltd. v. County of Los Angeles, 15 Cal.2d 1, 14-15, 97 P.2d 963. Prior to 1933 section 15 of Article XIII of the California Constitution provided for a gross receipts tax. Such tax was deleted by the 1933 amendment to that section and the tax was imposed by Statutes of 1933, Chapter 339, upon which the provisions of the Revenue and Taxation Code are based. Such history negatives any contention that the tax is at present imposed by virtue of section 15, Article XIII.

For the foregoing reasons the judgment should be affirmed.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

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93 Cal.App.2d 225

AMIDON v. HEBERT.

Civ. 3885.

District Court of Appeal, Fourth District, California.

Aug. 1, 1949.

1. Appeal and error ⚷1064(1)

Where method of giving instruction clearly indicates that it was not intended to state all elements involved in case, and where omitted elements were covered by specific instructions elsewhere given, the giving of such a so-called formula instruction is not prejudicial error.

2. Trial ⚷253(7)

The rule that a formula instruction must contain all the elements essential to a recovery has been relaxed where the conditions and surrounding circumstances indicate that it should not be applied in its original strictness.

3. Negligence ⚷100

Ordinarily, negligence of plaintiff is not available as a defense to a charge of willful misconduct and may become so only where the act of plaintiff is such that it is a part of or an inducing cause of the defendant's misconduct.

4. Trial ⚷295(8)

In action for damages from willful misconduct in operation of automobile, where instructions as a whole repeatedly and correctly instructed as to the law governing all elements of the case, giving of the so-called formula instruction was not prejudicial because it failed within itself to cover proximate cause, burden of proof and assumption of risk.

Appeal from Superior Court, Orange County; Kenneth E. Morrison, Judge.

Action by Nelson A. Amidon against Walter Hebert, for damages from negligence in operation of automobile. After judgment for plaintiff was entered, the plaintiff died and Rachel Amidon, special administratrix of the estate of Nelson A.

Amidon, deceased, was substituted in his stead. The defendant appeals.

Affirmed.

Forgy, Reinhaus & Forgy, Santa Ana, for appellant.

Meyer & Dreizen, Santa Ana, for respondent.

BARNARD, Presiding Justice.

This is an appeal from a judgment for the plaintiff, entered on a jury verdict. The action was based, under section 403 of the Vehicle Code, on wilful misconduct of the defendant in driving at an excessive speed upon wet pavement and on a downhill curve. The answer alleged contributory negligence and, as a separate defense, that the plaintiff knew before and during the trip of any wilful misconduct, that he assented to and lent his approval to such misconduct by riding in the automobile, and that he thereby assumed the risk. After judgment was entered the plaintiff died and his widow was substituted in his stead. This appeal followed. The original plaintiff will be referred to as the plaintiff.

The accident happened about 1:00 A.M. on March 28, 1947, at Crystal Cove, about four miles north of Laguna Beach. On the preceding evening the plaintiff and defendant and another man went to Balboa in the defendant's car and bowled until about 10:30 P.M., during which time each of them had some beer to drink. They then went to Laguna Beach where they again bowled. Later on, they went to a bar where they had something to drink and then to a restaurant where they ate. After leaving Laguna Beach, on the way home, the plaintiff saw that the defendant was going at a fast rate of speed and asked him to slow down. The defendant replied "It is all right", and speeded up as they approached Crystal Cove. The plaintiff then saw that the speedometer read 90 miles per hour and said to the defendant: "For God's sake, slow down." very shortly thereafter the defendant lost control of the car which skidded 87 feet along the pavement, 120 feet along an enbankment, and over the bank where it came to rest 425 feet from the point where it commenced skidding. The defendant testified that he was familiar with the highway and knew that the pavement was wet. Two witnesses who were driving along the same road testified that the defendant passed their car about 800 feet from the crest of the hill leading to Crystal Cove, and that he was then going between 70 and 80 miles an hour. These witnesses were the first to arrive at the scene of the accident, and they testified that they did not smell any alcohol on the defendant's breath. A doctor who treated the defendant about an hour later testified to the same effect. While there was evidence that these parties had had some drinks during the evening there is no evidence that any of them were intoxicated. There is no evidence of speed or other improper driving until shortly before the accident. Another witness testified that four days after the accident the defendant told him that the accident was due to excessive speed and that he lost control of the car.

The sole point raised is that the court committed prejudicial error in giving one instruction, which reads:

"You are instructed that ordinary negligence on the part of the plaintiff is no defense upon which a defendant may rely when the defendant is guilty of wilful misconduct. In order to bar plaintiff's recovery, said negligence, if any, must be of such a type and character that it contributes to and becomes a part of, that is, the inducing cause of the defendant's wilful misconduct.

"If you find defendant guilty of wilful misconduct, and do not find the plaintiff guilty of negligence, as hereinabove defined, you must bring in a verdict for the plaintiff." It is argued that this is a formula instruction and that it fails to cover proximate cause, burden of proof, and assumption of risk.

[1] It has frequently been held that where the method of giving an instruction clearly indicates that it was not intended, and does not purport, to state all of the elements involved in the case, and where the omitted elements were covered by specific instructions elsewhere given, the giving of such a so-called formula instruction does not constitute prejudicial error.

Purcell v. Goldberg, 34 Cal.App.2d 344, 93 P.2d 578; Douglas v. Southern Pacific Co., 203 Cal. 390, 264 P. 237; Reuter v. Hill, 136 Cal.App. 67, 28 P.2d 390; Hall v. Pacific Elec. Ry. Co., 13 Cal.App.2d 456, 56 P.2d 1284.

[2] The other elements were thoroughly and repeatedly covered in other instructions. At the outset the jury was instructed that any rule or idea might be stated in varying ways, that it was not to single out any sentence or any individual point or instruction but was to consider all the instructions as a whole, and that it was to regard each in the light of all of the others. The instruction complained of was the last one of a series of instructions relating to wilful misconduct, and covering assumption of risk and contributory negligence as a defense thereto. In several of these instructions the matter of wilful misconduct was fully defined and covered, including all elements, and the jury was told that if wilful misconduct, as thus defined, was established the plaintiff would be entitled to recover unless he was barred by contributory negligence or assumption of risk, "under instructions to be given later." Five instructions followed the instructions on misconduct, of which three were requested by the defendant, covering contributory negligence and assumption of risk and the circumstances under which these matters, or either of them, would be a defense to the charge of wilful misconduct. The challenged instruction was the last of these five.

The matter of wilful misconduct had been fully covered and completed, with the statement that the claimed defenses were to be considered under instructions thereafter given. The instructions which followed related to those matters and concluded with the one in question. It seems rather clear that this instruction was intended as a part of those covering the defenses thus relied on, and that it was not intended as an instruction covering all elements in the case.

The rule relied upon by the defendant, that a formula instruction must contain all of the elements essential to a recovery, has been somewhat relaxed where the conditions and surrounding circumstances indicate that it should not be applied in its original strictness. Westover v. City of Los Angeles, 20 Cal.2d 635, 128 P.2d 350; Wells v. Lloyd, 21 Cal.2d 452, 132 P.2d 471; Dawson v. Boyd, 61 Cal.App.2d 471, 143 P.2d 373; McChristian v. Popkin, 75 Cal.App.2d 249, 171 P.2d 85; Bee v. Tungstar Corp., 65 Cal.App.2d 729, 151 P.2d 537. The reasoning in these cases is particularly appropriate here whether or not the criticized instruction should properly be considered as being one which was formula in character. The jury was repeatedly and correctly instructed as to the law governing all elements of the case and was told to consider the instructions as a whole, and to regard each in the light of all of the others. It could not reasonably be supposed that it was misled by the instruction complained of, that it misunderstood the issue submitted to it, or that any omission in this instruction contributed to or affected the verdict.

[3, 4] Not only was assumption of risk covered in three other instructions but the two defenses here pleaded amount to the same thing in such a case as this. While there is a difference between contributory negligence and assumption of risk, no such difference is material here. Ordinarily, the negligence of a plaintiff is not available as a defense to a charge of wilful misconduct. It may become so only where the act of the plaintiff is such that it is a part of, or an inducing cause of, the defendant's misconduct. Schneider v. Brecht, 6 Cal.App.2d 379, 44 P.2d 662. The doctrine of assumption of risk is usually applied under entirely different circumstances. If applicable here at all it could only relate to an act or assent on the part of the plaintiff which was a part, or an inducing cause, of the misconduct. Assumption of risk was here pleaded, and is here relied on, as arising from plaintiff's assent to and approval of the defendant's conduct, whatever it was. In such a case as this, this assent and approval would have to be of a kind and character exactly similar to that involved in the other defense. In either case, it would amount to a participation in the misconduct. Such an assent and approval has been usually treated, in such a case,

as a form of contributory negligence which becomes a part of and an inducing cause of the wilful misconduct. Jones v. Pacific Gas & Electric Co., 104 Cal.App. 47, 285 P. 709; Schneider v. Brecht, 6 Cal.App.2d 379, 44 P.2d 662. While this may be technically inaccurate it is no more so than it would be to refer to such active participation as being merely a passive assumption of the risk. The instruction here given purported to cover negligence of a particular and unusual kind. In practical effect, it covered the matter of assent and approval upon which the defendant relied. There was no evidence of any other participation or act by the plaintiff. Regardless of the name used or the fact that the same defense was pleaded under two names, the actual situation and the only possible factual ground of defense was covered and no prejudice could have resulted.

The Judgment is affirmed.

MUSSELL, J., concurs.

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93 Cal.App.2d 199

PEOPLE v. RUSSELL et al.

Cr. 4352.

District Court of Appeal, Second District,
Division 3, California.
July 29, 1949.

Gaming 🔑98(5)

Evidence sufficiently connected defendant with the corpus delicti, so as to authorize his conviction of keeping a house with papers and paraphernalia for recording of wagers upon results or purported results of horse races. Pen.Code, § 337a, subd. 2.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Earnest Russell was convicted of violation of Penal Code, § 337a, subdivision 2, in that he kept and occupied a house with papers and paraphernalia for recording of wagers upon results or purported results of horse races, and he appeals.

Affirmed.

Max Solomon, Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and William E. James, Deputy Attorney General, for respondent.

VALLÉE, Justice.

Defendant was convicted of a violation of Penal Code section 337a, subdivision 2, in that he kept and occupied a house with papers and paraphernalia for the recording of wagers upon the result or purported result of horse races. He appeals from the judgment and sentence. His only point is that the evidence is insufficient "to connect the defendant with the corpus delicti."

The evidence follows. On December 16, 1948, about 2:00 p. m., three deputy sheriffs entered a private residence in Watts. Defendant opened the door to let them in. They proceeded to a rear room where a co-defendant was seated near a desk. There were several betting markers on the desk and in the drawers of the desk. The telephone rang. Defendant picked it up and said, "hello, who do you want?" and then "The police are here" and hung up. Shortly thereafter the telephone rang several times. One of the officers answered. Each time the caller asked for Thelma—the codefendant. In each conversation the person calling made a wager on a horse running that day. Underneath a couch in the room the officers found a number of betting markers and a scratch sheet. Some of the betting markers listed numbers of horses appearing on the scratch sheet as running at various race tracks that day. It is conceded that the telephone in the room was listed in defendant's name.

One of the officers asked defendant if he had written on the betting markers. Defendant replied, "Well, I don't think I have written any of these today." The officer asked, "this is your residence?" Defendant replied, "Yes." The officer asked defendant, "If he was in back of this bookie business?" Defendant said, "yes, that it was his own and that he was the recognized bookie." Betting markers dated prior to and after December 16, 1948, were also found in the room by the officers.

The foregoing was sufficient to establish defendant's connection with the offense charged. People v. Kelley, 22 Cal.2d 169, 137 P.2d 1; People v. Allen, 22 Cal.2d 191, 137 P.2d 439; People v. Warnick, 86 Cal.App.2d 900, 195 P.2d 552.

The appeal from the sentence is dismissed. The judgment is affirmed.

SHINN, P. J., and WOOD, J., concur.

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93 Cal.App.2d 110

In re CLARK'S ESTATE.

LEACH et al. v. NICHOLS et al.

Civ. 16637.

District Court of Appeal, Second District, Division 1, California.
July 29, 1949.

1. Trial 🔑55

Evidence properly admissible upon issue presented cannot be excluded because it may have ulterior or collateral effects detrimental to one of the parties.

2. Wills 🔑384
Witnesses 🔑344(1)

In proceeding for probate of purported will of deceased, question asked petitioner's attorney, who was one of the subscribing witnesses in purported will, concerning his suspension from practice of law, did not constitute proper cross-examination, but was not prejudicial error, in view of fact that case was not tried before jury.

3. Wills 🔑322

The proofs upon petition for probate of will may be made either before or after hearing of issues upon will contest.

4. Constitutional law 🔑75

Trial court had power to require proponent of will to make a prima facie case, and having the power itself to examine witnesses, committed no error in delegating that power to counsel for will contestants and guardian of one of the heirs, though contestants and guardian were not parties to the proceedings for probate of the purported will.

5. Wills 🔑322

In proceeding for probate of purported will of deceased, where examination of affidavits in support of petition to reopen case for further trial after denying admission to probate of proffered will, led to conclusion that testimony therein offered was cumulative, and that with reasonable diligence it could have been produced at trial, trial court did not abuse its discretion in refusing to open case for further proceedings.

6. Appeal and error 🔑989

In reviewing evidence on appeal, appellate court's power begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support conclusion reached by trier of facts.

7. Wills 🔑302(2)

Evidence, including testimony of handwriting experts, supported judgment denying admission to probate of proffered will on ground that signature attached to such will was not the signature of testator, notwithstanding positive testimony of attesting witnesses to contrary.

◆

Appeal from Superior Court, Los Angeles County; Raymond McIntosh, Judge.

Proceeding in the matter of the estate of Clarence Clark, deceased, wherein Martin Carter Leach offered for probate what was alleged to be the last will of Clarence Clark, and Andrew L. Nichols, and Cora W. Jenkins, claiming to be heirs of the decedent, each filed contest to probate of the testamentary document. From judgment denying admission to probate of proffered will, and from order denying motion to set aside the judgment and to reopen case for purpose of receiving further testimony, the petitioner, together with Martin Andrew Leach and Andrew Clarence Leach, purported heirs, and Martin E. Geibel, one of the counsel for petitioner, appeal, opposed by the contestants and Richard Young, guardian of estate of Cora Leach, Elizabeth Nichols, California Trust Company and others.

Affirmed.

See also 208 P.2d 743.

Crossland & Crossland, Fresno, for appellants.

Bailey & Poe, Rufus Bailey, Los Angeles, for certain respondent heirs at law.

Charles E. Taintor, Scott Weller, Los Angeles, for contestants and respondents.

WHITE, Presiding Justice.

This is an appeal from a judgment denying admission to probate of a proffered will of Clarence Clark, deceased, and from an order denying the motion of petitioner Martin Carter Leach, named as executor in said will, to set aside the foregoing judgment and to re-open the case for the purpose of receiving further testimony.

The record reflects that on October 14, 1946, petitioner and appellant Martin Carter Leach offered for probate what was alleged to be the last will and testament of Clarence Clark and executed on or about February 10, 1944.

Thereafter, contestants and respondents Andrew L. Nichols and Cora W. Jenkins, claiming to be heirs at law of said decedent, each filed a contest to the probate of the foregoing testamentary document on the grounds that the signature attached to said will was not the signature of the decedent and that the document was not duly executed by the testator in the manner and form required by law. Following trial before the court sitting without a jury, findings were made that the document offered "was not duly executed by the said Clarence Clark in the manner and form as required by law" and "That the proof offered was not sufficient to warrant admission of said purported will." Judgment was entered accordingly, denying admission to probate of said testamentary document and refusing issuance of letters testamentary to petitioner and appellant Martin Carter Leach, named therein as executor.

The latter, together with Martin Andrew Leach and Andrew Clarence Leach, purported heirs, prosecute this appeal from said judgment; from an order directing that the foregoing contests of said will be marked "off calendar"; from the above-mentioned order denying the motion "to set aside the decision and judgment * * *"; and from the order denying a motion for a new trial.

The record reveals that a motion to vacate the judgment and to re-open the case for further proceedings was also filed by Martin E. Geibel, an attorney at law and one of counsel for appellant Martin Carter Leach. Said motion was grounded on the claim that attorney Martin E. Geibel was a party in interest in said proceedings in that he was a creditor of the estate by reason of a contract executed by decedent on June 16, 1928, and acknowledged before a notary public on February 10, 1944, under the terms of which contract, the decedent engaged the professional services of attorney Geibel "at the yearly rate of fifty dollars * * *, except any matter for which a service of fifty dollars be inadequate, such matter to be separately treated as occasion may arise." The motion of attorney Geibel was made on the further ground that "new evidence has been discovered since the trial of said cause material to the rights of petitioner, which could not have been produced at the trial, which said evidence will show that the decedent, Clarence Clark, executed the will dated February 10, 1944." In support of the motion several affidavits were filed including one from a handwriting expert, all of which it was claimed would "establish the fact that the signature of said will is genuine and the signature of said Clarence Clark, decedent." From the order denying his motion to vacate the judgment attorney Geibel also appeals.

Because the main question presented for determination on this appeal is whether the evidence supports the finding of the trial court that the proffered testamentary document was not executed by the decedent in the manner and form required by law and that the proof offered was not sufficient to warrant admission of such document to probate, it becomes necessary to set forth in some detail the testimony produced at the trial.

Appellant, attorney Martin E. Geibel, one of the subscribing witnesses to the document in question, testified that the decedent, a man about 69 years of age at the time of the claimed execution of the will, had been a client of his since about 1923; that he was an eccentric person. That on the morning of February 10, 1944, decedent came to the office of the witness insisting that his will be immediately prepared on the basis of some notes decedent had made the night before. That attorney Geibel's secretary, Mary Silber, was not in the office at that time, having been called to the bedside of her sick mother. Attorney Geibel suggested to the decedent that they await the return of Miss Silber. However, the decedent insisted that the will be drawn at once. He then read from his notes and attorney Geibel in longhand drafted a will as the decedent read from the notes. When the reading of the notes was completed the decedent insisted the will drawn therefrom be executed at once, and accompanied by Mr. Geibel, he went to a public stenographer named Gertrude M. Berg at the Rosslyn Hotel, of whose services Mr. Geibel frequently availed himself. A will was then dictated to Miss Berg based upon the will previously written by Mr. Geibel in longhand. However, the disinheritance clause was changed to provide for the payment of five dollars to anyone who contested the will rather than nothing as provided in the handwritten will. The services for this typing were paid for; a receipt was issued by Miss Berg which was introduced in evidence.

Attorney Geibel testified that he and the decedent then returned to the former's office and shortly thereafter Miss Silber reached the office, at which time the will was executed, attorney Geibel and Miss Silber being the attesting witnesses. That a few moments later a telephone call from Miss Berg informed attorney Geibel that he or decedent had left an envelope at her office. That Mr. Geibel immediately left his office, picked up the envelope and upon his return noticed that the decedent was erasing his signature on the will written in longhand. That when questioned as to what he was doing, decedent said, "I like this paper better than the typed paper which I signed, and I had signed it in lead pencil, and I am erasing my lead pencil signature and I am going to sign this paper with ink. I prefer it to that other paper." Decedent further informed attorney Geibel that he did not like the provision bequeathing five dollars in the disinheritance clause, that he had heard that wills written upon ladders or scraps of paper were good and valid, that the handwritten will was good enough for him, and that he insisted upon its execution. That the decedent then signed the handwritten will in the presence of attorney Geibel and his secretary, who, as attesting witnesses, signed in the presence of the testator and in the presence of each other. That this document was then filed in attorney Geibel's office.

As an exemplar of the signature of the decedent, proponents introduced into evidence the foregoing employment contract between attorney Geibel and the decedent. The former testified that the latter insisted on signing it before a notary public, though advised by the attorney that this was not necessary. That, however, the agreement was then signed on February 10, 1944, in the presence of the aforesaid Gertrude M. Berg, a notary public, who acknowledged the signature of decedent and affixed her notarial seal.

Mary Silber, secretary to attorney Geibel, corroborated the latter in regard to the formalities in connection with the claimed execution of the testamentary document in question and also with reference to the events which transpired subsequent to her arrival at her employer's office on February 10, 1944.

Gertrude M. Berg, a public stenographer and notary public, also testified in corroboration of the foregoing testimony given by attorney Geibel and Miss Silber with reference to matters relating to the participation of Miss Berg in the typing of a will on February 10, 1944, and with reference to an envelope being left at her office on the occasion of the visit of decedent and attorney Geibel thereto. This witness also testified to the taking by her of the acknowledgment of decedent to the aforesaid employment contract between the latter and attorney Geibel.

Received as evidence in opposition to the admission of the proffered will to probate was the testimony of Lieutenant Louis C. Davis of the Los Angeles Police Department, whose specialized work in that department for some nineteen years consisted of the examination of handwriting and questioned documents. It is not necessary to here detail the qualifications of the witness as disclosed by the evidence because it was stipulated that he was "amply qualified." Over the objection of appellants, this witness was appointed by the court to make an examination of the exhibits in the case, including the challenged testamentary document. He testified that the signature, "Clarence Clark," on the will offered for probate was not made by the same person who signed various admittedly genuine exemplars, including checks and other documents containing decedent's genuine signature, which were admitted into evidence and examined by the expert witness.

[1, 2] As a first ground of appeal it is urged that the court committed prejudicial error in admitting over objections, evidence that the witness, attorney Geibel, one of the subscribing witnesses to the will offered for probate, had been suspended from the practice of law. In this regard it is appellants' contention that it is only the conviction of a felony that furnishes grounds for impeachment. In the instant case, attorney Geibel had testified on direct examination that, "I have been representing Clarence Clark (decedent) mostly after the death of his mother December 25, 1923." On cross-examination the following occurred:

"Q. * * * I believe you said you acted continuously for Clarence Clark from the date of this contract, 16th day of June, clear through until the time of his death. Is that a true statement, Mr. Geibel? A. For the most part, yes.

"Q. Were there any interruptions? A. Possibly. I was in the east from around about September, 1939 until along into the summer or late fall of 1940, an entire year on business in connection with the settlement of my father's estate and some business in Tennessee and Salt Lake City.

"Q. So you are not contending you represented Mr. Clark during the period from 1938 to 1941, are you, Mr. Geibel?

* * * * * *

"The Witness: That matter—I didn't do any legal work for Mr. Clark during that particular period I was in the east on business."

Following some discussion the witness was asked: "Q. Did you have the capacity to represent Clarence Clark during the period from 1938 to 1940?"

Following some further discussion, the following ensued:

"Q. The fact is that you were suspended from the practice of law during the time you testified that you represented Mr. Clark? A. I had a problem, yes.

"Q. I tried to spare you that. A. I am not ashamed of that because I still maintain I was right in that matter, and I had Justices of the Supreme Court who were with me on the matter."

Appellants insist that "the obvious effect of the record as it stands was to prejudice the trial court against the witness (attorney Geibel) and jeopardize the establishment of the genuineness of the document as the last will of Clarence Clark."

While it is true that evidence properly admissible upon the issue presented cannot be excluded because it may have ulterior or collateral effects detrimental to one of the parties, Avery v. Wiltsee, 177 Cal. 484, 486, 171 P. 95; Lampton v. Davis Standard Bread Co., 48 Cal.App. 116, 120, 191 P. 710; Taylor v. Oakland Scavenger Co., 17 Cal.2d 594, 605, 110 P.2d 1044, we are persuaded that the question concerning appellant Geibel's suspension from the practice of law was not proper cross-examination and should not have been asked. In no way did it tend to prove or disprove the ultimate issue presented, which was whether the proffered testamentary document was executed in the manner and form required by law.

It must be borne in mind that this was not a jury trial, and as was so cogently pointed out in People v. Albertson, 23 Cal. 2d 550, 577, 145 P.2d 7, 21 (quoting from Wharton's Criminal Evidence, sec. 360, p. 567), " 'It does not reflect in any degree upon the intelligence, integrity, or the honesty of purpose of the juror that matters of a prejudicial character find a permanent lodgment in his mind, which will, inadvertently and unconsciously, enter into and affect his verdict. The jury does not possess that trained and disciplined mind which enables him either closely or judicially to discriminate between that which he is permitted to consider and that which he is not. Because of this lack of training, he is unable to draw conclusions entirely uninfluenced by the irrelevant prejudicial matters within his knowledge. * * *' " On the other hand, there is little, if any, justification for the assumption that the trained mind of the trial judge who presided in the case at bar considered the foregoing testimony for any other than what he conceived to be the limited purpose of cross-examination, or was influenced to the prejudice of appellant Geibel by the testimony to which objection is here made.

[3, 4] It is next contended that the trial judge erred "in appointing, over objection, attorneys as amici curiae to examine witnesses rather than examine the witness himself, as the only attorneys who may participate in a will contest are attorneys representing qualified contestants."

The situation of which appellants complain arose at the conclusion of the direct examination of appellant Geibel, one of the subscribing witnesses to the proffered will, when attorneys Taintor and Bailey expressed a desire to cross-examine the witness. Objection was made on the ground that these attorneys did not represent any of the parties to the particular proceeding then before the court. Attorney Taintor was one of counsel for Andrew L. Nichols and Cora W. Jenkins who had filed contests to the probate of the will in question, which contests were at issue and then pending before the court. Attorney Bailey stated that he was representing Richard Young, guardian of one of the heirs. After some argument concerning the rights of attorneys Taintor and Bailey to participate in the proceeding the court said:

"I see no reason why you couldn't appear as friend of the Court without representing anybody. If you have information in your possession, it might be your duty as an officer of this Court to present it to the Court.

* * * * * *

"The Court: It is the duty of the Court to find out whether a will is properly executed.

"Mr. Crossland (one of appellants' counsel): That is exactly why we are here today.

"The Court: And if anyone has evidence in their possession to show that there is a possibility that the will was not properly executed, they should present it to the Court.

"Mr. Crossland: We have no objection to that, your Honor, but when they start to cross examine witnesses, we wish them to state they are here representing somebody, because they are acting as attorney for someone.

"The Court: Very well, I will ask him to examine as friend of the Court, to examine this witness."

When the foregoing discussion arose the court was engaged in the proceeding for the probate of the will as distinguished from the proceedings upon the contest. The proofs upon the petition for the probate of the will (commonly referred to as the preliminary proof) may be made either before or after the hearing of the issues upon the contest. As was said in Re Estate of Relph, 192 Cal. 451, 459, 221 P. 361, 364: "The contestants are not parties to this proceeding, and have no right to appear therein ([In re] Estate of Latour, supra [140 Cal. 414, 73 P. 1070, 74 P. 441]), but the trial court, having itself the right to cross-examine the witnesses produced therein, may, in the exercise of its discretion, permit counsel for contestants so to do. ([In re] Estate of Cullberg, supra [169 Cal. 365, 146 P. 888].) But when such permission is granted it is as a matter of grace, and not in recognition of a right possessed by contestants." The trial court had the power to require the proponent of the will to make a prima facie case, and having the power itself to examine the witnesses, committed no error in delegating that power to counsel for the contestants and the guardian of one of the heirs. In re Estate of Latour, 140 Cal. 414, 421, 422, 73 P. 1070, 74 P. 441.

[5] The third ground urged for a reversal is that the court erred in denying a petition to re-open the case for further trial. In support of this claim appellants direct our attention to the affidavits of appellant Martin E. Geibel, Maurice F. Geibel, Mary J. Geibel, and L. Dale Gasteiger, handwriting expert and examiner of questioned documents. The affidavit of Mr. Gasteiger sets forth that after an examination made by him it was his opinion and conclusion that the signature of decedent on the proffered will, as well as on the foregoing contract of employment, was true and genuine. An examination of the supporting affidavits, in the light of the record before us, leads to the inevitable conclusion that the testimony therein offered was cumulative, and with reasonable diligence could have been produced at the trial. Upon such a showing, the court was warranted in disregarding these affidavits in considering the motion to re-open the case for further testimony and in passing on the motion for a new trial. In re Estate of Jepson, 178 Cal. 257, 261, 172 P. 1107. Therefore, it can not be said that the court abused its discretion in refusing to re-open the case for further proceedings.

[6, 7] Finally, appellants earnestly urge that the evidence is insufficient to support the judgment rendered. In justice to appellants we must state, in passing, that the evidence would have been sufficient to sustain an order admitting the proffered will to probate had the trial court so concluded. However, it is firmly established in our law that the duty of a reviewing tribunal "begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support * * *" the findings and conclusion reached by the trier of facts. In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689, 690. When a judgment is predicated upon a question of fact, it is supported by the evidence although the testimony in relation thereto is in complete conflict. Such is the situation with which we are confronted here. A court of appellate jurisdiction cannot be expected to assume the role of a handwriting expert, for the purpose of setting aside a finding made by the trial court, and based, not only upon its own inspection and comparison of the original writings but upon the opinion of a witness peculiarly qualified by special study of the subject.

Appellants' contention that the testimony of handwriting experts should not be permitted to overcome the positive testimony of attesting witnesses, whose testimony is unimpeached, and apart from the testimony of the handwriting expert, uncontradicted, is answered by what was said by this court in Re Estate of Kisling, 68 Cal.App.2d 163, 166, 167, 156 P.2d 57, 58, as follows: "By reason of the foregoing testimony and from an examination of the questioned document, the photographs and writings admittedly that of decedent, by the court, which was proper, the court pointed out certain variations in the exemplars and the questioned document, from all of which the court concluded that the claimed testamentary document was not entirely in the handwriting of decedent, saying 'this is one case where I don't think you need so much handwriting expert as good eyes.' Based upon the testimony of the expert witness and upon his own examination of the questioned document, the trial court stated that he could not give any credence to the testimony proffered by appellant that the document under consideration was written by the decedent. Under well established and oft repeated rules which require no citation of authority, it must be held that the evidence relied upon by the court for its decision is of sufficient substantiality to sustain the finding made thereon."

The attempted appeals from the order "ordering the contest of will before probate of Cora W. Jenkins and contest of will before probate of Andrew L. Nichols off calendar" and denying the motion for a new trial are dismissed. The judgment and the order made after final judgment denying the petition and motion to "set aside the decision and judgment" are, and each is, affirmed.

DORAN and DRAPEAU, JJ., concur.

93 Cal.App.2d 147

PEOPLE v. GEIBEL.

Cr. 4242.

District Court of Appeal, Second District,
Division 1, California.
July 29, 1949.

1. Forgery ⇨1

When one either makes or passes a false instrument with intent on his part to defraud, the crime of "forgery" is completed. Pen.Code, § 470.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Forgery".

2. Indictment and Information ⇨71

When pleading in criminal case gives accused notice of offense of which he is charged, it is sufficient, and particular details thereof are furnished defendant by transcript of testimony upon which indictment or information is predicated. Pen. Code, §§ 870, 925, 952, 959, 960.

3. Forgery ⇨27

A count in information which informed defendant that he was charged with making, uttering and publishing as true and genuine the alleged forged will of certain decedent with intent thereby to cheat and defraud was sufficient to state offense, without allegation of intent to defraud or cheat any particular person. Pen.Code, §§ 470, 870, 925, 952, 959, 960.

4. Forgery ⇨12(4)

The crime of forging a will is complete when document has been so prepared that upon its face it will have effect of defrauding one who acts upon it as genuine. Pen.Code, § 470.

5. Forgery ⇨16

Knowingly tendering a forged will for probate is an uttering thereof. Pen.Code, § 470.

6. Forgery ⇨47

Although intent to defraud is of the essence of forgery, the question of intent is one primarily for jury. Pen.Code, § 470.

7. Criminal law ⇨1159(2)

To appraise weight of evidence is function of jury, while function of appellate court is to appraise its legal value.

8. Criminal law ⇨1159(2)

Before appellate court is authorized to disturb conclusion arrived at by constituted arbiters of facts it must be clearly made to appear that upon no hypothesis whatever is there sufficient substantial evidence to support conclusion reached by them.

9. Criminal law ⇨1159(2)

Where appellate court was unable to say that the inference of guilt drawn from evidence by jury was wholly unwarranted as a matter of law, appellate court was powerless to interfere.

10. Forgery ⇨44

In prosecution on charge of forging will and a contract whereby decedent retained defendant as his attorney, where defendant himself as well as his secretary definitely testified that they saw decedent sign both instruments, and in case of will, defendant himself was one of the subscribing witnesses, failure to prove that defendant or any other person who allegedly attached such signatures did so without authority of decedent was not a vital defect in evidence to prove that signatures on will and contract were forgeries. Pen.Code, § 470.

11. Criminal law ⇨881(1)

A general verdict of guilty as charged on count in information charging forgery necessarily included a finding that prosecution was commenced within specified statutory period, since statute of limitations is jurisdictional and a prosecution within the specified statutory period is an essential element of the offense. Pen.Code, §§ 470, 800.

12. Criminal law ⚷149

The statute of limitations for commencement of prosecution for forgery began to run from actual date of forgery, and not from date of alleged forged instrument. Pen.Code, §§ 470, 800.

13. Criminal law ⚷323

The presumption that alleged forged writing was truly dated as regards commencement of running of statutory period for bringing prosecution was a rebuttable presumption, and could be controverted by other evidence. Pen.Code, §§ 470, 800; Code Civ.Proc. §§ 1961, 1963, subd. 23.

14. Forgery ⚷41

The possession of instrument recently forged by one claiming under it is evidence against the possessor. Pen.Code, § 470.

15. Criminal law ⚷565

Evidence supported finding that alleged forgery of will was committed within three years prior to filing of the information, so that prosecution was not barred by statute of limitations. Pen.Code, §§ 470, 800.

16. Forgery ⚷16

The crime of offering false or forged instruments to be filed of record is sufficiently proven when it is shown that accused intentionally committed the forbidden act, without showing that act was done with intent to defraud another. Pen.Code, § 115.

17. Forgery ⚷44(3)

Evidence that will was forged and that defendant has possession of it, and that instrument was filed for probate in office of county clerk, was sufficient to sustain conviction on charge of offering false or forged instrument to be filed of record, and whether document was filed with county clerk by defendant himself or at his behest was immaterial. Pen.Code, § 115.

18. Forgery ⚷16

The offering of a false will for probate constitutes an "offering in evidence" within statute defining offense of offering in evidence as genuine any document in writing knowing same to be forged. Pen.Code, § 132.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Offering in Evidence".

19. Acknowledgment ⚷52

Proof of acknowledgment by notary public is prima facie evidence of execution of the writing, but such a showing is rebuttable. Code Civ.Proc. § 1833.

20. Acknowledgment ⚷55(1)

A certificate of acknowledgment is only prima facie evidence, and may be contradicted by other evidence. Code Civ. Proc. § 1833.

21. Forgery ⚷44

In forgery prosecution, evidence was sufficient to justify jury in concluding that, notwithstanding notarial acknowledgment thereon, contract retaining defendant to act as attorney for one since deceased was not signed by decedent. Pen.Code, § 470; Code Civ.Proc. § 1833.

22. Criminal law ⚷696(3)

In forgery prosecution, where question was asked defendant's handwriting expert on cross-examination as to whether, in examining letters taken from body of will as depicted in chart, he had seen any considerable tremor, that part of witness' answer which stated that he thought chart was a completely unfair type of selection and comparison of the problem was properly stricken as not embodying an opinion on questions in controversy, and was also properly stricken on ground that it was not responsive to question asked. Code Civ. Proc. § 2056.

23. Criminal law ⚷338(7), 1169(1)

In prosecution under information charging defendant with crimes of offering false or forged instruments to be filed of record, forgery and offering false evidence, overruling defendant's objection to question asked him on cross-examination as to whether he had been suspended from practicing law in state constituted prejudicial error. Pen.Code, §§ 115, 132, 470.

24. Criminal law ⚷338(7)

Upon trial of one accused of a crime, evidence of other specific wrongful acts not pertinent to issue of trial is not admissible.

25. Witnesses ⚷344(1), 345(1)

A witness cannot be impeached by evidence of particular wrongful actions, except that it may be shown that he has been convicted of a felony.

26. Criminal law ⚷1170(1)
Forgery ⚷38

Where prosecution was required to prove defendant's specific intent to defraud in support of count of information charging forgery of will, refusal to permit defendant to prove what legal services he had rendered to decedent whose will he was charged with having forged, as basis for establishing verity of his claim against decedent's estate for purpose of rebutting evidence tending to establish intent to defraud, was prejudicial error. Pen.Code, §§ 115, 132, 470.

27. Criminal law ⚷444

In prosecution under information charging forgery of will, offering false or forged will to be filed of record, and offering false evidence, file in probate proceeding in which defendant acted as counsel and testified as subscribing witness to proferred will was properly admitted, where documents contained in the file were originals, identified by deputy county clerk, who testified he obtained them from court files in his office. Pen.Code, §§ 115, 132, 470; Code Civ.Proc. § 1905.

28. Criminal law ⚷481, 1153(6)

Examination of expert witness as to his qualifications and competency before he gives his opinion is a question of procedure which lies within discretionary power of trial court, and unless there is an obvious abuse of discretion an appellate tribunal will not interfere.

29. Criminal law ⚷480

In prosecution under information charging forgery of will, offering false or forged will to be filed of record, and offering false evidence, permitting district attorney, in qualifying witness as a handwriting expert, to ask witness as to whether he testified as a handwriting expert in the well-known Hauptman kidnapping case, and as to how many handwriting experts testified for prosecution in that case, was not abuse of discretion. Pen.Code, §§ 115, 132, 470.

30. Criminal law ⚷829(1)

Trial court need not give any particular instructions offered by either the prosecution or defense, but it is sufficient if jury is fully, fairly and correctly instructed on law applicable to issues tendered by indictment or information, or raised by evidence.

31. Criminal law ⚷778(6), 1172(2)

In prosecution under information charging forgery of will, offering false or forged will to be filed of record and offering false evidence, charge that law presumed that act, if knowingly done, was done with criminal intent was proper as to offenses of offering false or forged will to be filed of record and offering false evidence, but it was not proper as to offense of forgery, which required a specific intent, and charge constituted prejudicial error where it was not limited to the offenses other than forgery. Pen.Code, §§ 115, 132, 470.

32. Criminal law ⚷823(9)

Where charge that law presumed that act, if knowingly done, was done with criminal intent was proper as to two of the offenses charged in information, but was improper as to the other offense charged, which required specific intent, and instruction was not limited to the two offenses not requiring specific intent, subsequent giving of correct instruction on specific intent did not overcome prejudicial effect of the erroneous instruction as to count in information charging offense which required specific intent.

33. Criminal law ⚷814(19)

Where there was no evidence to establish a confederation between defendant and any other persons for purpose of committing offenses charged in information, instruction on question of aiding and abetting in commission of a crime should not have been given.

34. Criminal law ⚷814(1)

To give instructions not pertinent to issues involved tends only to confuse jury, and instead of enlightening them, serves to impede administration of justice.

35. Criminal law ⚿814(3)

An instruction that if defendant endeavored to procure false or fabricated evidence to be produced at trial, such fact could be considered by jury as circumstance tending to prove a consciousness of guilt, was improper, where there was no evidence introduced at trial that proved or tended to prove that defendant endeavored to procure false or fabricated evidence.

36. Criminal law ⚿1186(4)

Under constitutional provision that no judgment shall be set aside or new trial granted because of improper admission or rejection of evidence unless error has resulted in "miscarriage of justice", quoted phrase has no hard or fast definition and does not mean that a guilty man has escaped or that an innocent man has been convicted, and is equally applicable where acquittal or conviction has resulted from some form of trial in which essential rights of the people or of accused were disregarded or denied. Const. art. 6, § 4½.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Miscarriage of Justice".

37. Criminal law ⚿1186(4)

Where evidence was in sharp conflict, and reviewing court was unable to say whether defendant would or would not have been convicted but for errors of trial court in admitting evidence and giving of improper instructions, conviction could not be sustained on ground that no "miscarriage of justice" resulted. Const. art. 6, § 4½.

38. Criminal law ⚿1186(4)

Criminal cases should not be conducted with an eye to saving grace of constitutional provision saving conviction where errors at trial would probably not have changed result. Const. art. 6, § 4½.

39. Criminal law ⚿1186(4)

Except in proceedings on motion for new trial, constitutional provision saving conviction where errors at trial would probably not have changed result is of no concern to trial courts, and so far as its application goes, it is of interest only to courts of review. Const. art. 6, § 4½.

◆

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Martin E. Geibel was convicted of offering false or forged instruments to be filed of record, of forgery, and of offering false evidence, and he appeals.

Reversed and remanded.

See also 208 P.2d 737.

Frederic H. Vercoe, Los Angeles, for defendant and appellant.

Fred N. Howser, Attorney General, Henry A. Dietz, Deputy Attorney General, for plaintiff and respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was accused in Count I of a violation of Section 115 of the Penal Code (offering false or forged instruments to be filed of record); in Count II with the crime of forgery, and in Count III of a violation of Section 132 of the Penal Code (offering false evidence). To each of the foregoing counts of the information, defendant duly entered his plea of not guilty, and at the time of trial moved to dismiss Count II on the ground that the information was filed more than three years after the offense was committed, and was therefore barred by the Statute of Limitations (Penal Code, sec. 800). The court reserved its ruling on said motion, and so far as the record discloses, never passed upon the same. Trial by jury resulted in verdicts of guilty upon all three counts. Defendant's motion for a new trial was denied, as was his motion in arrest of judgment. He was thereupon sentenced to state prison for the term prescribed by law, the sentences to run concurrently. Execution of the sentences was thereupon suspended and defendant was placed on probation for a period of five years on condition that as to Count I of the information he pay a fine of $1,000 within the first year of his probationary term "in installments according to his ability to pay". From the judgments and the order denying his motion for a new trial defendant prosecutes this appeal.

As grounds for reversal appellant urges: (1) That the facts stated in Count II of the information (forgery) do not constitute a public offense and that the motion in arrest of judgment should have been granted as to this count; (2) that the evidence is insufficient to support the verdict as to Count I and that the verdict and judgment therein are contrary to the evidence and the law; (3) that the evidence is insufficient to support the verdict and judgment on Count II; (4) that the evidence is not sufficient to support the verdict and judgment on Count III; (5) that the trial court erred prejudicially by overruling objections to a question asked of appellant on cross-examination as to whether or not he had ever been suspended from the practice of law in California; (6) that the court erred in refusing to allow him to prove what legal services he had rendered to one Clarence Clark whose will was allegedly forged by appellant, such legal services forming the basis for appellant's claim against the estate of said Clark; (7) that the court erred in overruling objections by appellant to claimed improper cross-examination of Lawrence Gasteiger, a handwriting expert by the district attorney and in restricting the testimony of the same witness on direct examination; (8) that the trial court erred in the decision on numerous questions of law which arose during the course of the trial; (9) that the district attorney was guilty of prejudicial misconduct during the trial and in his argument to the jury; (10) that the trial court erred in the giving of various instructions to the jury; and (11) that the court erred in refusing to give certain instructions to the jury as requested by appellant.

The factual background of this prosecution as reflected by the record is that Clarence Clark, apparently an eccentric man living in Los Angeles, was, from the time of his father's death, a client of Martin Geibel, an attorney at law and appellant in this case. Clark was characterized at the trial as a man who was unkempt and slovenly in his dress and appearance. It further appears that appellant had been the attorney for Clark's father and mother prior to their respective deaths. Mary Silber is the secretary-stenographer for appellant and had been acting in such capacity for him since January 2, 1928. Appellant has been admitted to the practice of law in this state since March, 1909, and maintained offices in downtown Los Angeles. At the time of trial he was sixty-nine years of age, afflicted with serious eye trouble, having a cataract in one eye while the vision of the other was completely gone. He first met the testator Clarence Clark in 1909 when appellant was a law clerk with a firm of Los Angeles attorneys. He acted as counsel for Clark for a considerable time subsequent to his first becoming acquainted with him, this representation in the main relating to matters which were brought into the office with respect to Clark's parents. According to appellant, his best recollection is that he first represented Clark as his sole attorney from and after the death of Clark's mother, December 25, 1923, up to the date of Clarence Clark's death, which occurred about March 4, 1946. Clark was a single man.

Gertrude Berg is a public stenographer at the Hotel Rosslyn in Los Angeles, and appellant had known her for some ten or fifteen years, during which time she had done legal stenographic work and notarizing for him.

Scott Weller, an attorney in Los Angeles, represented Cedric Gardham, a cousin of Clark, and filed a petition for special letters of administration in his behalf in the Superior Court of Los Angeles County in the matter of the estate of said Clarence Clark. In the middle or latter part of September, 1946, Weller received a telephone call from appellant at approximately 10:45 a. m. when, according to attorney Weller, the following conversation occurred: "A voice on the telephone said, 'This is Martin Geibel speaking, an attorney in the Merritt Building. I understand that Clarence Clark has died. I did not know that he had died. I was his attorney. I understand that you represent the Special Administrator, Cedric Gardham.' I said, 'That is correct.' He said, 'I would like to talk to you about the case.' I said, 'I will be very glad to talk to you about the case.' He said, 'Can you come over to my office?' I said, 'No, I cannot come to your office. Mr. Taintor, whose case it primarily is, is out; the Clarence Clark papers are here; I am right across the street from you; if you wish to come to the office I will be very glad to talk to you.' He said that he would be right over * * *."

In from five to fifteen minutes thereafter appellant appeared at Weller's office, and according to the latter a conversation occurred, appellant, Weller, and Taintor being present. According to the testimony of attorney Weller, appellant stated in effect that he had known Clarence Clark for years, that he was his attorney, and asked whether they had found any of appellant's cards in his effects. Appellant was told they had found his card and others, that they did not know Clarence Clark but did know Cedric Gardham who had consulted them. According to the witness, appellant told them that he would like to find out about the heirs because he said he knew who the heirs in California were but did not know about any others. In the conversation appellant was told that attorneys Weller and Taintor knew nothing about heirs except that there were some names mentioned in letters, particularly one Mr. Leach of Fresno who had found a will, and a Mr. Nichols who had written to them advising that Mr. Leach had found a will. Appellant then said, "No, Mr. Leach did not find the will, I found the will," to which the witness inquired, "What type of will, is it holographic?" to which appellant replied, "Well, it is and it isn't. It is a strange will." The witness Weller than inquired, "Is it a witnessed will?" to which appellant replied that it was a partly holographic and partly typed document. Then, according to the witness, appellant said, "I want to find out about these heirs outside of the state of California," and asked whether there was a family tree. He was told that there was no family tree, that they had gone to Clark's place and searched through his papers which were in a great state of disarray, that there were hundreds and hundreds of them —forty paper bags filled with papers—but that they found no family tree and that they found no will. Attorney Weller then asked appellant where he found the will and he said that upon learning of the death of Clarence Clark he looked through some old papers and found the will while searching through the files of the estate of Clark's deceased mother. That appellant was then asked whether he had not known that the will was in said file, to which he responded, "No," that he did not know it was there or he had forgotten it was there, that "the strange thing about it is that it is almost in the words I told him (Clark) his will should be in when he drew one."

About August 8 or 9, 1946, attorney Weller went to Clark's home and made an investigation into his personal effects in an effort to locate a will. In the course of this investigation he found some of appellant's cards but found no letters or communications from the appellant to the decedent. He also found many cancelled checks of Clark's.

On October 4, 1946, appellant filed a will in the office of the County Clerk of Los Angeles County purporting to be the last will and testament of Clarence Clark, and paid $7 as a filing fee.

Cedric P. Gardham, a cousin of Clarence Clark, lived with the latter quite some time. He is the special administrator of the estate of Clarence Clark with general powers. Gardham first heard of the death of Clark through the police department. He thereafter went to Clark's house and examined the premises. Among Clark's possessions, Gardham found a number of cancelled checks and most of the checks that were introduced into evidence at the trial were those found by Gardham at Clark's home. Mr. Gardham identified these checks as bearing the genuine signature of Clarence Clark.

The decedent Clarence Clark voted on November 7, 1944, in Los Angeles, at which time he signed the roster of voters. His signature written on this occasion was introduced into evidence.

Hearings to determine the admissibility of the will offered for probate by appellant were held in the Superior Court of Los Angeles County during the months of February and April, 1947. Appellant was one of counsel for the executor named in such will.

During the hearing upon the petition for admission to probate of the will in question appellant was sworn as a witness, identified the will in question as being that of Clarence Clark. Appellant also identified his own signature upon the will as that of a subscribing witness. During the same hearing appellant also identified another exhibit which is a purported contract between decedent Clark and appellant, under the terms of which contract, the decedent engaged the professional services of appellant Geibel "at the yearly rate of Fifty Dollars * * *, except any matter for which a service of Fifty Dollars be inadequate, such matter to be separately treated as occasion may arise." The issues before the court at the hearings on the petition for admission to probate of the will of decedent Clarence Clark and a résumé of the testimony given in that proceeding is contained in the matter of the Estate of Clark, Cal.App., 208 P.2d 737, and need not here be repeated.

On August 7, 1947, a creditor's claim was filed by appellant in the above-mentioned probate proceeding. This claim was in the amount of $4,472 and purported to be a claim of appellant against Clark's estate for professional services rendered as an attorney. This claim was admitted into evidence at the trial of the instant case.

It becomes unnecessary to here detail the testimony given by appellant as a witness in the foregoing probate proceeding during the year 1947 because the same is fully set forth in the matter of the Estate of Clark, supra.

The will that was offered for probate was the document filed by appellant on October 14, 1946. The principal portion of the testamentary document is in appellant's own handwriting. The foregoing employment agreement was also offered in evidence at the trial in the instant case. Handwriting exemplars of appellant were written by him on June 20, 1947, in the office of the district attorney and were also in evidence in the instant proceeding.

Lewis C. Davis, an examiner of questioned documents, testified at the trial herein. It becomes unnecessary to set forth in detail his testimony because the same is set forth in the matter of the Estate of Clark, supra.

Clark Sellers, an examiner of questioned documents and handwriting expert, testified that he had examined the will in question as well as the foregoing employment contract and also admittedly genuine signatures of decedent Clark and appellant Geibel. It was the opinion of this witness that the person who signed the name "Clarence Clark" to the various exemplar signatures which were submitted to him as being the genuine signatures of Clarence Clark did not sign the name "Clarence Clark" on the will nor did he sign the name "Clarence Clark" on the employment contract. The witness further testified that it was his opinion that the signatures "Clarence Clark" on the will and employment contract were made by making a pencil outline, then inking over the pencil outline with pen and ink, then erasing the pencil, but that in his judgment there is still pencil in the inked lines that has not been entirely erased. That the handwriting on the will down to the signature of Clarence Clark is that of appellant, that the entire surface of the paper on that document has been erased where the name "Clarence Clark" appeared, and that the erasure occurred after the name "Clarence Clark" was written, and that the so-called "patch-work" was done after the erasure.

The aforesaid employment contract was all typed on an Underwood typewriter in one operation, with the exception of the signature. The contract was dated June 16, 1928 (it should be noted that the same was not acknowledged before a notary public until February 10, 1944). The witness Clark Sellers testified further that the typewriter used to typewrite the contract was not manufactured in 1928, that the first one came into existence no earlier than 1934 or 1935.

In the opinion of the witness Sellers, the entire area where the name "Clarence Clark" is written on the employment contract had been erased with rubber, art gum or some other abrasive material of that kind, in the same manner as was the area on the will.

In his examination of the exemplars of the handwriting of decedent Clarence Clark, Mr. Sellers found no signature that was written with a slow, laborious writing movement or a hesitant writing movement. That normally a person attempting to forge a signature with which he is not familiar generally does it in a careful, slow, laborious manner. That the signatures on both the will and the contract were written slowly, laboriously and lack almost entirely the natural hidden handwriting line quality and characteristics of the genuine handwriting of Clarence Clark. That there was a general similarity as to form, but the manner in which the two questioned signatures are signed to the will and the contract was highly indicative of the fact that they were written by the tracing method, not by the free, natural, normal writing of any writer but a slow, drawn, laborious writing in which the writer was attempting to follow an outline already placed on the paper in pencil form. That the questioned signatures of Clarence Clark on both the will and the contract were written with the same writing movement, in the same manner, and *may* have been written by the same writer. *The witness Clark Sellers did not find sufficient evidence from his examination to enable him to express an opinion as to whether or not appellant forged the signatures.* The witness however testified that there is a similarity between the handwriting of appellant and the handwriting on the questioned signatures, especially as to the signature on the contract.

This witness further testified that "It is my best judgment that the person who wrote the body of the document in pencil wrote the 'c-e' on top of the word 'Clarence' in pencil immediately below the signature, Exhibit 2 (the will), and wrote the word 'Clark' immediately below the signature in pencil; that the 'c-e' and the **'Clark'** was touched up or rewritten after the erasure. I can not say positively that the same writer who wrote the body of the writing in pencil made that rewriting, the 'c-e' and the word 'Clark', but it is my best judgment that the same writer did".

Appellant took the stand in his own behalf and testified with reference to the circumstances immediately surrounding the execution of the will. It becomes unnecessary to here state in detail such testimony because the pertinent and material parts thereof are set forth in the matter of the Estate of Clark, supra.

With reference to the employment agreement, appellant testified that he never had the same in his possession before February 10, 1944, but that he had written, at the instance and direction of Clark, an agreement exactly like that except that where the Security-First National Bank was written, the former document had the Security Trust and Savings Bank. He also testified that he had never seen the signature "Clarence Clark" on the upper portion of the document.

After February 10, 1944, both the will and employment contract were in a safe in appellant's office, in a file marked "Clarence Clark, Personal". That decedent Clark came into appellant's office March 6, 1945 in the morning, at which time Maurice F. Geibel, appellant's brother, and Mary J. Geibel, his sister-in-law were present. That Clark and Mr. and Mrs. Geibel were in conversation when appellant entered his office; that at that time the following conversation transpired:

"He said, 'Some of my things have disappeared, and the typed document that you wrote for me over there in the Hotel Rosslyn is also gone; but,' he said, 'they are not as smart as they think they are. You have my will here in the office. And I wish you to go with me to rid them all out of my home,' he said. 'I'm all fed up with it.'

"Well, I said, 'Clarence, I'm sorry, I'm arranging to go to see John Lordan and he will probably send me to the hospital for a surgical operation for my sight—cataracts.'

"And he also said—made the statement that the Gardhams had sponged on him to the tune of $1,200.00.

"I then took the occasion, I said, 'Clarence—'. In fact, he wished to see his will, and I started to get his will from the safe, and I had difficulty to open the combination because of my eye conditions, and my brother assisted me.

"And then I had difficulty finding his will and my brother assisted me and we were able to show him his will, and I handed it to Clarence Clark and then he handed it to my brother and I told my brother to read it, I told him that I wished to rewrite it then and there, 'Because that document,' I said, 'is a hard looking paper, and then you will have a decent looking document,' and then my brother said to him, 'That is some will, write it yourself, Clarence, and sign it and it will be better than that,' or words to that effect.

"Clarence stood up on his two feet and he said, 'That will is all right, I am not ready to rewrite it.' My brother read it all over and handed it back to Clarence and he in turn handed it to me and directed me to put it back in the safe."

Appellant further testified that his signature on the will was genuine as was also the signature of Mary Silber, the other attesting witness.

Appellant further testified that on February 10, 1944, Clark owed him approximately $4,000 or $4,400. That this amount was arrived at by virtue of the aforesaid contract of employment. That he did not render Clark any statements for such fees, nor did Clark pay him any of the $50 retainer fee from 1928 until 1944. Appellant further testified that on March 6, 1945, decedent Clark came into his office, examined the will which was taken from the safe, returned it to appellant who replaced it in the safe. That after notification of Clark's death he searched for the will but could not find it in Clarence Clark's personal file but that Miss Silber located it, according to the best recollection of the witness, in the file of Clark's mother. Appellant further denied that he ever said to attorneys Weller and Taintor that the will that he had in his possession was half typed and half written.

Miss Gertrude M. Berg, public stenographer and notary public at the Rosslyn Hotel, testified in corroboration of the foregoing testimony given by appellant and Miss Silber with reference to matters relating to the participation of Miss Berg in the typing of a will on February 10, 1944, with reference to an envelope being left at her office on the occasion of the visit of decedent and Attorney Geibel thereto, and also as to the taking by her of the acknowledgment of one introduced to her as Clarence Clark, to the aforesaid employment contract between the latter and appellant.

Mary Silber, secretary to appellant, corroborated the latter in regard to the formalities in connection with the claimed execution of the testamentary document in question and also with reference to the events which transpired subsequent to her arrival at her employer's office on February 10, 1944.

Miss Ida Silverman, who has known appellant for approximately thirty years and who was a client of his for approximately five years before the commencement of this prosecution, testified that she was in his office on February 10, 1944 between one and two o'clock. That she was acquainted with Clarence Clark for some twenty years; that on said February 10, 1944, at the time she came to appellant's office the decedent Clark was there and appeared to her to be erasing something when appellant entered. This witness corroborated the testimony of appellant and Miss Silber with respect to the claimed signing of the will. That after appellant had departed from the office with another client, decedent Clark showed her the will in question, saying that it was what he wanted and that was the way he was going to have it. She identified the will introduced in evidence in the instant trial as being the document which Clark showed to her. This witness further corroborated the testimony of Miss Silber with reference to the typing of the employment contract by Miss Silber. She particularly recalled the question with respect to the changing of the name of the bank and that appellant was to receive $50 a year for his work.

Maurice F. Geibel, appellant's brother, testified that he had known decedent Clark for some five years prior to the latter's death. That the witness called at his brother's office on March 6, 1945 with his wife at about 8:30 or 9:00 o'clock in the morning. That decedent Clark came in at approximately 9 o'clock or shortly thereafter. That when Clark came into the office he seemed to be nervous and upset and was under the impression that the witness Maurice Geibel was in fact the appellant. Upon being straightened out, Clark asked whether the witness expected appellant, saying that he would like to see him. That the witness stated to Clark that the latter would have to make it brief because appellant had an engagement at Dr. Lordan's office and was to go therefrom to the hospital to have his eye operated on. That when the appellant came into the office Clark told him he was having trouble out at his home, that the Gardhams had stolen a will he had and some papers, and that they also had cheated him out of some $1,200 and squandered the money. That decedent Clark further said, "They are not as smart as they think they are; they stole the will and now I can't find it, you will make a will of mine here in your office". That appellant then said to Clark, "Clarence, I would like to have you rewrite that will". That appellant had difficulty opening his safe, that the witness assisted him in looking through the safe and that they found a document in a file of Clark's mother. That appellant handed Clark the complete file, the latter read over the document again, then handed it to appellant's brother who read it and noted where it had been signed. That after the witness had examined the will he handed it back to Clark, the latter handed it to appellant and according to the best recollection of the witness, the document was then put back into the safe.

Lawrence Dale Gasteiger, an examiner of questioned documents, testified in behalf of appellant that he first met him on June 11, 1947. That he had examined various exhibits introduced into evidence, some of which contained the admittedly genuine signatures of decedent Clarence Clark and appellant. That it was his opinion that the signature "Clarence Clark" on the will, and the signature "Clarence Clark" on the employment contract are in the handwriting of the individual who wrote the signatures on the exemplars which were submitted to the witness as being those of decedent Clark. This witness expressed the further opinion that both signatures had been erased, but that the writing in pencil and the writing in ink were done by the same person. That on the will he could not find any evidence of attempted tracing. He saw graphite deposits on the paper on the entire area but that there was no single deposit such as would effect or give the appearance of a line. That the same condition applied to the employment contract. He could not state whether the erasing was before or after the inking in of the signatures. The witness also gave the reasons for his conclusions.

Lawrence J. Buys, an examiner and photographer of questioned documents, testified that he had examined the will and employment contract and the exemplar genuine signatures of Clarence Clark. That he also obtained exemplars of appellant's genuine signature from himself. That with respect to the signatures "Clarence Clark" on the will and employment contract he had reached the conclusion that as to the will, the ink signature "Clarence Clark" is an inked in signature from a pencil signature outlined already on the paper. That an erasure had occurred on the area then occupied by the ink signature and that most of the pencil outline was removed by an erasure, the pencil writing was put on, then the pencil writing was inked over and that then an erasure was made of that area. Referring to the employment contract, the witness gave it as his opinion that the pencil signature was first placed on the area now occupied by the ink signature; that the pencil signature was converted into an ink signature by following the pencil outline and that the erasure in this instance was after the ink signature was placed thereon. This witness testified that in his opinion there was no basis in fact from a comparison in the handwriting of appellant and the two questioned signatures on the will and contract to show in any degree whatever that appellant wrote them. That the admittedly genuine signature of Clarence Clark is completely in conformity with the letter formation of the signatures on the will and contract. It was the opinion of this witness that appellant did not forge the signatures on the will and contract. The witness outlined at some length his reasons for the conclusions at which he had arrived.

In support of his first ground of appeal. it is earnestly urged by appellant that Count II of the information (forgery) does not state facts sufficient to constitute a public offense.

The charging part of the challenged count is as follows: "For a further and separate cause of action, being a different offense of the same class of crimes and offenses as the charge set forth in Count I hereof, and connected in its commission, the said Martin E. Geibel is accused by the District Attorney of and for the County of Los Angeles, State of California, by this information, of the crime of Forgery, a felony, committed as follows: That the said Martin E. Geibel, on or about the 14th day of October, 1946, at and in the County of Los Angeles, State of California, with intent then and there to cheat and defraud, did then and there willfully, unlawfully, fraudulently and feloniously make, forge and counterfeit a certain Last Will and Testament and did then and there utter, publish and pass the same, knowing that said Will was false, forged and counterfeited, as aforesaid, with intent then and there to cheat and defraud, as aforesaid."

It is appellant's contention that the provisions of section 470 of the Penal Code, which defines the crime of forgery, definitely require that the false making and forging of a document, and the uttering, publishing or passing of the same, must be done with the intent to prejudice, damage or defraud some particular person. Appellant concedes that the charging part of the count in question may consist, as it were, of two branches, that is, the making and forging of the will, and the uttering and publishing of the same with intent to defraud, but insists that the pleading is fatally defective unless it be charged that the defendant forged the will and published it as true and genuine with intent to prejudice, damage or defraud some particular person.

[1] We are persuaded that the allegations of Count II are sufficient to state a public offense. The alleged counterfeited handwriting here in question was of such a nature that at least someone might possibly be defrauded or deceived by it, and the allegations set forth that it was prepared and published with intent to deceive and defraud. We have been so prone to think of forgery as defined and denounced in our Penal Code as being an act designed to injure an individual or set of individuals that it is not surprising appellant has indulged in this fallacious assumption. In Volume 2, Bishop's New Criminal Law, section 531, is the following pertinent language: "If forgery when prejudicial to an individual, is indictable, a fortiori it may be when tending to the harm of many or the public. Indeed, this is the kind of common-law forgery mostly spoken of in the older books". The author then lists among the examples alteration of a matter of record "or any other authentic matter of a public nature". We entertain no doubt that the allegations of Count II of the information state a public offense. It is at once apparent that forgery of a will might well have the effect of prejudicing or defrauding any or all of the heirs at law of a decedent. It is not necessary to allege that the appellant was benefited or that any particular person was defrauded. It is sufficient if the forged instrument could possibly have had that effect. When one either makes or passes a false instrument with intent on his part to defraud the crime of forgery is complete. People v. Davidian, 20 Cal.App.2d 720, 724, 67 P.2d 1085.

[2, 3] Furthermore, that the rules of pleading with reference to criminal charges have been liberalized by the amendments of 1927 and 1929 relating to pleading in criminal cases is not now open to question. Since these amendments the rule is that the purpose of an indictment or an information is to inform the accused of the charge which he must meet at the trial. When a pleading in a criminal case gives the accused notice of the offense of which he is charged it is sufficient. The particular circumstances and details thereof are furnished him by the transcript of the testimony upon which the indictment or information is predicated. Penal Code, sections 952, 959, 960, 870, 925. Count II of the information herein informed the appellant that he was charged with making, uttering and publishing as true and genuine the alleged forged will of decedent Clark with the intent thereby to cheat and defraud. No substantial right of appellant was prejudiced upon the merits. Count II therefore stated a public offense and the motion made in arrest of judgment thereon

was properly denied. People v. Pierce, 14 Cal.2d 639, 644, 645, 646, 96 P.2d 784; People v. Yant, 26 Cal.App.2d 725, 730, 80 P.2d 506; People v. Brac, 73 Cal.App.2d 629, 634, 635, 167 P.2d 535; People v. Codina, 30 Cal.2d 356, 358, 359, 181 P.2d 881.

In support of his claim that the evidence is insufficient to support the verdicts and judgments rendered, appellant urges that there is in the record no substantial evidence to prove that the will and contract are false and forged instruments as charged in Count II of the information. It would unduly prolong this opinion to here again narrate in detail the evidence which we have hereinbefore set forth. Suffice it to say, there was evidence that decedent did not sign the name "Clarence Clark" on either the will or the employment contract. Concededly, the handwriting on the will down to the signature was that of appellant. There was evidence that the contract was all typed on an Underwood typewriter in one operation with the exception of the signatures, of course, and that the typewriter upon which the instrument was typed was not in existence at the time the contract was dated. There was expert testimony that while the expert witness could not find sufficient evidence from his examination to state whether or not appellant forged the signatures, that he could have because, in the opinion of the expert witness, there was a similarity between the handwriting of appellant and the handwriting of the questioned signatures. There is also direct and positive evidence that appellant was in possession of both the will and contract until the will was filed for probate and until the contract was introduced into evidence in the matter of the Estate of Clark, supra, on February 28, 1947. Other circumstances which could have been considered by the jury are that the will in question recites that the decedent had no debts or obligations other than those he owed appellant as his attorney since the death of the former's mother, and the testamentary document directed that appellant be paid out of the assets of the estate for his time-to-time services. Then again, the contract provides for the payment of $50 annually to appellant, beginning on or prior to February 4, 1924, and for further sums if the $50 payments were deemed inadequate. In this regard, appellant testified that he kept no record of payments made to him nor did he render decedent Clark any statement or demand for such fees, which he believed to amount to from $4,000 to $4,400 on February 10, 1944. And that from 1928 to 1944 decedent never paid appellant any of the annual $50 retainer fees.

[4-9] The crime of forging a will is complete when the document has been so prepared that upon its face it will have the effect of defrauding one who acts upon it as genuine. People v. Horowitz, 70 Cal.App.2d 675, 686, 687, 161 P.2d 833. Knowingly tendering a forged will for probate is an uttering thereof. People v. Driggs, 14 Cal.App. 507, 509, 112 P. 577. While intent to defraud is of the essence of forgery, the question of intent was one primarily for the jury. People v. Horowitz, supra, 70 Cal.App.2d page 687, 161 P.2d 833. We find competent evidence in the record to the effect that the signature to the will and the contract was not that of Clarence Clark, the purported testator—by experts, it is true, but competent. There is in the record evidence of circumstances which belie the assumption that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below that appellant attached the forged signatures. It is true that appellant presented direct evidence to disprove the opinions expressed by certain expert witnesses and to negative inferences unfavorable to him which could be drawn from circumstances in evidence and heretofore alluded to. Such evidence, however, merely created a substantial conflict and the determination thereof by the jury is controlling. To appraise the weight of the evidence is the function of the jury, while ours is to appraise its legal value. That under the circumstances here present an inference of innocence might reasonably have been drawn does not justify us in upsetting the verdicts of the jury. Between the two inferences that might be drawn, the jury must choose. Before we are authorized to disturb the conclusion arrived at by the constituted arbiters of

the facts it must be clearly made to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached by them. Were the rule otherwise it would make this court the arbiter of both law and fact. Being unable to say that the inference of guilt drawn from the evidence by the jury was wholly unwarranted as a matter of law, we are powerless to interfere. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778. The case of People v. Holt, 25 Cal.2d 59, 69, 70, 153 P.2d 21, relied upon by appellant, does not militate against the foregoing rule in the light of the facts and circumstances present in the instant case.

[10] Appellant argues that a vital defect in the evidence to prove that the signatures on the will and contract are forgeries is the failure of proof that appellant or any other person who allegedly attached such signatures, did so without authority of decedent Clarence Clark. This contention is without merit. Appellant himself as well as his secretary Miss Silber definitely testified that they saw Clarence Clark sign both instruments, and in the case of the will appellant himself admittedly was one of the subscribing witnesses.

[11, 12] Before proceeding to additional discussion of the claim that the evidence is insufficient to sustain the verdicts and judgments under Counts I and III, we shall dispose of appellant's contention that Count II, charging the crime of forgery, was barred by the statute of limitations. Penal Code, sec. 800. The code section just cited provides that in a case such as the one at bar, an indictment or information must be filed within three years after the alleged commission of the offense. Count II of the information herein alleged that the will in question was forged on or about October 14, 1946. The testamentary document is dated February 10, 1944, and the information was filed on October 9, 1947.

Because the statute of limitations is jurisdictional, it follows that a prosecution within the statutory period specified is an essential element of the offense. A general verdict of guilty as charged, therefore, necessarily includes a finding on this element as it does in reference to the other elements of the offense.

Appellant's contention that Count II fails to state a public offense because the instrument alleged to have been forged is set out therein and bears date of February 10, 1944 is without merit. The statute begins to run from the actual date of the forgery and not from the date of the instrument. As was said in People v. McPherson, 6 Cal.App. 266, 269, 91 P. 1098, 1099: "Equally untenable is the position taken by appellant upon the oral presentation of the case. The crime is alleged by the information to have been committed on or about the 7th day of June, 1906. The instrument said to have been forged is set out in the information in extenso and bears date of March 18, 1889. It is urged that the prosecution is barred by the statute of limitations, because the information was not filed within three years after the date of the deed. In other words, the contention is made that by judiciously dating the forged instrument more than three years prior to its utterance the forger may protect himself from prosecution for the crime. To state the proposition is sufficient reason for refusing to adopt it. For the purpose of testing the sufficiency of the information the date of the alleged commission of the offense (June 7, 1906) alone can be considered, and the date of the forged instrument is immaterial."

[13-15] Appellant urges that there is no evidence in the record upon which the jury could base its decision as to the date of forgery other than the presumption that the writing was truly dated. Code Civ.Proc. sec. 1963, subd. 23. This, however, is a rebuttable, not a conclusive presumption and may be controverted by other evidence, direct or indirect. Code Civ.Proc., sec. 1961. In the case now engaging our attention, the jury had before it the testimony of the appellant himself and of two corroborating witnesses that the instrument had been in his possession up to the time it was filed in the office of the County Clerk on October 14, 1946. "The possession of an instrument recently forged, by one claiming under it, like the possession of goods recently stolen, is evidence against the possessor." People v. Smith, 103 Cal. 563, 566, 37 P. 516, 517. There was also evidence that the testator Clark did not die until about March 4, 1946 justifying an inference that the forgery was committed after the demise of the alleged maker of the testamentary document. This we say because there was before the jury evidence given by appellant and his corroborating witnesses that on March 6, 1945, decedent Clark visited appellant's law office and examined the will. Obviously, no forgery had occurred prior to that time. All of this evidence was sufficient upon which to base an inference, Code Civ.Proc., sec. 1958, 1960, and consequent conclusion that the forgery was committed within three years prior to the filing of the information. The motion to dismiss Count II of the information was, therefore, without merit.

[16] We come now to a consideration of appellant's claim that the evidence is insufficient to sustain the verdict and judgment on Count I which charged him with a violation of section 115 of the Penal Code, in that he offered for filing a false and forged instrument (the will). The section under which appellant was charged in Count I does not require that the act must be done with the intent to defraud another, nor is there any provision therein requiring that anyone be defrauded thereby. In this it differs from many other sections of the same code relating to forgery. The crime of violating section 115 of the Penal Code is sufficiently proven when it is shown that the accused intentionally committed the forbidden act.

[17] There is evidence in the record that the will was forged and that appellant had possession of the same. That the instrument was filed for probate in the Office of the County Clerk on October 14, 1946. That a fee of $7 was paid for such filing. That a receipt for said filing fee was issued in the name of appellant whose name was obtained from the document filed. That when the petition for admission of the will to probate was filed and came on for hearing, appellant appeared as one of counsel for the petitioner therein. That at such hearing appellant identified the document as the last will and testament of decedent Clark and testified to the circumstances surrounding the execution thereof. These and other circumstances hereinbefore narrated lead us to the conclusion that the evidence was sufficient to establish a violation of the code section under which appellant was charged in Count I, and is sufficient in law to sustain the judgment of conviction thereon. Whether the document was actually filed with the County Clerk by appellant himself or at his behest is immaterial. In either event, the offense is complete.

[18] In urging a reversal of the judgment of conviction on Count III which charges a violation of section 132 of the Penal Code, offering in evidence a false document, appellant insists that the offering of a false will for probate does not offend against the provisions of section 132 of the Penal Code which uses the words *"offers in evidence,* as genuine or true, any * * * document * * * in writing, knowing the same to have been forged * * *". (Emphasis added.) Appellant poses the question, "At a hearing where a will is presented for probate, is it offered in evidence or is it just offered for probate?" Appellant's query is answered by People v. Horowitz, supra, 70 Cal.App.2d page 688, 161 P.2d page 841, wherein it is stated: "Similary does appellant stand legally convicted of offering in evidence the forged instrument. He offered it for probate. He defended a contest filed by Morris. He knowingly offered the forged instrument in evidence, the crime denounced by section 132."

In the instant case there is evidence that the will was offered for probate by appellant or at his behest, and at the hearing on the petition for admission to probate of the will, appellant appeared not only as one of the attorneys for the petitioner, but there testified as to the execution of the will and the genuineness of the disputed signature of the testator. The document was examined by the court, and was the subject of expert testimony and legal argument. We are persuaded that such use of the instrument constitutes an offering in evidence within the meaning of the code section, People v. Hooper, 10 Cal.App.

2d 332, 334, 151 P.2d 1131, and that the evidence was therefore, sufficient to support the verdict and judgment on Count III.

[19-21] Appellant's claim that the evidence taken as a whole was insufficient to warrant the conclusion by the jury that the will and contract of employment were forgeries is answered by what we have hereinbefore said in considering appellant's contention that the record was barren of sufficient substantial evidence to support the verdict and judgment of conviction on Count II. It is true, as stated by appellant, with reference to the genuineness of the signature on the contract, that proof of acknowledgment by a notary public is prima facie evidence of the execution of the writing, but such a showing is rebuttable and not conclusive. In the case at bar, Mrs. Berg, the notary, could not testify to the identity of the individual whose acknowledgment she took except that she had been introduced to him as Clarence Clark by appellant. While she testified as to the general appearance of the individual, his approximate age and dress, there was expert testimony by handwriting experts that decedent Clark did not sign the contract, and there was positive testimony that it was typed on a typewriter which was not in existence on the date of said contract. A certificate of acknowledgment being only prima facie evidence, such certificate may be contradicted by other evidence direct or indirect. Code Civ. Proc., sec. 1833; Moore v. Hopkins, 83 Cal. 270, 271, 272, 23 P. 318, 17 Am.St.Rep. 248; Le Mesnager v. Hamilton, 101 Cal. 532, 534, 538, 35 P. 1054, 40 Am.St.Rep. 81. Courtney v. Daniel et al., 124 Okl. 46, 253 P. 990, 995, 996. The evidence was sufficient to justify the jury in concluding that notwithstanding the notarial acknowledgment thereon, the contract was not signed by Clarence Clark. We are not unmindful of the earnestness and zeal with which appellant presents his arguments as to the insufficiency of the evidence in this cause. Concededly, there is a sharp and direct conflict in practically every phase of the evidence, not only as to the surrounding circumstances of the execution of the will and contract, but as to the opinions of the expert witnesses, but the jury, as was their right, have resolved these differences against appellant. For reasons heretofore stated, we can not, under the factual situation here present, disturb the conclusion at which the constitutional and statutory arbiters of the facts have arrived.

[22] We are now confronted with appellant's contention that the court committed prejudicial error in certain rulings made during the course of the trial. In this regard, appellant first predicates error on the ruling of the court in striking out the answer given by Lawrence J. Buys, a handwriting expert testifying for appellant. The question was asked him on cross-examination by the district attorney when the witness was examining an exhibit made by Clark Sellers, a handwriting expert witness for the prosecution, which was introduced into evidence. The following occurred:

"A. Yes. I see that comparison, method of comparison.

"Q. What is that? A. I see that method of comparison as presented by this chart, yes.

"Q. Now, in examining those letters taken from the body of the will as depicted in that exhibit, you do not see any considerable tremor, do you? A. No, I do not. I think that chart is a completely unfair type of selection and comparison of this problem.

"Mr. Crail (Deputy District Attorney): May that be stricken as a conclusion of the witness?

"Mr. McMahon (Counsel for Appellant): He is an expert.

"The Court: The motion to strike is granted."

Appellant cites no authority in support of his claim that the ruling was erroneous and we are satisfied of its correctness. That part of the answer, "No, I do not", was proper and responsive to the interrogatory propounded. The remainder of the answer did not embody an opinion on questions in controversy at the trial and amounted only to a criticism of the methods used by another expert witness. The last quoted portion of the answer was not responsive to the question and could properly have been stricken on that ground. Code Civ.Proc., sec. 2056. Nor do we perceive any prejudice to appellant's substantial rights from the ruling.

[23–25] It is next contended by appellant that the trial court committed prejudicial error in overruling his objection to a question asked of him by the district attorney and in requiring appellant on cross-examination to answer the same. In that regard the record reflects the following:

"Q. Mr. Geibel, you stated this morning you had been representing Mr. Clarence Clark as an attorney from 1923 to the date of his death, approximately. Is that statement entirely true? A. All of that period I represented him for legal services and other services, but I didn't perform any legal services beginning September 5, 1939 up to September 5, 1940; I was out of the state.

"Q. Is that the only reason you didn't render any services for him as attorney during that period of time? A. As far as I know, it was.

"Q. Isn't it a fact that during that period of time you were suspended from practicing law in the State of California by the Supreme Court of this state?

"Mr. McMahon: That is objected to, incompetent, irrelevant and immaterial, has no bearing on any of the issues of this case.

"The Court: In view of the last answer, the objection is overruled. You may answer the question.

"A. I was."

With commendable candor the attorney general states in his brief that "While respondent will concede for the purpose of argument that it would have been better had the question never been asked", he still insists that the asking of the question "was perfectly proper cross-examination and impeachment and the ruling of the court was correct". We agree with respondent that "it would have been better had the question never been asked", and furthermore, definitely say that it should not have been asked. The ruling of the court was manifestly erroneous. We so held with reference to the asking of this question in the probate proceeding which gave rise to this prosecution, Estate of Clark, supra, but concluded it was not prejudicial because that proceeding was one before the court without a jury, and that the trained mind of the judge would not be prejudicially affected by the challenged testimony and would be considered by him only for what he conceived to be the limited purpose of cross-examination on the issue of whether appellant herein had, so far as that proceeding was concerned, rendered services for the decedent Clark continuously over a stated period of years. Here, however, we are concerned with a trial by jury, and as was said in People v. Albertson, 23 Cal.2d 550, 577, 145 P.2d 7, 20 (quoting from Wharton's Criminal Evidence, sec. 360, p. 567), " 'It does not reflect in any degree upon the intelligence, integrity, or the honesty of purpose of the juror that matters of a prejudicial character find a permanent lodgment in his mind, which will, inadvertently and unconsciously, enter into and affect his verdict. The juror does not possess that trained and disciplined mind which enables him either closely or judicially to discriminate between that which he is permitted to consider and that which he is not. Because of this lack of training, he is unable to draw conclusions entirely uninfluenced by the irrelevant prejudicial matters within his knowledge. * * *' "

The question was not proper cross-examination and the answer sought did not prove, nor tend to prove, any issue in the instant case. Unless the evidence sought to be elicited is relevant and material to the ultimate issue involved in the trial, the law does not sanction the introduction of evidence falling short of a felony and designed merely to degrade and prejudice the accused in the mind of the jury. What bearing upon the issues of the trial was contained in the question as to whether appellant had been previously suspended from the practice of law in this state? Respondent seeks to answer this question with the statement that on his direct examination appellant "attempted to build up in the minds of the jury, by his own testimony, his character, honor and trustworthiness" as an "honorable, honest, experienced attorney who had the interests of his client at heart, no larceny in his mind and no fraud in his makeup". We have read the entire record in this case, consisting as it does in part of a reporter's transcript containing more than eight hundred pages, a clerk's transcript of ninety-one pages, and manifold exhibits, and fail to find therein any material issue in the determination of which the challenged question and answer were helpful. Under the limitations of the rule applicable to the cross-examination of a defendant in criminal cases, People v. Gilliland, 39 Cal. App.2d 250, 260, 103 P.2d 179, it was error to permit the challenged interrogatory to be propounded to appellant on cross-examination. It is too well settled to require the citation of authorities that, upon the trial of one accused of a crime, evidence of other specific wrongful acts not pertinent to the issue on trial is not admissible; and, also that a witness cannot be impeached by evidence of particular wrongful actions, except that it may be shown that he has been convicted of a felony. It would be an impeachment of the legal learning of counsel for the people to intimate that he did not know the aforesaid question and the answer sought thereto were improper and peculiarly calculated to prejudice the substantial rights of appellant. That the asking of the question was prejudicial there can be little doubt. It would ignore human experience and belie the dictates of common sense to entertain a contrary view. What was said by the Chief Justice of the United States Supreme Court in the case of Viereck v. United States, 318 U.S. 236, 63 S.Ct. 561, 566, 87 L.Ed. 734, quoting from Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314, 1321, reflects our views as to the duties and obligations of a prosecuting officer. We quote: "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

[26] Appellant predicates prejudicial error on the ruling of the court refusing to allow him to prove, in particular, what legal services he had rendered to decedent Clarence Clark, as a basis for establishing the verity of his claim against the estate of said Clark.

A creditor's claim in the amount of $4,472 filed by appellant in the Clark estate for legal services rendered the decedent during the latter's lifetime was introduced into evidence by the prosecution. Manifestly, the only purpose for introducing this creditor's claim was that it tended in some way to prove an intent upon appellant's part to defraud. During the direct examination of appellant his counsel directed his attention to the exhibit in question (the creditor's claim) and inquired, "I will ask you if you rendered the services, legal services, referred to in that claim?", to which appellant responded, "I did". Objection was made on the ground that it was "immaterial whether he did or didn't". After considerable discussion, much of which took place outside the presence of the jury, the district attorney, upon resumption of proceedings in the presence of the jury stated: "Before we get rid of this reporter—I mean, before he leaves us, I move to strike the last answer that was given by the witness and insert the objection that was stated to the Court at the bench. The Court: The motion is granted."

The ruling was erroneous. As to Count II of the information, the prosecution was required to prove appellant's specific "intent to defraud". It follows as a matter of course that appellant was entitled to rebut or controvert any of the evidence that tended to establish such alleged intent. It would be a poor exemplification of the administration of even-handed justice to allow the prosecution by the introduction of evidence to prove specific intent on the part of an accused in the alleged commission by him of a criminal offense, and in the same action to deny the accused an equal privilege to rebut or controvert such evidence by showing his lack of criminal intent. People v. Becker, 137 Cal.App. 349, 352, 30 P.2d 562.

Appellant has abandoned the contentions made by him under his Point VII relative to rulings of the court made during the direct and cross-examination of one of his handwriting experts.

[27] Appellant complains that the court erred in overruling his objection to the introduction into evidence of the superior court file in the aforesaid probate proceeding, Estate of Clark, supra, in which appellant acted as counsel and testified as a subscribing witness to the proferred will. Without citation of authority appellant argues that the file in question was hearsay and that no proper foundation was laid for its introduction. The claim is without merit and cannot be sustained. The documents contained in the file were originals, identified by a deputy county clerk who testified he obtained them from the court files in his office. Such foundation was sufficient under the provisions of section 1905 of the Code of Civil Procedure.

[28, 29] The next ruling to which appellant excepts occurred during the direct examination of Clark Sellers, called by the prosecution as a handwriting expert. While the district attorney was qualifying the witness as an examiner of questioned documents, the following occurred:

"Q. Now, I recall the Lindberg kidnapping case, known as the Hauptman case. Did you take part in that trial? A. Yes. I was asked by the Attorney General of New Jersey to examine the letters written to Colonel Lindberg and to Mr. Condon, to determine whether or not in my opinion Mr. Hauptman wrote those letters, and I made a report to him and was called as a witness in behalf of the State and testified in that case.

"Q. By the way, how many handwriting experts testified for the prosecution in that case, do you recall?

"Mr. McMahon: Object to that as incompetent, irrelevant and immaterial.

"The Court: The objection will be overruled.

"A. Eight for the prosecution."

We perceive no error, certainly not reversible error in the ruling. The examination of an expert witness as to his qualifications and competency before he gives his opinion is a question of procedure which lies within the discretionary power of the trial court. Unless there is an obvious abuse of discretion an appellate tribunal will not interfere with the ruling. No such situation is here presented.

Appellant has abandoned his contention as contained in Point IX with respect to further claimed prejudicial misconduct of the district attorney during the trial and in his argument to the jury, other than that already set forth herein and discussed.

[30] Appellant complains that the trial court did not give to the jury any instructions requested by him. It is not incumbent upon the court to give any particular instructions offered by either the prosecution or the defense. It is sufficient if the jury is fully, fairly and correctly instructed on the law applicable to the issues tendered by the indictment or information, or raised by the evidence. And the rule is too well established to require the citation of authorities, that it is not error to refuse a requested instruction if it has been covered by those already given.

[31] We shall now give consideration to appellant's contention that the court erred in giving certain instructions. In this regard appellant asserts prejudicial error in the giving of the following instructions:

"In every crime or public offense there must exist a union or joint operation of act and intent. To constitute criminal intent it is merely necessary that a person intent to do an act which, if committed, will constitute a crime. When a person intentionally does that which the law declares to be a crime, such person is acting with criminal intent even though he may not know that such act is unlawful and even though there be no bad motive."

Respondent concedes that had appellant been charged only with the crime of forgery

(Count II) his contention would be meritorious, but asserts that appellant was also charged in Counts I and III with violations of sections 115 and 132 of the Penal Code, to which offenses the instruction claimed of is clearly applicable. There can be no question but that in the offenses charged in Counts I and III the intent is not made an affirmative element of the crimes, and the law presumes that the act, if knowingly done, was done with a criminal intent. However, the vice of the challenged instruction lies in the fact that it was not limited to the offenses charged in Counts I and III.

The same criticism is applicable to the following instruction: "The word 'willfully', when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act or make the omission referred to. It does not require any intent to violate law or to injure another, or to acquire any advantage."

True, the court did give an instruction as follows:

"In the case of certain crimes it is necessary that in addition to the intended act which characterizes the offense, the act must be accompanied by a specific or particular intent without which such a crime may not be committed.

"Thus in the crime of *forgery,* a necessary element is the existence in the mind of the perpetrator of the specific intent to *defraud* and unless such intent so exists that crime is not committed."

[32] However, it cannot be said that the giving of the last named correct instruction on specific intent overcame the prejudicial effect of the erroneous instruction as to Count II. At most it created a conflict and normally would serve only to confuse or mislead the jurors and make it impossible to determine whether, in their deliberations, they followed the law as correctly or incorrectly given to them, People v. Maciel, 71 Cal.App. 213, 217, 234 P. 877; People v. Richardson, 161 Cal. 552, 564, 120 P. 20; People v. Miller, 2 Cal.2d 527, 532, 42 P.2d 308, 98 A.L.R. 913; People v. Gibson, 107 Cal.App. 76, 82, 289 P. 937.

[33, 34] The court gave the following instruction on the question of aiding and abetting the commission of a crime:

"All persons concerned in the commission of a crime who either directly and actively commit the act constituting the offense or who knowingly and with criminal intent aid and abet in its commission or, whether present or not, who advise and encourage its commission, are regarded by the law as principals in the crime thus committed and are equally guilty thereof.

"(One who does not actively commit the offense, but who aids, promotes, or encourages its commission either by act or counsel or both, is not deemed by law to be guilty and shall not be found guilty of the crime unless he did what he did knowingly and with criminal intent. To abet another in the commission of a crime implies a consciousness of guilt in instigating, encouraging, promoting, or aiding the commission of such criminal offense.)"

Appellant's contention that this instruction should not have been given must be sustained. The instruction is substantially in the language of section 31 of the Penal Code, and of course states the law correctly, but under the circumstances of this case it should not have been read to the jury. The necessary implication from this instruction, in the light of the situation as it was developed by the evidence, was that there was evidence tending to show that the claimed forgery of the will (Count II and the offenses charged in Counts I and III were the result of the joint acts of appellant and others. Save and except for the fact that appellant and his secretary, Miss Silber, were subscribing witnesses to the will, there is not the slightest evidence to establish a confederation between appellant and any other persons for the purpose of committing the offenses charged in the information. The trial court is required by section 1127 of the Penal Code to refuse to give all requested instructions not pertinent. To give instructions not pertinent to the issues involved tends only to confuse the jury, and instead of enlightening them, serves to impede the administration of justice. People v. Silva, 48 Cal.

App. 728, 738, 192 P. 330; People v. Adams, 79 Cal.App. 373, 377, 249 P. 536.

[35] What we have just said applies with equal force to the instruction: "Evidence, if any, that the (a) defendant, on one or more occasions other than from the witness stand, made false, contradictory or misleading statements concerning the charge against him which now is being tried (*or that he endeavored to procure false or fabricated evidence to be produced at the trial*) may be considered by the jury as a circumstance tending to prove a consciousness of guilt, but is not sufficient of itself to prove guilt. The weight to be given to such a circumstance, and the significance, if any, to be attached to it, are matters for the jury to determine." (Emphasis added.)

There was no evidence introduced at the trial that proved or tended to prove, or from which a fair or reasonable conclusion or inference could be drawn by the jury that appellant "endeavored to procure false or fabricated evidence to be produced at the trial". It therefore manifestly follows, that the instruction should not have been given.

We have considered but find no merit in appellant's further complaint as to certain other instructions given or refused.

Finally, we come to a consideration of respondent's contention that assuming the district attorney was guilty of misconduct and that certain rulings of the court were prejudicial, nevertheless, "in view of the obvious guilt of the defendant as is shown by the facts, the misconduct nor any prejudicial ruling of the court are such as would warrant this court, in reversing the judgment on these grounds (Cal.Const., Art. VI, Sec. 4½)". With the reasoning of the learned Attorney General that the saving grace of section 4½ of Article VI of the State Constitution should come to the rescue of these convictions, we are not in accord. As was said by this court in People v. Braun, 31 Cal.App.2d 593, 603, 88 P.2d 728, 733: "Illegitimate and unconstitutional practices get their first footing by silent approaches and slight deviations from established legal modes of procedure. In a strong dissenting opinion delivered by Mr. Justice Sutherland of the Supreme Court of the United States, in Associated Press v. National Labor Relations Board, 301 U.S. 103, 57 S.Ct. 650, 659, 81 L.Ed. 953, we are counseled to 'withstand all beginnings of encroachment for the saddest epitaph which can be carved in memory of a vanished liberty is that it was lost because its possessors failed to stretch forth a saving hand while yet there was time.' The acquittal of a guilty person is truly a miscarriage of justice, but the conviction of an innocent person through relaxation of those fundamental legal principles such as the one with which we are here concerned, would be a tragedy. It is the duty of the courts to be watchful for the constitutional and individual rights of the citizen and against any stealthy encroachments thereon."

[36, 37] In the case at bar the evidence is in sharp conflict. All the material facts testified to by witnesses for the prosecution were denied and controverted. The language used by this court in People v. Gilliland, supra, 39 Cal.App.2d pages 264, 265, 103 P.2d page 186, we consider is applicable to and determinative of respondent's claim that the general evidence is sufficient to put into operation the saving grace of section 4½ of Article VI of our State Constitution. We quote:

"We do not understand section 4½ of Article VI of the Constitution as intended to mean that merely because the evidence may legally be able to stand up under the weight of the judgment, that is sufficient reason in all cases for refusing to set aside the judgment. People v. Davis, 210 Cal. 540, 556, 293 P. 32. The phrase 'miscarriage of justice' as used in the constitutional provision has no hard or fast definition, and as was said in People v. Wilson, 23 Cal. App. 513, 138 P. 971, 975, 'does not simply mean that a guilty man has escaped or that an innocent man has been convicted. It is equally applicable to cases where the acquittal or the conviction has resulted from some form of trial in which the essential rights of the people or of the defendant were disregarded or denied. The right of the accused in a given case to a fair trial, conducted substantially according to law, is at the same time the right of all inhabitants of the country to protection against procedure which might at some time illegally deprive them of life or liberty. "It is an essential part of justice that the question of guilt or innocence shall be determined by an orderly legal procedure, in which the substantial rights belonging to defendants shall be respected." '

"If a defendant cannot be fairly convicted, he should not be convicted at all; to hold otherwise would be to provide ways and means for the conviction of the innocent. It cannot be gainsaid that you cannot inspire or preserve respect for the law by withholding its protection from those accused of crime. While deviation from the prescribed rules of law governing trials may result in justice for the particular defendant who is before the bar, it is dangerous to the community and its citizens. As was said by Chief Justice Hughes of the United States Supreme Court not so long ago, 'In our system, the individual finds security in his rights because he is entitled to the protection of tribunals that represent the capacity of the community for impartial judgment as free as possible from the passion of the moment and the demands of interest or privilege.' When, as here, we are unable to say 'whether appellant would or would not have been convicted but for the errors of the court,' we must direct a reversal. People v. Degnen, 70 Cal. App. 567, 234 P. 129, 145. We do not regard the evidence in this case as sufficient to put into operation the saving grace of section 4½ of Article VI of the Constitution. Even convincing proof of a defendant's guilt does not necessarily mean, under all circumstances, that there has been no miscarriage of justice. People v. Mahoney, 201 Cal. 618, 258 P. 607; People v. Patubo, 9 Cal.2d 537, 71 P.2d 270, 113 A.L.R. 1303. From our examination of the record in this case we are of the opinion that the errors complained of have resulted in a miscarriage of justice. It is quite likely that the conviction of appellants was caused by the errors that are shown by the record. From the standpoint of the prosecution, the most that can be said is that the evidence as a whole, which was legally admissible was quite evenly balanced. In venturing these observations, we speak only from the showing made by the record. It is true the jury had an opportunity to observe the demeanor of the witnesses and may have had reason to return the verdicts which were found irrespective of the errors which were committed during the trial. As to this, of course, we can say nothing. From the mere record, as we read it, the errors may very easily have turned the scale in favor of the prosecution. Appellants were denied that fair and impartial trial guaranteed by law, which amounts to a denial of due process of law. Powell v. [State of] Alabama, 287 U.S. 45, 52, 53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527." See also People v. Duvernay, 43 Cal.App.2d 823, 829, 111 P.2d 659 and People v. Hooper, 92 Cal.App.2d 524, 207 P.2d 117.

[38, 39] Criminal cases should not be conducted with an eye to the saving grace of section 4½, Article VI of the Constitution. Except in proceedings on motion for a new trial, the constitutional section is of no concern to the trial courts, and so far as its application goes, it is of interest only to the courts of review. People v. Black, 73 Cal.App. 13, 43, 238 P. 374.

For the foregoing reasons, the judgments and the order denying defendant's motion for a new trial are, and each is reversed, and the cause remanded for a new trial.

DORAN and DRAPEAU, JJ., concur.

93 Cal.App.2d 120

PALASKE v. CITY OF LONG BEACH et al.

Civ. 16799.

District Court of Appeal, Second District,
Division 1, California.
July 29, 1949.

Rehearing Denied Aug. 18, 1949.
Hearing Denied Sept. 26, 1949.

1. Municipal corporations 🔑187(3)

Time that city policeman served in armed forces constituted a part of his aggregate service as a policeman with the city for pension purposes. St.1931, p. 2785, § 187; St.1945, p. 2954, § 187.1; Military and Veterans' Code, § 395.1(c); Const. art. 20, § 3.5.

2. Municipal corporations 🔑187(3)

Statutory provision that an employee shall be entitled to participate in insurance or other "benefits" offered by employing governmental agency pursuant to established rules and practices in effect at time employee left his position to join the armed forces includes pensions granted by city charter to policeman. St.1931, p. 2785, § 187; St.1945, p. 2954, § 187.1; Military and Veterans' Code, § 395.1(c); Const. art. 20, § 3.5.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Benefit".

3. Municipal corporations 🔑187(9)

Evidence that pension board of city had granted retirement applications of several members of police and fire departments who had not completed 20 years of service exclusive of times spent on leave of absence, established that at time city policeman entered armed forces an established rule or practice on part of pension board included leaves of absence in computing aggregate service, so as to warrant the inclusion of time spent by policeman in the armed services in determining his pension. St.1931, p. 2785, § 187; St.1945, p. 2954, § 187.1; Military and Veterans' Code, § 395.1(c); Const. art. 20, § 3.5.

4. Administrative law and procedure 🔑330
Statutes 🔑219

Contemporaneous construction by pension board of city of provisions of city charter relating to pensions, though not controlling on courts, was entitled to great weight, particularly when long acquiesced in. St.1931, p. 2785, § 187; St.1945, p. 2954, § 187.1; Military and Veterans' Code, § 395.1(c); Const. art. 20, § 3.5.

5. Municipal corporations 🔑187(3)

Where, by law or by an established rule or practice of the administrators of a pension system, time spent on leave of absence or furlough is included in computing time required to be served in order to qualify for retirement on pension, returning veteran is entitled to have time spent by him in the armed forces included in the computation of his length of service for purpose of qualifying for such pension, the same as if he had been on an ordinary furlough or leave of absence. St. 1931, p. 2785, § 187; St.1945, p. 2954, § 187.1; Military and Veterans' Code, § 395.1 (c); Const. art. 20, § 3.5.

6. Municipal corporations 🔑220(9)

City had power to modify its pension plan to provide that on and after effective date of amendment an employee entitled to retire might do so or not, as he saw fit, but that if he chose to continue as an employee, he could not thereby earn any additional pension above that to which he was entitled on effective date of amendment. St.1931, p. 2785, § 187; St.1945, p. 2954, § 187.1.

7. Municipal corporations 🔑176(3)

Amendment of city charter repealing pension provisions for members of fire and police department, with a saving clause applicable only to those who had served 20 years prior to effective date of amendment, was ineffective as to policeman who had served all but two days of 20 years on effective date of amendment. St.1931, p. 2785, § 187; St.1945, p. 2954, § 187.1.

8. Statutes 🔑64(4)

Where amendment of city charter repealing pension provisions for members of fire and police department with a saving clause applicable only to those who had served 20 years was invalid insofar as it attempted to deprive policeman who had served two days less than 20 years, of pension provision of amendment limiting pension rights to 50 per cent of employee's salary was separable, and precluded policeman from recovering, in addition to 50 per cent of his annual salary, an addition of 1⅔ per cent of his salary for each year over 20 years as provided in city charter prior to amendment. St.1931, p. 2785, § 187; St.1945, p. 2954, § 187.1.

9. Statutes ⚷64(1)

Where an attempted repeal of a statute is unconstitutional as to a portion thereof, but is constitutional as to the remainder, and the two portions of the statute are separable, the repeal will be effective with respect to the valid portion thereof if the legislative intent can be construed that the repeal was to be effective as to a part thereof.

10. Statutes ⚷64(1)

A portion of a statute may be declared unconstitutional without affecting the remainder of the statutes, where the result of the deletion of the constitutional portion will not make the statute meaningless, and it can be said to have been the intention of the legislature to have the act stand with such deletion.

◆

Appeal from Superior Court, Los Angeles County; Thomas J. Cunningham, Judge.

Mandamus proceeding by Stanley H. Palaske against the City of Long Beach, a municipal corporation, and certain of its officials, to require the City of Long Beach to pay petitioner an annual pension equal to 50 per cent of his annual salary plus 1⅔ of his annual salary for each year of service over an aggregate of 20 years. From a judgment for the petitioner, the defendants appeal.

Judgment modified and, as modified, affirmed.

Irving M. Smith, City Attorney, Nowland M. Reid, Assistant City Attorney, Clifford E. Hayes, Deputy City Attorney, Long Beach, for appellants.

Joseph A. Ball, Kenneth Sperry, Long Beach, for respondent.

WHITE, Presiding Justice.

The City of Long Beach and certain of its officials have appealed from a judgment of the Superior Court of Los Angeles County granting to petitioner and respondent, a policeman of said city, a writ of mandate requiring the city to pay him an annual pension equal to 50% of his annual salary plus 1⅔% of his annual salary for each year of service over an aggregate of 20 years.

Petitioner entered the Long Beach Police Department on April 1, 1925, and served continuously until March 12, 1942, when he entered the armed forces. On July 1, 1945, he was discharged from the United States Navy and was "reinstated" to his former position of patrolman in the Police Department. On July 10, 1947, he applied for a retirement pension pursuant to the provisions of section 187 of the Charter of the City of Long Beach (Stats. 1931, p. 2785). On August 19, 1947, his application was denied by the City Council on the ground that he had not served twenty years "in the aggregate" as a member of the Police Department. It is admitted in the briefs that subsequent to the entry of judgment herein petitioner completed twenty years' aggregate service exclusive of the period of his absence in military service and has been granted a pension of fifty per cent of his annual salary. The question of whether such period of absence in the armed forces should be included in computing petitioner's aggregate service in the police department is not moot, however, for reasons that hereafter appear.

Petitioner sought his pension pursuant to the provisions of subdivision 2 of section 187 of the Charter of the City of Long Beach (Stats.1931, p. 2785), which provided that any member of the fire or police departments who should have served thirty years might be retired on a pension equal to two-thirds of the annual salary attached to the rank or position held by him one year prior to the date of retirement, and which further provided: "* * * that after twenty years' aggregate service, * * * such person shall be retired and paid in equal monthly installments from said fund a limited pension as follows: for twenty years' service, fifty per cent (50%) of the annual salary * * * and an additional one and two-thirds per cent (1⅔%) of such salary for each year over twenty years and less than thirty years in the aggregate served by such member before retirement."

By an amendment to the city charter effective March 29, 1945 (sec. 187.1, stats. 1945, p. 2954), section 187 was repealed with a saving clause applicable only to those who had served twenty years prior to the effective date of the amendment. This section 187.1 provided: "Sections 187 and 188 of this Charter are hereby repealed; provided, however, that any member of the Fire or Police Department who shall have served in such department for twenty (20) years or more on the effective date of this amendment shall be entitled to retire at any time within five (5) years from said effective date as provided by subdivision (2) of said Section 187, and, beginning with the date of his retirement, shall be paid a pension of such percentage of his salary, as he would have been entitled to receive had he been retired on the effective date of this amendment."

On the effective date of this amendment petitioner lacked two days of completing 20 years' service in the police department, even including the period during which he was absent in the Navy. His situation was therefore the same as that of the petitioner in Kern v. City of Long Beach, 29 Cal.2d 848, 179 P.2d 799, 803, where it was held that "petitioner has a vested pension right and that respondent city, by completely repealing all pension provisions, has attempted to impair its contractual obligations. This it may not constitutionally do, and therefore the repeal is ineffective as to petitioner."

Appellants first urge that the court erred in holding that the time respondent served in the armed forces constituted a part of his aggregate service as a patrolman with the city. If the time served in the armed forces is included as part of respondent's aggregate service, then on the date of his retirement, July 10, 1947, his aggregate service would be a little over twenty-two years, and the second question then arises, whether he is entitled to the additional sum of one and two-thirds per cent of a patrolman's annual salary for each year of service in excess of twenty years.

We have concluded that the trial court properly held that respondent was entitled to credit for the time served by him in the armed forces. Section 3.5 of Article 20 of the Constitution of this state provides: "Notwithstanding any other provision of this Constitution, the Legislature by general law may provide for the reinstatement and re-entry into public office within the terms for which they were elected, and the reinstatement in public employment, respectively, of public officers and employees who have resigned or who resign their offices or employments to serve or to continue to serve in the armed forces of the United States or in the armed forces of this State."

Pursuant to this constitutional authority, the Legislature enacted subdivision (c) of section 395.1 of the Military and Veterans' Code, providing, so far as here pertinent, as follows: "Any officer or employee other than a probationer who is restored to his office or employment pursuant to this act shall not be discharged from such office or position without cause within one year after such restoration, *and shall be entitled to participate in insurance or other benefits offered by the employing governmental agency pursuant to established rules and practices relating to such officers or employees on furlough or leave of absence in effect at the time such officer or employee left his office or position to join the armed forces of the United States.*" (Emphasis added.)

Appellants argue that in using the phrase "insurance or other benefits" the Legislature did not intend to include pension rights; that a pension is an integral part of the salary and contract of employment of an employee, Kern v. City of Long Beach, supra; Dryden v. Board of Pension Commissioners, 6 Cal.2d 575, 59 P.2d 104; that the Legislature is without power to provide for or determine the pay of employees of a chartered city, even under the authority granted by section

3.5 of Article 20 above quoted. It is urged that while the Legislature, in proper circumstances, may declare a particular matter to be of statewide concern and pass laws which supersede the power of a municipality to legislate in connection therewith, it is "without power to leave a matter subject to municipal control and then enact legislation in effect amending a Charter provision and extending to persons benefits not contemplated by the Charter." Further, contend appellants, even if the term "other benefits" includes pensions, there was no proof that the city had established "rules and practices" granting any pension benefits.

[1] Appellants' contentions must be rejected. As was said in Cunningham v. Hart, 80 Cal.App.2d 902, 908, 183 P.2d 75, 79, "the people of the state have declared this" (the reinstatement of veterans in public office and employment) "to be a matter of state-wide concern by an amendment to the Constitution, and in so doing, have granted the Legislature the power to enact general laws controlling the subject, '*Notwithstanding any other provision of this Constitution.*' (Emphasis added.) This alone would appear to compel a holding that section 395.1 prevails over the 'home rule' afforded in municipal affairs by section 6, article XI." Further, as was held in the cited case, "Even disregarding the fact that the people and the Legislature have already declared this to be a matter of state-wide concern, it would seem that the mere fact that so great a number of veterans were returning within so short a period of time, necessitating their assimilation in civil life in an orderly, uniform manner, without undue dispute or conflict, differing in each locality, makes it a matter affected with a public interest and one affecting the general welfare of the state."

[2] The contention that the phrase "and other benefits" should not be construed to include pensions or pension rights is directly contrary to the national and state policy as disclosed by the various enactments for the relief of those who have been obliged to drop their own affairs to take up the burden of the nation, as well as the oft-announced intention of state and federal courts to take a liberal view of such enactments. Cunningham v. Hart, supra, 80 Cal.App.2d at pages 908, 909, 910, 183 P.2d 75; People ex rel. Happell v. Sischo, 23 Cal.2d 478, 144 P.2d 785, 150 A.L.R. 1431; Boone v. Lightner, 319 U.S. 561, 63 S.Ct. 1223, 87 L.Ed. 1587; Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 66 S.Ct. 1105, 90 L.Ed. 1230, 167 A.L.R. 110; Johnson v. Johnson, 59 Cal. App.2d 375, 379, 139 P.2d 33. In McCoy v. Board of Supervisors, 18 Cal.2d 193, 114 P.2d 569, 571, the court said: "* * * A study of similar enactments in other jurisdictions, of various soldiers' and sailors' relief acts, and of the trend of judicial decision, reveals a growing recognition of the necessity of protecting those in military or naval service against the loss of civil rights, and of the potency of a national emergency to justify broad and appropriate relief. Not only have state and national legislative bodies been alert to meet the need for special protective measures, but state and federal courts have kept pace and have evinced a firm intention to take a liberal view of these emergency enactments in order that their protective purposes may be fulfilled without undue imposition of constitutional limitations or hindrance through narrow judicial construction."

In Fishgold v. Sullivan Drydock & Repair Corp., supra, the Supreme Court of the United States was considering an act of Congress very similar to section 395.1 of the Military and Veterans' Code of this state. The court said [328 U.S. 275, 66 S.Ct. 1110]:

"The Act was designed to protect the veteran in several ways. He who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job. He was, moreover, to gain by his service for his country an advantage which the law withheld from those who stayed behind. * * * He shall be 'restored without loss of seniority' and be considered 'as having been on furlough or leave of absence' during the period of his service for his country, with all of the insurance and other benefits accruing to employees on furlough or leave of absence. § 8(c) [50 U.S.C.A.Appendix, § 308(c)]. Thus, he does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war.

* * * * * *

"This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need.

* * * * * *

"As we have said, these provisions guarantee the veteran against loss of position or loss of seniority by reason of his absence. He acquires not only the same seniority he had; *his service in the armed services is counted as service in the plant so that he does not lose ground by reason of his absence.*" (Emphasis added.)

We are in accord with the statement of counsel for respondent that the word "benefit" is a generic term which includes all contractual rewards which the employer owes to the employee through established rule and practice. In MacLaughlin v. Union Switch & Signal Co., 3 Cir., 166 F.2d 46, 48, the question involved was one of vacation rights. The court there said, in part: "* * * Vacation advantages accorded employees are certainly no less to be prized than such *benefits* as *pensions,* bonuses, and participation in insurance programs * * *." (Emphasis added.) In another vacation case, Mentzel v. Diamond, 167 F.2d 299, 300, 301, it was said, with respect to the returning veteran, "He is protected, while away, to the same extent as if he had been either continuously on the job in the plant or away on furlough or leave of absence for some personal reason."

Respondent in his petition alleged that at the time he was called for service in the armed forces the Board of Police and Fire Pension Commissioners of the city had adopted the practice of permitting officers and employees of the police and fire departments to receive credit for the time spent by them on furlough or leave of absence toward the time necessary to entitle them to receive a retirement pension. The trial court found this allegation to be true, and it is urged that such finding is without support in the evidence. This contention may not be sustained. At the trial it was stipulated, in substance, that from July, 1939, to March 29, 1945, it had been the custom of the pension commissioners of the city to submit all legal questions concerning the pension provisions of the city charter and all doubtful pension claims to the city attorney for an opinion, and it was customary for the pension commissioners to follow such opinion; that no formal rules or regulations with respect to granting or denying pension claims had ever been adopted.

Copies of minutes of the pension board and of the opinions of the city attorney were introduced in evidence, from which records it appeared that pursuant to opinions rendered by the city attorney from time to time, the board had granted the retirement applications of several members of the police and fire departments who had not completed twenty years of service exclusive of time spent on leave of absence. For example, on April 1, 1941, a pension was granted to Alonzo White, who had been a member of the police department since February 21, 1921, but who had been on leave of absence since November 25, 1940. The city attorney in his opinion concluded that "neither vacations nor sick-leaves during which the member receives compensation, nor leaves of absence granted upon the recommendation of the head of his Department and City Manager, on order of the City Counsel, as provided in Section 47, St. 1921, p. 2076, during which the member receives no compensation, were intended to be eliminated in computing the length of service." The city attorney took the view that the term "aggregate service" was intended "to cover cases where there was such an interruption of service, as where there was a retirement for disability * * * or where the member of the Department had resigned and was afterward re-employed."

The same procedure was adopted and the same ruling made in the case of Mrs. Lulu Straw, who applied for and received a pension effective October 9, 1941. Mrs. Straw had been "off duty" during her period of service a total of 197 days, mostly "sick without pay." A similar ruling was made in the case of a patrolman who had had one month's leave of absence and one ten-day suspension, as well as in three other like cases.

It was further stipulated that neither the minutes of the Board of Police and Fire Pension Commissioners since July, 1939, and prior to March 29, 1945, nor the minutes of the City Council since that date, disclosed any case in which a pension was denied by reason of a portion of the applicant's aggregate service having been spent on an extended leave of absence granted by the City Council under the provisions of Section 47 of the Charter; and further that it does not appear from the minutes or records that either the board or the city council "has failed to take into consideration, as a part of the aggregate service * * * the periods during which they were absent from active duty on account of sickness where sick leave had been granted pursuant to the provisions of the so-called Sick Leave Ordinances of the City of Long Beach, or where such members were absent on vacations pursuant to the provisions of the so-called Vacation Ordinance of Long Beach."

Appellants submit that the action of the board of pension commissioners, as disclosed by its minutes, based upon the advice of the city attorney, does not constitute the adoption of a rule or establishment of a practice; that the board could not establish a rule or practice which would grant any rights which were not granted by section 187 of the charter. The city attorney, it is urged, in his opinions was interpreting section 47 of the charter, which authorized the City Council to grant a leave of absence, not exceeding one year, for the purpose of health, or study, travel and research, to any employee of the city, other than elective officers and the City Manager.

[3, 4] We consider the foregoing evidence ample to support a finding that there existed at the time respondent entered the armed forces an established rule or practice on the part of those administering the pension program to include leaves of absence in computing "aggregate" service. While there was no formal adoption of a rule, there was certainly shown to exist an "established" practice. The opinion of the City Attorney was followed in the case of Alonzo White in 1941 and consistently adhered to thereafter. Under its charter authority to administer the pension system, the board had the right and the duty to establish rules and practices not inconsistent with the charter provisions. It was necessary for the board to determine the meaning of the phrase "aggregate service." This it did, acting upon the advice of the City Attorney. Its contemporaneous construction of the law it was charged with administering, while not controlling upon the courts, is entitled to great weight, particularly when long acquiesced in. 23 Cal.Jur. 775; Koenig v. Johnson, 71 Cal.App.2d 739, 755, 163 P.2d 746. The policy adopted by it amounted to a "departmental rule of action." See Tyra v. Board of Police etc. Commissioners, 32 Cal.2d 666, 670, 197 P.2d 710.

The contention that the policy adopted can apply only to "authorized" leaves of absence under section 47 of the charter begs the question. Under subdivision (c) of section 395.1 of the Military and Veterans' Code hereinbefore quoted, the employee was entitled to participate in benefits offered pursuant to established rules and practices relating to employees "on furlough or leave of absence" in effect at the time he entered the armed forces. It is of no moment that a furlough or leave of absence was not granted by the department head or city council. The effect of the code section was to place the employee in the *status* of one on furlough or leave of absence so far as his right to participate in "insurance or other benefits" is concerned.

It should further be noted that in 1941 the electors of Long Beach adopted section 101.5 of the Charter, St.1941, p. 3355, evincing their policy toward the returning veteran by providing that "all persons in the classified service who on or after June

1, 1940, shall have entered, or who hereafter shall enter, the armed forces * * shall be reinstated without loss of *status* or seniority * * *." (Emphasis added.)

[5] Recognizing the complexity of the problems that can arise in the administration of pension systems of various types, we deem it advisable to point out that the holding in the case now before us is limited to the particular facts here presented—that is, that where by law or by an established rule or practice of the administrators of a pension system, time spent on leave of absence or furlough is included in computing the time required to be served in order to qualify for retirement on pension, then the returning veteran is entitled to have the time spent by him in the armed forces included in the computation of his length of service for the purpose of qualifying for such pension, the same as if he had been on an ordinary furlough or leave of absence. We further hold that such an "established rule or practice" was shown to exist in the case at bar. Problems which may arise in the administration of other systems (including the question of contributions) and the rights of the veteran thereunder, with the many questions which may be raised through the necessity of maintaining a sound actuarial basis and preserving the integrity of a fund, are not now before us. We recognize, as appears from the following quotation, that "The rule permitting modification of pensions is a necessary one since pension systems must be kept flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system and carry out its beneficent policy." Kern v. City of Long Beach, supra, 29 Cal.2d at page 854, 179 P.2d at page 803.

We are now met with the question raised by the fact that although by the amendment to the charter of March 29, 1945, the city repealed all pension provisions as to persons not then eligible for retirement, the repealing section contained a proviso that any person who had completed 20 years or more service on the effective date should be entitled to retire at any time within five years and receive the pension to which he would be entitled had he retired on the effective date of the amendment. In other words, one who had served twenty years on the effective date would be entitled to a pension of 50% of his salary and no more, and could not by continuing in his employment earn an increase of 1⅔% for each year of service over twenty years.

As heretofore noted, the respondent herein is in the same position as the petitioner in Kern v. City of Long Beach, supra, in that he had not completed the minimum of twenty years' service upon the effective date of the repeal. The attempt to completely repeal all pension provisions as to persons with less than twenty years' service was held unconstitutional in the Kern case, the court there saying: "Accordingly, we conclude that petitioner has a vested pension right and that respondent city, by completely repealing all pension provisions, has attempted to impair its contractual obligations. This it may not constitutionally do, and therefore the repeal is ineffective as to petitioner."

The question of the validity of that portion of the amendment which limited the amount of pension which an employee with twenty years or more service on the effective date could receive to the amount to which he would be entitled if he retired on the effective date, was not before the court in the Kern case. The language of the court in that case, however, justifies the implication that such a limitation is valid. In considering the contractual rights of an employee whose right to a pension has not vested (that is, vested in the sense that the contingency upon which it becomes payable has arrived), the court said: "Thus it appears, when the cases are considered together, that an employee may acquire a vested contractual right to a pension but that this right is not rigidly fixed by the specific terms of the legislation in effect during any particular period in which he serves. The statutory language is subject to the implied qualification that the governing body may make modifications and changes in the system. The employee does not have a right to any fixed or definite benefits, but only to a substantial or reasonable pension. There is no inconsistency therefore in holding that he has a vested right to a pension but that the amount, terms and conditions of the benefits may be altered."

Illustrative of the kind of modification that will be upheld, the court said: "The kind of modification that has been upheld is illustrated by Brophy v. Employees Retirement System, 71 Cal.App.2d 455, 162 P.2d 939, where the court sustained an amendment, made before the time for retirement, reducing the monthly amount to be paid to retired employees engaged in gainful occupations. It has also been held that a pension could be reduced prior to retirement from two-thirds to one-half of the employee's salary, and modifications have been approved in some cases when made after the happening of the contingencies upon which the payments were to commence." (Citing cases.)

As heretofore stated, the court did not go into the effect of the modification here under discussion, but said: "The permissible scope of changes in the provisions need not be considered here, because the respondent city, with a minor exception, has repealed all pension provisions."

[6] Applying the principles set forth in Kern v. City of Long Beach, supra, it appears that it was within the power of the city to modify its pension plan to provide that on and after the effective date of the amendment an employee who was entitled to retire might do so or not, as he saw fit, but that if he chose to continue as an employee he could not thereby earn any additional pension above that to which he was entitled on the effective date of the amendment. As stated by the Supreme Court, the employee has a vested right only to a substantial or reasonable pension. His contractual right to such a pension has not been impaired by legislation which, operating prospectively, merely withdraws his right or option to earn a bonus by continuing in employment after he has become eligible for retirement.

[7] A further difficulty is presented, however, by reason of the fact that the modification in question, by its terms, was not made applicable to one who, like respondent here, was not eligible to retire on the effective date of the amendment. As to him, and others in like situation, all pension provisions were repealed. As to him, the repeal was "ineffective". Kern v. City of Long Beach, supra, 29 Cal.2d at page 856, 179 P.2d 799. Respondent contends that since the repeal was ineffective as to him, he is entitled to all the benefits provided by section 187 of the Charter prior to its repeal, and that he has a contractual right to a pension of 50% of his annual salary plus 1⅔% for each year served by him over twenty years. The answer to this contention is, as hereinbefore stated, that respondent's contractual right is limited to a substantial or reasonable pension.

If it be held that respondent is entitled to earn the additional 1⅔% because the repeal was ineffective as to him, then he would be placed in a more favored position than employees who had completed twenty years of service, but who, under the amendment, could not earn any additional pension.

[8] We are in accord with appellants' contention that since the city had the power to modify the pension plan although it could not repeal it altogether, that section 187.1 should be construed as effective to limit respondent's pension right to 50% of his salary. While the attempted repeal of all rights was void, the provision limiting pension rights is separable therefrom. It appears from the amendment that the electors of the city intended to reduce the liability for pensions created under section 187 to the extent of their power constitutionally to do so, and intended to preserve pension rights only to those who were eligible for retirement on the effective date. Although they could not deprive respondent and others similarly situated of all pension rights, they had the power to modify such rights, and it would seem to follow, therefore, that respondent is entitled only to those rights accorded by the amendment—that is, a limited pension. Those who were eligible for retirement on the effective date were entitled to the pension they had

earned on the effective date and no more, while those who reached the 20-year mark subsequent to the effective date became eligible for retirement on a 50% pension and no more.

[9, 10] The law appears to be well settled that where an attempted repeal of a statute is unconstitutional as to a portion thereof, but is constitutional as to the remainder, and the two portions of the statute are separable, then the repeal will be effective with respect to the valid portion thereof if the legislative intent can be construed that the repeal was to be effective as to a part thereof. As above stated, it is apparent that it was the intention of the electorate to limit the benefits under section 187 of the charter to the extent of their ability to do so. The language in Re Estate of Childs, 18 Cal.2d 237, 245, 115 P.2d 432, 436, 136 A.L.R. 333, is here pertinent: "* * * If the portion added in 1935 is unconstitutional because retroactive, it is apparent from what has heretofore been said that it may be separated from the balance of the provision without stripping it of meaning or effect. This would be in accord with the well-established rule that a portion of a statute may be declared unconstitutional without affecting the remainder of the act when the result of the deletion of the unconstitutional portion will not make the statute meaningless and it can be said to have been the intention of the legislature to have the act stand with such deletion." See also Robison v. Payne, 20 Cal.App.2d 103, 106, 66 P.2d 710; McCabe v. Jefferds, 122 Cal. 302, 304, 54 P. 897; People v. Lewis, 13 Cal.2d 280, 284, 89 P.2d 388.

For the foregoing reasons, the judgment appealed from is modified by striking therefrom the words "and an additional one and two-thirds per cent (1-⅔%) of said salary for each year over twenty (20) years and less than thirty (30) years in the aggregate served by Petitioner before retirement." As so modified the judgment is affirmed, respondent to recover costs on appeal.

DORAN and DRAPEAU, JJ., concur.

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93 Cal.App.2d 75

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. BOARD OF SUP'RS OF LOS ANGELES COUNTY et al.

Civ. 16680.

District Court of Appeal, Second District, Division 2, California.

July 26, 1949.

Rehearing Denied Aug. 15, 1949.

Hearing Denied Sept. 19, 1949.

1. Banks and banking 🔑153

A deposit in a bank is "general" unless there is an agreement that it should be special or there are circumstances which give to the transaction the nature of a special deposit.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "General Deposit".

2. Banks and banking 🔑153

Money deposited with a bank for a particular purpose but with depositor's consent commingled with other funds is a "general deposit".

3. Banks and banking 🔑153

A deposit will be deemed to be "general" unless made special by agreement, and intent of both parties to do so must be shown to concur.

4. Banks and banking 🔑153

If money is deposited in a bank for a special purpose, bank is a trustee or bailee of money if it is understanding of parties that money deposited is not to be used by bank for its own purposes.

5. Taxation 🔑83

Escrow funds on deposit in a national bank used in bank's general business were not assessable to bank for property tax as "solvent credits" owned, claimed, possessed or controlled by it. Revenue and Taxation Code, §§ 112, 113.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Solvent Credits".

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by Bank of America National Trust & Savings Association, a national banking association, against Board of Supervisors of the County of Los Angeles and others, for a writ of mandamus to compel cancellation of assessments on escrow funds on deposit as solvent credits owned by plaintiff. From a judgment for the plaintiff, defendants appeal.

Affirmed.

Harold W. Kennedy, County Counsel, and John D. Maharg, Deputy County Counsel, Los Angeles, for appellants other than Ray L. Chesebro, City Atty. of Los Angeles.

Ray L. Chesebro, City Atty., Leon T. David, Asst. City Atty., and Louis A. Babior, Deputy City Atty, for appellant Ray L. Chesebro as City Atty. of City of Los Angeles.

Samuel B. Stewart, Jr., San Francisco, Hugo A. Steinmeyer and Robert H. Fabian, Los Angeles, for respondent.

WILSON, Justice.

The sole question to be determined is whether escrow funds on deposit in a national bank on the first Monday of March are assessable to the bank as solvent credits owned, claimed, possessed or controlled by it.

This appeal is from a judgment declaring that the assessment levied against respondent on escrow funds held by it, together with taxes and penalties, was erroneous, illegal and void, directing the board of supervisors to order the cancellation thereof and the county counsel and city attorneys of those cities sharing in the taxes collected by the county to consent in writing to such cancellation and ordering that a writ of mandate issue.

On March 5, 1947, the county assessor of Los Angeles County made a demand upon respondent for "a return of all monies held by you as an escrow company or agent, when such money represents an escrow deposit or escrow payment in your possession on the first Monday of March at noon," such monies having been considered by the assessor as solvent credits. Pursuant to this demand respondent filed a property statement "as agent and escrow holder for the respective parties to the several escrows listed herein" asserting that it held the money for the account of the persons whose names and addresses were set forth, subject to escrow instructions. Thereafter the amount shown on such property statement was assessed as "solvent credits" against "Bank of America National Trust and Savings Association escrow agent and trustee." Respondent thereupon petitioned the board of supervisors to declare the assessment invalid. The board having no power to cancel it without the consent of the county counsel, Revenue & Taxation Code, sec. 4986[1], who refused such consent, denied the petition. Respondent then filed this action for a writ of mandamus to compel cancellation.

Solvent credits are defined in section 113 of the Revenue and Taxation Code as "all credits except notes, bonds, and debentures" and credits are defined in section 112 as "solvent debts owing to the assessee * * *."

Appellants cite Title Guaranty & Trust Company v. County of Los Angeles, 3 Cal. App. 619, 86 P. 844, as authority that funds placed in escrow may be taxed as solvent credits and the funds assessed to the escrow holder possessing or controlling such funds. In that case the title company deposited the funds in its bank and an assessment was levied upon it for the escrow money in the bank. Upon deposit of the funds there was a debt owing to the title company by the bank and thus there was a solvent debt owing to the assessee which was properly taxed as a solvent credit.

It is appellants' contention that respondent bank holds the escrow funds in the form of solvent credits as a fiduciary or trustee for the sellers; that respondent acts in a dual capacity, to wit, as a trustee and as a depositary, and that after it turned over the funds to the banking department in its capacity as a bank it was holding funds in the form of solvent credits.

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[1] Section 4986 requires the consent of the district attorney. "District attorney" means the civil legal adviser of the board of supervisors. Sec. 4802. In Los Angeles county the county counsel is the civil legal adviser of all county officers. Los Angeles County Charter, sec. 21, Stats. 1913, pp. 1484, 1490.

It was the practice of respondent in escrow transactions, upon receiving a deposit, to open a liability ledger account in which the amount of the deposit was credited to the account of the depositing party, subject to escrow instructions. There was a separate deposit liability ledger account for each party depositing funds in an escrow transaction, the deposit being credited directly to the account of the party making the deposit. All such deposits were treated by respondent as creating a deposit liability to the depositor and were received, credited, accounted for, insured and reported to the comptroller of the currency in the same manner as any general demand deposits received by it. Respondent used these funds in its normal banking operations, such as for making loans, in the same manner as it used general demand deposits. There was no agreement between the parties to the escrow and respondent that the monies deposited should not be commingled with other assets of respondent. The deposits were accompanied by escrow instructions directing respondent as to the manner in which they should be disbursed and authorizing respondent to pay out such deposits by its own check.

In support of their contention that respondent holds the escrow funds as trustee for the sellers appellants cite several cases holding in effect that prior to the performance of the terms of the escrow the escrow holder is the agent of both parties to the escrow and when the conditions have been performed the escrow holder becomes the agent not for both but for each of the parties to the transaction in respect to those things placed in escrow to which each has become entitled. Shreeves v. Pearson, 194 Cal. 699, 707, 230 P. 448; Law v. Title Guarantee & Trust Co., 91 Cal.App. 621, 628, 267 P. 565; Newport Bay Dredging Co. v. Helm, 120 Cal.App. 127, 133–135, 7 P.2d 1039.

In the Shreeves case the question was whether the escrow had been so far performed as to render the escrow holder the agent of the seller and not of the buyer. The Law case was an action in equity brought by the vendee to procure a decree establishing the delivery of a deed which had been placed in escrow by the vendor. The court held that when the vendee had fully performed every requirement of the escrow contract on his part the escrow was terminated and the fact that the grantor subsequently died before the manual delivery of the instrument did not defeat the grantee of his right to possession of the deed. The court stated 91 Cal.App. at page 628, 267 P. at page 568, that "When the conditions upon which the deposit of the instrument have been fully performed, the relationship of the interested parties automatically changes and the depositary is then deemed to hold the instrument as a trustee for the party entitled thereto" and "upon the happening of the event or the performance of the condition upon which manual delivery should be made by the depositary to the grantee * * * thenceforth the depositary or holder is regarded as the mere agent or trustee of the grantee." In the Newport Bay Dredging Co. case plaintiff delivered a deed to his agent with instructions to deliver it upon the signing of a contract. The court held that although plaintiff could have revoked the agent's power and recalled the deed before the agent had exercised his authority, when he had fulfilled his instructions and had exercised the authority given him he became more than plaintiff's agent and held the position of trustee of the deed for the benefit of the grantee.

None of the foregoing cases involved escrow deposits in a bank and the question in each being entirely foreign to that in the instant case none of them can be considered as authority that when a bank acts as escrow holder it is a trustee of the funds deposited with it or that a debtor-creditor relationship does not exist between the bank and the parties to the escrow.

In Los Angeles Trust & Savings Bank v. Ward, 197 Cal. 103, 239 P. 847, plaintiff sought to be reimbursed for its attorneys' fees upon the theory that the privileges and duties of an escrow holder are closely analogous to those of a trustee of an express trust. In that case the court, after discussing cases in which an escrow holder is referred to as a trustee states, 197 Cal. at page 109, 239 P. at page 849:

"It is readily apparent from each of these quotations that the escrow-holder is referred to as a 'trustee' only in those instances where he is to deliver a deed to the grantee upon the death of the grantor, and he is so regarded merely to preclude the termination of his authority upon the grantor's death; in all other cases an escrow holder is referred to as the 'agent' of the parties. * * * Though, as indicated, an escrow holder has at times been referred to as a 'trustee,' in most instances he is looked upon as the mere agent of the parties."

Respondent contends that it is not a trustee, that the deposits in escrow were general deposits creating a debtor-creditor relationship. Appellants, upon the other hand, argue that the funds are deposits for a special purpose which precludes the use of the funds by the depositary and that since the depositor remains the equitable owner of the funds a debtor-creditor relationship does not exist.

[1-4] Appellants concede that in the case of normal demand deposits the bank becomes owner of the funds deposited and a debtor-creditor relationship results, but they contend that a deposit for a specific or special purpose resembles a special deposit in that the depositor retains ownership of the funds and the transaction results in a trust or fiduciary relationship. A deposit in a bank is general unless there is an agreement or understanding that it should be special or there are circumstances which give to the transaction the nature of a special deposit. Bank of America v. California Sav. & Commercial Bank, 218 Cal. 261, 273, 22 P.2d 704; 5 Michie on Banks and Banking, p. 624. Money deposited with a bank for a particular purpose but, with the depositor's consent, commingled with other funds is a general deposit. Holbrook v. Smith, 87 Cal.App.2d 66, 71–72, 196 P.2d 84; Cabrera v. Thannhauser & Co., 183 Cal. 604, 609, 192 P. 45; 5 Michie on Banks and Banking, p. 643. A deposit will always be deemed to be general unless made special by agreement and something more than the intent of one party to the deposit is necessary—the intent of both parties must be shown to concur. People v. California Safe Deposit & Trust Co., 23 Cal. App. 199, 206, 137 P. 1111, 1115; Allen v. Rainey, 4 Cal.App.2d 558, 563, 41 P.2d 374. "If money is deposited in a bank for a special purpose, the bank is a trustee or bailee of the money if, but only if, it is the understanding of the parties that the money deposited is not to be used by the bank for its own purposes." 1 Restatement, Trusts, sec. 12, comment h, p. 46.

Bank of America v. California Sav. & Commercial Bank, 218 Cal. 261, 22 P. 2d 704, and Burket v. Bank of Hollywood, 9 Cal.2d 113, 69 P.2d 421, cited by appellants in support of their contention, involve claims against insolvent banks, the cases holding that the depositors are entitled to a preference over general creditors in the event of the bank's insolvency. In the Burket case, the court stated that the record of the transactions on the books of the bank clearly showed that the money on deposit in the escrow account at the time the bank closed its doors was no part of the general assets. In the Bank of America case the question presented was whether the plaintiff banks and others, to whom defendant was admittedly indebted, were general depositors and creditors of the defendant bank or were entitled to receive payment in full as preferred creditors or special depositors.

In the latter case the court held that when the nature of the transaction is such that it must be said the depositor does not intend that the funds deposited shall become part of the general assets of the bank, it becomes the duty of the bank at all times to keep on hand cash in a sum equal to such deposit and the amount thereof constitutes a fund which the bank is not authorized to use in its general banking operations. Such deposits although not within the definition of special deposits are deposits made for a special purpose and as to such funds, in the event of the bank's insolvency, the depositors are entitled to a preference to the extent that the bank's cash has not been reduced below the amount of such deposits. Such depositors do not have a prior lien on all general assets of the bank in preference to other depositors but a preference in the lowest cash balance between the date of deposit and the closing of the bank. The court stated that special depositors are "in effect" tracing and reclaiming their own property rather than asserting a preference in the bank's general assets so that if the bank's cash balance at any time after receipt of the special deposit falls below the amount thereof the identity of the special funds is lost and the preference of the special depositors does not extend to the general assets or to subsequent increases in the cash balance but as to such receipts the special depositors are on a par with general depositors.

Appellants cite section 2 of the Bank Act, 1 Deering's Gen.Laws, 1944 Ed., p. 195, Act 652, and section 2(b) of the Escrow Act, Stats.1947, ch. 921, p. 2126, 1 Deering's Gen.Laws, 1947 Supp., Act 2365, in support of their assertion that deposits in escrow do not create ordinary general demand deposits. Although section 2 of the Bank Act, as amended, Stats. 1913, ch. 104, p. 137, provides that the taking of money or its equivalent in escrow by an agent shall not constitute the doing of a banking business, it also provides that banks are divided into three classes, namely, savings banks, commercial banks and trust companies. And there is nothing in section 6 of the Bank act, defining "trust company," to indicate the business of acting as agent or escrow holder is considered the business of a trust company. Section 2(b) of the Escrow Act defines an escrow but section 3 provides the act does not apply to any person doing business under any law of this state or of the United States relating to banks, trust companies, building and loan associations or insurance companies.

Section 11(k) of the Federal Reserve Act, 12 U.S.C.A. § 248(k), provides that a national bank shall not commingle funds held in trust with other funds used in the conduct of the business of the bank unless the bank shall first provide collateral security for such deposits. The record does not indicate whether security was deposited by respondent but it does show escrow deposits were received, credited, accounted for, insured and reported to the comptroller of the currency as normal demand deposits.

[5] In the instant case, it is unnecessary to determine whether the escrow funds are a general deposit, as contended by respondent, or a deposit for a special purpose, as contended by appellant, since in either event the funds are debts owing by the bank to one or the other of the parties to the escrow and consequently are not assessable to the bank as solvent credits. Furthermore, even if the bank were considered to be a trustee of the money deposited in escrow and there were no debtor-creditor relationship, the assessment is invalid as an assessment on solvent credits.

Appellants' argument that after respondent received the funds in the capacity of escrow holder it turned them over to the banking department and thus there was a solvent credit owing by the bank to itself as escrow holder is not tenable. Upon receipt of the money respondent credited the funds to a deposit account in the name of the party depositing the money and held the account subject to escrow instructions.

Unquestionably the funds are taxable but they are assessable as solvent credits of the parties to the escrows and are not solvent credits owned, claimed, possessed or controlled by the bank and are not assessable to the bank.

Judgment affirmed.

MOORE, P. J., concurs.

McCOMB, J., deeming himself disqualified, does not participate herein.

HOLM et al. v. CITY OF SAN DIEGO et al.

Civ. 3935.

District Court of Appeal, Fourth District, California.

July 29, 1949.

Hearing Granted Sept. 26, 1949. *

1. Municipal corporations ⚷741(2)

A statement in verified claim against city for damages that claimant was informed and believed that he would incur bills for household help and nursing services because of injuries to his wife in specified sum, including expense of numerous trips to named city from another named place for therapy treatments, did not constitute substantial compliance with statutory requirement that claimant's address be stated in claim so that action for damages claimed was properly dismissed. Government Code, § 1982.

2. Municipal corporations ⚷741(1)

The statutory provisions as to filing of claims against municipalities for damages are mandatory. Government Code, § 1982.

3. Municipal corporations ⚷741(1, 2)

Substantial compliance with statutory provisions as to filing and contents of claims against municipalities for damages is sufficient. Government Code, § 1982.

4. Municipal corporations ⚷741(1)

One purpose of statute prescribing contents of verified claims required to be filed against city for damages is to provide city with information, so that it may settle meritorious claims against it without litigation. Government Code, § 1982.

5. Municipal corporations ⚷741(1, 3)

A city cannot waive compliance with statutory provisions as to filing and contents of claims against it for damages, and city official's knowledge of facts required to be stated in such a claim does not dispense with necessity of filing proper claim. Government Code, § 1982.

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Appeal from Superior Court, San Diego County; William A. Glen, Judge.

Action by Orlando E. Holm and others against the City of San Diego and another for damages sustained in a collision between an automobile driven by named plaintiff and defendant city's truck operated by codefendant. From a judgment of dismissal, plaintiffs appeal.

Affirmed.

Sweet, Ault & Warner, San Diego, and C. Rupert Linley, El Cajon, for appellants.

McInnis & Hamilton and Jean Du Paul, City Attorney, San Diego, for respondents.

MUSSELL, Justice.

This is an appeal from a judgment of dismissal in favor of the defendants. The action was brought by Orlando E. Holm and Myrle E. Holm, husband and wife, and Yvonne, their minor daughter, and is for damages for personal injuries and other consequential damage alleged to have been sustained by the three plaintiffs in an accident between an automobile driven by Orlando E. Holm and a truck owned by the defendant City of San Diego and under the control of the defendant Ben D. Romero. The complaint alleged negligent operation of the truck by the city employee. The answer sets up the usual affirmative defenses, denies the alleged negligence, admits the ownership of the truck, the employment of defendant Romero by the city and that he was acting within the scope of his employment.

In the second day of the trial plaintiffs offered in evidence a verified claim which had been served upon the defendants. Defendants thereupon objected to the further introduction of evidence upon the part of plaintiffs and moved the court for a judgment of dismissal on the grounds that the verified claim, as admitted in evidence, was insufficient in law, in that it did not state the addresses of the claimants in accordance with section 1982 of the Government Code. The motion was granted and the court rendered judgment of dismissal in favor of the defendants. Plaintiffs appeal from this judgment.

[1] The sole question to be decided is whether the verified claim filed by plaintiffs contained a sufficient, or any state-

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* Subsequent opinion 217 P.2d 972.

ment of their addresses as required by section 1982, which provides that "the claim shall specify the name and address of the claimant, the date and place of the accident and the extent of the injuries or damages received."

The verified claim contains eleven paragraphs and the following matters are therein set forth: The names and relationships of the claimants; the date and place of the accident; the ownership of the vehicles involved and by whom operated; allegations of negligence and the extent of the injuries to plaintiff Orlando E. Holm, to his wife and to his daughter. It is alleged that Myrle E. Holm has been confined to a hospital at all times since the date of the said collision; that she is informed and believes that she will suffer future hospital treatment for a period of three months from that date. The amounts claimed as damages are set forth, and in this connection it is alleged in paragraph eight of the claim "that by reason of said injuries Orlando E. Holm has incurred expenses for medical, surgical and hospital treatment, including X-rays, medicines and supplies, for himself, his wife and daughter, in the sum of $2166.84, and is informed and believes that future medical, surgical and hospital treatment of Myrle E. Holm will be in the sum of $1470.00; that by reason of said injuries, Orlando E. Holm has suffered loss of earnings in the sum of $933.33, and is informed and believes that he will lose another $400.00 in the next thirty days; that he is informed and believes that he will necessarily incur future bills for household help and nursing services for his wife by reason of her injuries, for a period of one year, in the sum of $1800.00, *which includes the expense of numerous trips to San Diego from Lakeside for various therapy treatments;* and that by reason of his own injuries he has suffered general damages in the sum of $1000.00. (Emphasis added.)"

The claim contains the statement that it was signed at Lakeside or La Mesa, California, on February 22, 1947, and the verification was by a notary public in San Diego County.

No address is stated of any of the claimants or of the person by whom the claim was prepared or of the notary public before whom it was subscribed. Plaintiffs' sole contention is that the italicized words in paragraph 8 of the claim constitute a substantial and sufficient compliance with the requirement of the statute that the address of the claimant be stated. It is argued that the statement made upon information and belief that plaintiff Orlando E. Holm would at some future date be required to expend money for trips from Lakeside to San Diego for various therapy treatments for his wife means that the claimants herein resided in Lakeside. This contention is without merit. We do not think that an address is sufficiently stated, especially when we consider other parts of the claim, in one of which it is stated that the claim is subscribed in Lakeside or La Mesa, and in another, "that said Myrle E. Holm has been confined to a hospital at all times since the date of said collision, and is informed and believes that she will suffer future hospital treatments for a period of three months after this date." The name or place where the hospital is located is not stated and there is no information whatever as to the address of plaintiff Orlando E. Holm or his minor daughter Yvonne.

[2] In Spencer v. City of Calipatria, 9 Cal.App.2d 267, 269, 49 P.2d 320, this court held that the provisions of the statutes relative to the filing of claims such as is here involved are mandatory, and that the filing of an unverified claim was not a substantial compliance with the statute. This holding is approved in Douglass v. City of Los Angeles, 5 Cal.2d 123, 128, 53 P.2d 353.

In Eppstein v. City of Berkeley, 52 Cal. App.2d 395, 126 P.2d 365, the plaintiff sued to recover damages for injuries sustained when she tripped and fell on an alleged defective sidewalk. She alleged the place of the accident, the injuries, and negligence, but in the claim presented to the city, she failed to state her address. In her complaint it was alleged that she orally informed defendant city of the circumstances and her name and address; that it was well known to defendant city and that the defendant suffered no prejudice by reason of the omission of the address in the claim.

The contention was made, as in the instant case, that the claim was insufficient and the court so held. The failure to state the place of the accident in such a claim is as serious a defect as a failure to verify it, Hall v. City of Los Angeles, 19 Cal.2d 198, 202, 120 P.2d 13, and as was said in the Eppstein case, supra, 52 Cal.App. at page 397, 126 P.2d at page 366: "In principle there is no difference between failing to allege the place where the accident occurred and failing to allege the address of the claimant."

[3-5] The rule is that substantial compliance with statutory claim provisions is all that is required and one of the purposes of the claim statute is to provide the city with information in order that it may settle claims of merit without litigation. Knight v. City of Los Angeles, 26 Cal.2d 764, 766, 767, 160 P.2d 779. In the instant case, we conclude that there was an entire failure of plaintiffs to comply with one of the mandates of the statute and, as was said in Hall v. City of Los Angeles, supra, 19 Cal.2d at page 202, 120 P.2d at page 15: "Substantial compliance cannot be predicated upon no compliance." A contrary holding would permit a claimant to bring suit against a city on the basis of a claim lacking one of the essential requirements. The city cannot waive compliance with the statute and knowledge of the city officials of the facts required to be stated in the claim does not dispense with the necessity of filing a proper claim. Kline v. San Francisco Unified School Dist., 40 Cal.App.2d 174, 104 P.2d 661, 105 P.2d 362.

We are not unmindful of the holding in the case of Ridge v. Boulder Creek etc. School Dist., 60 Cal.App.2d 453, 140 P.2d 990, 992, where the claim against a school district, filed by a father for injuries to his minor son, recited that they were "citizens and residents of the County of Santa Cruz, State of California, and the said R. C. Ridge is the father of the said Walter Ridge, a minor, who is a student at said Boulder Creek Union High School." In that case it was held that the giving of the pupil's address within the verified portion of the claim constituted substantial compliance with the statute, as a letter addressed to the pupil at school would reach him, and he could be found at school the major portion of the daylight hours. In Uttley v. City of Santa Ana, 136 Cal.App. 23, at page 25, 28 P.2d 377, at page 379, where the claim filed set forth the claimant's name and all the other statutory requirements, except that it did not give the claimant's address, but did set forth the name and office address of the attorney, the court held that the claim was sufficient, stating: "The purpose of the statute would seem to be accomplished if an address is given at which or through which the claimant may be found, in order that the city officials may make such investigation of the merits of the claim as may be desired." To the same effect is the decision in Stewart v. City of Rio Vista, 72 Cal.App.2d 279, 164 P.2d 274, 275, where the claim conformed to the requirements of the statute except that it failed to specify the address of the claimant in the body thereof. The claim was signed by Elizabeth Stewart, Ray E. Stewart, and by Sinclair M. Dobbins, their attorney. It was verified by the attorney and the verification contained this language: "That he is an attorney at law * * * and has his office in Vacaville, Solano County, California, and is the Attorney for the Claimant." The court held that the claim was not fatally defective and that the office of the attorney could be readily located. These cases are distinguishable from the instant case in that, in them, some compliance with the statute is shown, but here, as in Eppstein v. City of Berkeley, supra, the claim contains no specification of address.

We conclude there was an entire failure on the part of plaintiffs to comply with one of the mandates of the statute and that under such circumstances the principle of substantial compliance is inapplicable. Hall v. City of Los Angeles, supra; Stewart v. City of Rio Vista, supra, 72 Cal.App.2d at page 282, 164 P.2d 274.

Judgment affirmed.

BARNARD, P. J., concurs.

COMMERCIAL CREDIT CORPORATION v. ORANGE COUNTY MACH. WORKS et al.

ORANGE COUNTY MACH. WORKS v. COMMERCIAL CREDIT CORPORATION.

Civ. 16917.

District Court of Appeal, Second District, Division 1, California.

July 21, 1949.

Hearing Granted Sept. 15, 1949.[*]

1. Bills and notes 🔑97(1)

Where A company arranged for purchase by B company of a mechanical press owned by C company, B made a down payment to A and delivered a note to A for balance and a conditional sales contract, A assigned contract and endorsed note to credit company, and received a check for balance from credit company, and A never paid anything to C, and C refused to deliver press to B, B was not relieved from liability to credit company on note, on ground that consideration for note failed because credit company knew that title to press was not in A. Civ.Code, § 3133.

2. Bills and notes 🔑370

A purchaser of a negotiable instrument may rely on the legal presumption that conditional sales contract executed in connection with note, will be carried out in good faith, and that the consideration will become executed. Civ.Code, § 3133.

3. Bills and notes 🔑168

Where A company arranged for purchase by B company of a mechanical press owned by C company, B made a down payment to A and executed and delivered a note to A for balance and a constitutional sales contract, A assigned contract and endorsed note to credit company, and received a check for balance from credit company, and A never paid anything to C, and C refused to deliver press to B, B was not relieved from liability to credit company on note, on ground that when note was attached to conditional sales contract, note and contract became one instrument which was not negotiable, so that credit company became subject to all defenses which original parties to contract may have had. Civ. Code, § 3133.

4. Bills and notes 🔑144

The primary purpose of the law-merchant is to make commercial papers serve in lieu of money.

5. Bills and notes 🔑168

Conditional sales contract and note attached thereto with a perforated line separating them, represented two separate contractual relationships, and the perforated line was notice to the maker of the note that it was there so that note could be detached from the contract, and that note should have all attributes of negotiable paper. Civ.Code, § 3133.

6. Bills and notes 🔑170

Where A company arranged for purchase by B company of a mechanical press owned by C company, B made a down payment to A and executed and delivered a note to A for balance and a conditional sales contract, A assigned contract and endorsed note to credit company, and received a check for balance from credit company, and A never paid anything to C, and C refused to deliver press to B, B was not relieved from liability to credit company on note, on ground that negotiability of note was destroyed when it and conditional sales contract were conveyed both as one transaction. Civ.Code, § 3133.

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Appeal from Superior Court, Los Angeles County; Harold B. Landreth, Judge.

Action on a note by the Commercial Credit corporation, a corporation, against the Orange County Machine Works, a California corporation and others, wherein the named defendant filed a cross complaint. From an adverse judgment, the plaintiff appeals.

Judgment reversed and cause remanded with directions.

William G. Junge, Robert J. McGowan, Los Angeles, for appellant.

William K. Lindsay, Los Angeles, for respondents.

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[*] Subsequent opinion 214 P.2d 819.

DRAPEAU, Justice.

All of the parties named in this opinion are corporations.

General American Precooling Corporation was the owner of a large mechanical press used in manufacturing fabricated products. The press was in its possession and on the floor of its place of business. The press was for sale.

Ermac Company arranged for the purchase of the press by Orange County Machine Works. The purchase price was $5,637.50. The purchaser made a down payment of $1,512.50 to Ermac. It was understood that when the sale was completely financed, Ermac would remit the rest of the purchase price to General American Precooling Corporation. Ermac deposited the down payment in its own bank account, awaiting payment of the balance, which, including financing and recording charges, was $4,261.08.

Orange County Machine Works desired to borrow the balance of the purchase price. A representative of Ermac telephoned the Los Angeles representative of Commercial Credit Corporation, plaintiff in this case, and arranged for the loan. The loan was made. It was represented by the following documents: A conditional sales contract, whereby Ermac agreed to sell, and Orange County Machine Works agreed to buy, the press for the price indicated. The purchaser made, executed and delivered its promissory note to Ermac for the balance of $4,261.08. These instruments were prepared by filling in blanks in contract forms. Ermac had on hand a supply of these forms which had been furnished by Commercial Credit Corporation, these two parties having been engaged theretofore for some eight months in similar transactions.

Ermac assigned the contract and endorsed the note to Commercial Credit Corporation, and forwarded the papers to that company. After a few days, Commercial Credit Company sent to Ermac its check for $4,261.08. This check too was deposited to the bank account of Ermac.

During this time the press remained in possession of the owner, General American Precooling Corporation.

Then Ermac mailed its check to General American Precooling Corporation for the entire purchase price of the press. This check was sent to the bank by the payee for collection, but it was dishonored and never paid. The owner retained possession of the press, and the rest of the parties were left to litigate their respective rights.

Action was brought by Commercial Credit Corporation against all of the parties named, and other individuals made parties whose names are not necessary here to repeat. Ermac made no appearance, and its default was entered. Therefore, the contest we are to consider is between Commercial Credit Corporation and Orange County Machine Works. These parties will hereafter be referred to as plaintiff and defendant.

Defendant is out $1,512.50, the down payment on the press, paid to Ermac. Plaintiff, having advanced $4,261.08 to Ermac, is seeking to collect that money, together with interest, attorneys fees and costs, from the defendant, upon defendant's obligation as maker of the promissory note.

The plaintiff asserts that it is a holder in due course of the note, and that equities between Ermac and the defendant have no place in the case.

The defendant denies that plaintiff is a holder in due course, alleges that there was no consideration for the note, and that plaintiff had knowledge at all times of the fact that no delivery of the press had been made, or could have been made to the defendant.

Upon the trial it developed that the note was attached to and made a part of the conditional sales contract. The note and the contract constituted one document, labeled at the top "Industrial Conditional Sale Contract." The part in the form of a note was not labeled in any way to distinguish it from the rest of the contract. With reference thereto, however, the contract contained the following recital: "The balance shown to be due hereunder (evidenced by my note of even date to your order) is payable in 12 equal consecutive installments of $355.09 each the first installment payable one month from date hereof. Said note is a negotiable instrument, separate and apart from this contract, even though at the time of execution it may be temporarily attached hereto by perforation or otherwise." After the documents were delivered to the plaintiff and it was discovered that the money was gone and the defendant had no mechanical press, the note was severed from the contract by cutting or tearing along perforations in the paper placed there for that purpose, and the plaintiff brought its action upon the note alone and not the contract.

The trial court found that the plaintiff was not a holder in due course; that the plaintiff at the time it paid $4,261.08 to Ermac knew that the press did not belong to Ermac, was not in possession of, and had not been purchased by Ermac; and had not been delivered to the defendant. Judgment followed in favor of defendant and against plaintiff, and against Ermac in favor of plaintiff and defendant for the sums paid by each of them to Ermac.

Section 3133 of our Civil Code sets forth the essential requisites of a holder in due course of a negotiable instrument. Plaintiff's proof brings the note in suit within each essential element necessary to constitute the plaintiff a holder in due course of the instrument: The note is complete and regular upon its face; plaintiff became the holder of it before it was overdue; it was taken in good faith and for value; plaintiff had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

Admitting the truth of all of plaintiff's proof except the two last elements above mentioned, the defendant contends:

(1) That the plaintiff knew that title to the press was not in Ermac; that without title in Ermac the consideration for the note failed, and therefore the element of good faith and value in plaintiff's acquirement of the instrument was lacking; and that the plaintiff had notice of infirmities in the instrument and of defect in the title of Ermac, the negotiating party;

(2) When the note was attached to the conditional sales contract, the note and the contract became one instrument, to wit: a sales contract, assignable but not negotiable, with the holder subject to all equities and defenses which the original parties to the contract may have had.

(3) Negotiability of the note was destroyed when it and the conditional sales contract were conveyed both as one transaction.

[1, 2] Defendant's first contention falls because the consideration for the note was the promise of Ermac to convey title to the press upon payment of the purchase price. Notice of the fact that the contract was executory does not support a finding of failure of consideration or of any infirmity in the instrument. There is no proof in this case of lack of good faith on the part of the payee of the note, or of the holder thereof. Russ Lumber & Mill Co. v. Muscupiabe etc. Co., 120 Cal. 521, 52 P. 995, 65 Am.St.Rep. 186; Pratt v. Dittmer, 51 Cal.App. 512, 197 P. 365; English v. Shipley, 71 Cal.App. 45, 234 P. 334; Drukker v. Howe & Haun Invest. Co., 136 Cal. App. 437, 29 P.2d 289. In such cases as this, it is a legal presumption that a purchaser of a negotiable instrument may rely upon the presumption that the contract will be carried out in good faith and the consideration become executed. 8 Am.Jur., p. 139; Beutel's Brannan Negotiable Instruments Law, 7th Ed. 1948, p. 788; annotation, 100 A.L.R. 1357, "Bona Fides of Purchaser of Bill or Note on an Executory Consideration."

[3, 4] The second contention falls also because in applying the law-merchant, codified in California in our Civil Code, and generally following the Negotiable Instruments Law now adopted by every state in the Union, certain arbitrary rules must be applied. The application of the rules applicable to negotiable instruments in particular cases sometimes causes hardship and loss to individuals, as defendant earnestly argues to be the fact in this case. But the primary purpose of the law-merchant is to make commercial paper serve in lieu of money. This being the case, when one executes and delivers an instrument containing the elements of negotiability as prescribed by the Negotiable Instruments Law, and when that instrument passes into the hands of a holder in due course, it is the making of the instrument and the plac-

ing of it in the channels of commerce which set in motion a chain of circumstances peculiar to the law-merchant. In this case the defendant made, executed, and delivered the promissory note—put it into circulation as a substitute for money. The plaintiff had the right to rely upon the ability of Ermac to secure title to the press and to deliver it to the defendant, and the defendant was dealing with the situation upon that basis.

[5] The conditional sales contract and the note, notwithstanding the note was originally attached to the contract, represented two separate and distinct contractual relationships—one was the contract; the other was the promissory note. The fact that the two were together with a perforated line separating them was notice to him who signed that the promissory note was there for the purpose indicated, with all the attributes of negotiable paper. Russ Lumber & Mill Co. v. Muscupiabe etc. Co., 120 Cal. 521, 52 P. 995, 65 Am.St.Rep. 186; Williams v. Silverstein, 213 Cal. 269, 2 P.2d 165; Pitman v. Walker, 187 Cal. 667, 203 P. 739; Shawano Finance Corporation v. Julius, 214 Wis. 637, 254 N.W. 355; Shattuck v. Reed, 221 Mich. 155, 190 N.W. 649; First State Bank & Trust Co. v. Crain, 157 La. 427, 102 So. 513, 38 A.L.R. 347; First National Bank v. Newton, 119 Neb. 394, 229 N.W. 334; People's Bank v. Porter, 1922, 58 Cal.App. 41, 208 P. 200; 1 Daniel on Negotiable Instruments (Seventh Ed.), pp. 211-212, and cases cited therein; 7 Am.Jur., p. 849.

This brings us to a consideration of defendant's third proposition, that the negotiability of the note was destroyed when it and the sales contract were conveyed both in one transaction.

Conditional sales contracts, as every one knows, are a very common thing. Articles of personal property too numerous to mention are sold in this manner by thousands every day. The buyer gets possession of the personal property; he usually makes part payment for it at the time of the agreement; the finance company furnishes the rest of the purchase price, the funds advanced are secured by endorsement of the note and assignment of the contract. If defendant's contention were to be enforced, financing of this type of business transaction would become too hazardous for the risking of capital employed in it. It does not appear that this proposition has been pressed upon the courts of this state for decision since we adopted the Negotiable Instruments Law. Nor have we been able to find any cases in California helpful in determining the problem.

In some states it has been held that in a suit upon the note when a conditional sales contract was entered into at the same time, defenses under the terms of the contract may be interposed. Van Nordheim v. Cornelius, 129 Neb. 719, 262 N.W. 832; Federal Credit Bureau, Inc., v. Zelkor Dining Car Corporation, 238 App.Div. 379, 264 N.Y.S. 723; Todd v. State Bank, 182 Iowa 276, 165 N.W. 593, 3 A.L.R. 971; State National Bank v. Cantrell, 47 N.M. 389, 143 P.2d 592, 152 A.L.R. 1216. Other states take the contrary view. Carpenter v. Longan, 16 Wall. 271, 83 U.S. 271, 21 L.Ed. 313; Thal v. Credit Alliance Corp., 64 App.D.C. 328, 78 F.2d 212, 100 A.L.R. 1354, containing a review of the cases; United States v. Novsam Realty Corporation, 2 Cir., 125 F.2d 456; Commercial Credit Company v. Seale et al., 30 Ala. App. 440, 8 So.2d 199; Cotton v. John Deere Plow Co., 246 Ala. 36, 18 So.2d 727; Robertson v. Northern Motor Securities Co., 105 Fla. 644, 142 So. 226; Peoples Loan & Finance Co. v. Ledbetter, 69 Ga. App. 729, 26 S.E.2d 671; First State Bank etc. v. Crain, 157 La. 427, 102 So. 513, 38 A.L.R. 347; Commercial Credit Company v. McDonough Co., 238 Mass. 73, 130 N.E. 179; Standard Acceptance Corporation v. Chapin, 277 Mass. 278, 178 N.E. 538; Northwestern Finance Co. v. Crouch, 258 Mich. 411, 242 N.W. 771; Commercial Credit Co. v. Summers, 154 Miss. 501, 122 So. 541; Petroleum Acceptance Corporation v. Queen Anne Laundry Service, 265 App.Div. 692, 40 N.Y.S.2d 495; Auto Brokerage v. Ullrich, 134 A. 885, 4 N.J.Misc. 808; B. A. C. Corporation v. Cirucci, 131 N.J.L. 93, 35 A.2d 36; Motor Finance Corporation v. Huntsberger, 116 Ohio St. 317, 156 N.E. 111; Merchants National Bank v. Voudouris, Tex.Civ.App., 248 S.W. 810;

Shawano Finance Corporation v. Julius, 214 Wis. 637, 254 N.W. 355.

[6] It is our opinion that the latter is the correct view, and in consonance with the spirit and purpose of the Negotiable Instruments Law and the necessities of business in California.

The judgment is reversed and the cause remanded to the Superior Court, with directions to make and enter judgment in favor of the plaintiff for the amount of the note, together with interest to the date of said judgment, and together with reasonable counsel fees to be fixed by the court, and costs.

WHITE, P. J., and DORAN, J., concur.

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93 Cal.App.2d 230

CHRISTIAN v. CALIFORNIA BANK et al.

Civ. 16763.

District Court of Appeal, Second District, Division 2, California.

Aug. 4, 1949.

Hearing Denied Sept. 29, 1949.

1. Bills and notes ⚷339

Mere knowledge of facts sufficient to put a prudent man on inquiry without actual knowledge does not preclude transferee of negotiable instrument from becoming a holder in due course, unless suspicious circumstances are so cogent that to remain passive would amount to bad faith; but where facts warrant conclusion that failure to make inquiry arose from a suspicion that inquiry would disclose a vice in the instrument, transferee is charged with knowledge.

2. Banks and banking ⚷189

Where bank, with consent of partner who had instructions to deposit cashier's check to partnership account, struck out partnership indorsement knowing that check was payable to copartner and represented his contribution on entering the partnership which formerly had required two signatures, and bank credited check to presenting partner's personal account and then debited a second outstanding check held by it because of insufficient funds, bank took check with notice of defect in presenting partner's title and was liable to copartner for amount thereof.

3. Banks and banking ⚷189

Where cashier's check payable to partner was indorsed by him in blank and partnership indorsement was added, and check was delivered to copartner with instructions to deposit it to partnership account with understanding that title would not pass until delivery to bank holding partnership account, and signatures of both partners were required on checks withdrawing funds from partnership account, and copartner presented check for deposit in personal account and bank struck out partnership indorsement with his consent, title to check remained in first partner.

4. Estoppel ⚷79

Where partner to whom cashier's check was payable, copartner who presented check, and bank which struck out partnership indorsement and deposited it to copartner's personal account with his consent, all conceded on previous appeal from judgment dismissing first partner's action on the check that copartnership never had any interest in the check or proceeds, bank waived any right to claim on subsequent trial that copartnership had an interest in the check.

5. Estoppel ⚷107, 110, 114

An estoppel may not be relied upon unless pleaded.

6. Appeal and error ⚷173(9)

Where estoppel was not pleaded in defendant's answer to plaintiff's complaint as amended, defendant could not rely upon such defense on appeal.

7. Estoppel ⚷110

Waiver is an affirmative defense, and a defendant relying thereon must set it up in his answer.

8. Appeal and error ⚷173(9)

Where owner of check brought action against bank which cashed it to recover for wrongful misappropriation, and bank did not plead a waiver of owner's right to recover, bank could not urge that defense on appeal.

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Action by G. G. Christian against the California Bank, a corporation, the Security-First National Bank of Los Angeles, a national banking association, and others, for wrongfully paying a cashier's check. From an adverse judgment, the California Bank appeals.

Judgment affirmed.

Swanwick, Donnelly & Proudfit and Donald O. Welton, Los Angeles, for appellant California Bank.

A. W. Brunton, Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff against defendant California Bank after trial before the court without a jury in an action to recover on a cashier's check issued by Security-First National Bank of Los Angeles, payable to plaintiff, defendant California Bank (hereinafter referred to as defendant) appeals.

Facts: The evidence disclosed that Security-First National Bank of Los Angeles issued its cashier's check payable to plaintiff. This check he endorsed in blank and stamped immediately below his signature "Pay to the order of 303 Bank of America 303 National Savings and Trust Association S. & R. Produce Co." Plaintiff then delivered the check to Bill Rotsios, his partner in the S. & R. Produce Co., with instructions to deposit the check to the credit of S. & R. Produce Co. at the Bank of America. Mr. Rotsios presented the check to the Bank of America for deposit, which bank refused to accept it. He then took it to defendant bank requesting that it be deposited to the credit of his personal account. After verifying the fact that the Bank of America had refused to accept the check, the California Bank agreed to accept it for credit to Mr. Rotsios' personal account, provided the partnership endorsement was stricken and the check endorsed in blank by Mr. Rotsios. The bank then struck out the partnership endorsement with Mr. Rotsios' consent, after which he endorsed the check and it was deposited to his personal account. Later it was paid by the drawee bank.

At the time the check was deposited to Mr. Rotsios' account in defendant bank, his balance was $119.12. To make matters worse, he had issued checks in an amount almost sufficient to consume the entire proceeds of the cashier's check. Also, when he deposited it, he was permitted to withdraw $300.00 in cash. There had been in the bank since the day before his deposit a check in the amount of $2,137.55 drawn against his account. After deducting the total of his withdrawal of $300.00 and his check of $2,137.55, he had a balance to his credit of only $1,180.57. Other checks having been drawn by Mr. Rotsios on the day following the deposit of the check there was only $14.62 left to his credit at the bank. At the time of the deposit, defendant knew that it had received and was holding the check for $2,137.55 and that there were not sufficient funds in Mr. Rotsios' account to cover it; that the latter had been engaged in a partnership business under the name of S. & R. Produce Co. with a Mr. Smith prior to June 5th; that it was the rule of such company for its checks to be signed by two persons; that the partnership had been dissolved; that plaintiff was taking Mr. Smith's place in a new partnership with Mr. Rotsios, and that the $3,500.00 cashier's check was the money that plaintiff was putting into the new partnership. Plaintiff never authorized Mr. Rotsios to deposit the cashier's check to his own personal account.

The foregoing facts were set forth in plaintiff's amended complaint. A demurrer of defendant was sustained thereto and on appeal the Supreme Court in Christian v. California Bank, 30 Cal.2d 421, 182 P.2d 554, reversed the judgment predicated upon the order sustaining the demurrer holding that the complaint, as amended, stated a cause of action. Upon a trial of the issues raised by plaintiff's pleading and defendant's answer thereto, the judgment here appealed from in favor of plaintiff was entered.

Questions: First: *Under the law as established on the former appeal, did defendant take the cashier's check from Mr. Rotsios in good faith and for value, and without notice of any infirmity in it, or defect in his title?*

[1] This question must be answered in the negative. The decision on appeal from the judgment of dismissal after a general demurrer had been sustained held that the issue of the bank's good faith was sufficiently raised by reason of its having knowledge of facts which should have put it on inquiry; that mere knowledge of facts sufficient to put a prudent man on inquiry without actual knowledge does not preclude the transferee from becoming a holder in due course unless the suspicious circumstances are so cogent that to remain passive would amount to bad faith. But where the facts warrant the conclusion that failure to make inquiry arose from a suspicion that inquiry would disclose a vice in the instrument, the endorsee is charged with knowledge.

The facts as alleged would justify a finding that the failure of the bank to make inquiry arose from a suspicion that inquiry would disclose a defect in the endorsement of the check. Hence, if the evidence should establish the allegations, plaintiff would be entitled to recover from the bank. (Christian v. California Bank, 30 Cal.2d 421, 424, 182 P.2d 554.)

[2] The evidence introduced at the trial sustained the allegations as set forth above. The very act of the bank's official in striking out the rubber stamp endorsement on the cashier's check and in having Mr. Rotsios endorse the check for deposit to his personal account was the essence of bad faith. This conclusion is aggravated by the fact that the evidence discloses the bank was holding one of Mr. Rotsios' checks for insufficient funds to pay the same. As soon as the $3,500.00 cashier's check was credited to the account of Mr. Rotsios, his account was debited in the amount of $2,137.55, represented by the check which the bank was holding because there was not sufficient funds in Mr. Rotsios' account to pay it.

The trial court properly decided that defendant did not take the cashier's check without notice of any infirmity in it or defect in the title of Mr. Rotsios since the Supreme Court in Christian v. California Bank, supra, 30 Cal.2d at page 425, 182 P.2d at page 557, held that "The facts here alleged would if established justify the conclusion that the failure of the defendant California Bank to make inquiry arose from a suspicion that inquiry would disclose a vice or defect in the instrument."

Second: *Was the cashier's check still the property of plaintiff at the time of trial?*

[3] This question must be answered in the affirmative. Plaintiff testified that the title to the check was not to pass until it had been delivered to the Bank of America and a new account opened under the name of S. & R. Produce Co. requiring both the signatures of himself and Mr. Rotsios on checks withdrawing funds from the account. Mr. Rotsios was merely a messenger of plaintiff for delivery of the check to the Bank of America for the purpose of opening an account in accordance with instructions given him by plaintiff. He at no time had authority to strike the endorsement or to deposit the check to his own personal account. The Supreme Court, in referring to this subject on the previous appeal, 30 Cal.2d on page 422, 182 P.2d on page 555, says:

"Plaintiff delivered this check to Rotsios with instructions to deposit it in the Bank of America to the account of the produce company. Rotsios had no right to indorse the checks of the produce company without the joint signature of his copartner and had no right to deposit them to his personal account. However, contrary to instructions, he took the $3,500 check to a branch of the defendant California Bank, where he had a personal account. There, according to the amended complaint, Rotsios 'presented said Cashier's Check to said bank, at which time said bank, by and through its agents and servants, and the said Bill Rotsios, blocked out the stamped restrictive endorsement which the plaintiff had caused to be placed on the back of said check, and the said defendant, Bill Rotsios, then endorsed his own name on the back of said Cashier's Check and the said defendant, California Bank, accepted said altered check and credited the same to the personal bank account of the defendant, Bill Rotsios.' This was done without the knowledge or consent of plaintiff." (See also Nordin v. Eagle Rock State Bank, 139 Cal. App. 584, 594, 34 P.2d 490.)

Third: *Was the S. & R. Produce Co., a partnership, the only one who could recover the money wrongfully misappropriated?*

[4] This question will not be considered by us for the reason that defendant on the previous appeal stated in its brief: "The question of whether one partner has the right to strike the endorsement placed on a check by another partner is not involved as both appellant and respondents *concede* that S. & R. Produce Co., a copartnership, never had any interest in this check or the proceeds thereof." (Italics ours.) Defendant has thus waived any right to claim that the S. & R. Produce Co. had any interest in the cashier's check here involved.

Fourth: *Was plaintiff estopped to claim that defendant was not a holder in good faith for value and without notice of an infirmity or defect in the title of Mr. Rotsios to the cashier's check?*

[5, 6] This question must be answered in the negative. An estoppel may not be relied upon unless the estoppel is pleaded. (Producers Holding Co. v. Hill, 201 Cal. 204, 209, 256 P. 207.) In the instant case estoppel was not pleaded in defendant's answer to plaintiff's complaint, as amended, and therefore defendant may not rely upon such defense on appeal.

Fifth: *Did plaintiff waive his right to recover for the wrongful misappropriation of the cashier's check?*

[7, 8] This question must likewise be answered in the negative. Waiver is an affirmative defense and a defendant relying thereon must set it up in his answer. (Wood v. Jotham Bixby Company, 29 Cal. App.2d 294, 299, 84 P.2d 204; Williamson v. Clapper, 88 Cal.App.2d 645, 199 P.2d 337.) Since in the instant case defendant did not plead a waiver, it may not urge the same before this court.

Authorities relied on by defendant: Santa Marina Co. v. Canadian Bank of Commerce, 9 Cir., 254 F. 391, is not here in point for the reason that the secretary who endorsed the checks in question had authority to endorse checks for the corporation involved. In the present case, Mr. Rotsios did not have authority to endorse the check for deposit to his personal account. Likewise the case of Glen Falls Indemnity Co. v. Palmetto Bank, 4 Cir., 104 F.2d 671, is not applicable for the reason that the party who cashed the checks in such case was authorized by the corporation by whom he was employed to cash checks as well as to deposit them. The difference between the cited case and the present one lies in the fact that in the Glen Falls Indemnity Co. case the employee of the assured had authority to waive the restrictive character of a special endorsement placed by himself on the checks and to collect them as though they had been generally endorsed. (See 104 F.2d at page 674.) In the present case there was no such authority.

The judgment is affirmed.

MOORE, P. J., and WILSON, JJ., concur.

93 Cal.App.2d 134

AITKEN v. WHITE et al.

Civ. 16914.

District Court of Appeal, Second District, Division 1, California.

July 29, 1949.

1. False imprisonment ⚿39

In action for false arrest and imprisonment, question of reasonable or probable cause for arrest is one for the courts.

2. Trial ⚿199

In action for false arrest and imprisonment, instruction relative to probable cause for arrest, placing upon jury obligation not only to find whether facts relied upon by defendants to show probable cause were true, but also, if true, to determine whether they were legally sufficient for that purpose was improper.

3. Trial ⚿335, 339(1)

Generally, a jury cannot apportion damages between joint tort-feasors, and such a verdict should be sent back for amendment or correction by the jury.

4. Jury ⚿34(1)

Where jury rendered verdicts against joint tort-feasors of $6,000 and $4,000 respectively, and clerk entered judgment in conformity therewith, trial court could properly allow $4,000 verdict to stand and reduce the other verdict to same amount and deny new trial without infringing on constitutional rights of litigants to trial by jury, since form of verdict only was wrong. Code Civ.Proc. § 664.

5. Evidence ⚿314(5)

In action against police officers for false arrest and imprisonment, report of private detective agency sent to officers prior to and on day of plaintiff's arrest was admissible, not as to truth of contents, but on question of whether it contained such information as would tend to show good faith or probable cause on part of officers in arresting plaintiff.

◆

Appeal from Superior Court, Los Angeles County; Paul Vallee, Judge.

Action by Roger M. Aitken against W. W. White, Ray Borders and C. H. Anderson for false arrest and imprisonment. From the judgment and from certain orders of the court, defendants White and Anderson appeal.

Judgment reversed, and cause remanded for a new trial.

Desser, Rau, Christensen & Hoffman, Los Angeles, for appellants.

Joseph N. Owen, Los Angeles, for respondent.

WHITE, Presiding Justice.

This appeal is taken in an action for damages for false arrest and imprisonment brought against three members of the Police Department of the City of Beverly Hills, C. H. Anderson, Chief of Police, Captain W. W. White, Chief of Detectives, and Sergeant Ray Borders. The cause was tried before a jury which brought in a verdict against defendant Anderson for $6,000 and against defendant White for $4,000. The jury also brought in a verdict "against" defendant Borders, but assessed no damages against him. Upon being sent out to reconsider their verdict as to defendant Borders, the jury again found for the plaintiff and assessed the sum of $10 as damages. Judgment was rendered on the verdicts. Defendant Borders tendered payment of the $10 judgment (which in the superior court carried no costs), but the tender was refused. Thereafter Borders' motion that the judgment against him be satisfied upon deposit of $10 with the clerk was granted in the Law and Motion Department of the superior court. Thereafter the trial court denied defendants White and Anderson's motion for new trial upon plaintiff's consenting that the verdict against Chief Anderson be reduced to $4,000, the same amount as had been awarded against Chief of Detectives White. Subsequently defendants Anderson and White moved that the $4,000 judgment against them be declared satisfied by reason of the satisfaction of the $10.00 judgment against the joint tort-feasor Borders. This motion was denied.

Defendants White and Anderson have appealed from:

(1) The judgment;

(2) The "order of the court made June 28, 1948, denying the motion heretofore made for a new trial or for judgment notwithstanding the verdict"; and

(3) The order of July 27, 1948, denying defendants White and Anderson's motion for satisfaction of judgment.

The following statement of facts is taken from appellants' opening brief:

"Plaintiff was a salesman in the jewelry store of Brock and Company in Beverly Hills and Mr. Orville H. Joy was manager of the store. On November 12, 1946, a loss of jewelry occurred. Captain White made an investigation, and was informed by Mr. Joy that Aitken had set up the window display that morning and had access to the jewelry; that Aitken had himself reported the disappearance to Joy. He was further informed that Aitken and Joy were the only salesmen in the store that day, and that only Joy and Aitken had a key to the place where the jewelry was kept. The day had been rainy and very few customers had come in. Mr. Joy advised Captain White that he knew all the customers in the store that day with the exception of three people who came in the afternoon, and that Aitken alone waited on them. On this particular day one George Sheldon also came in. Aitken always waited on Sheldon. Sheldon came in while Aitken was waiting on some other people and spoke to him while waiting for Aitken to get through to take care of him. White and Borders were further informed that on the same morning of November 12, Aitken had been observed in the company of George Sheldon having coffee in a drug store.

"Aitken told White that he had met Sheldon some time in 1945 and that he had been in the store many times after the first meeting. White was also informed that there had been other jewelry disappearances in the same store. In February, 1946, a diamond solitaire was missing. It was reported to White that Aitken had been on duty that day too, and that Sheldon had likewise been in to see Aitken on that day. Sheldon had been arrested on two occasions by the Beverly Hills police.

"On November 16, 1946, White received a call from Joy advising that he had just received an anonymous phone call wherein he was told that George Sheldon and one Lee Sterling were attempting that day to sell the missing diamonds. Sheldon was arrested that night, but did not have the jewelry on his person. He did have in his possession sixty-four one-hundred-dollar bills. He stated he could not tell where he got the money because it would involve too many people. Sheldon was released on bond.

"On Friday, November 22, 1946, defendant Anderson received a Pinkerton Detective report on both Aitken and Sheldon. This report was offered in evidence, but was excluded on the ground that it was immaterial, hearsay, did not support reasonable cause for arrest of Aitken, did not charge him with any offense or connect him with the particular offense in question.

"On the same day, Friday, November 22, after receiving the Pinkerton report, White and Borders picked up Aitken at Brock & Co. at about 3:30 p. m., took him to his room, which they searched, and at about 4:30 p. m. took him to the office of Chief Anderson, where he was questioned about the jewelry disappearance and matters contained in the Pinkerton report. Upon inquiry concerning plaintiff having lost employment and losses of jewelry at places where he previously worked and whether he had been questioned by employers with regard thereto, plaintiff at first denied the information, but after being confronted with the facts contained in the report, later admitted part thereof. Upon the basis of the investigation made and information obtained, and on the basis of the interrogation of Aitken, White at that time believed Aitken guilty. During the course of the investigation White conferred with Anderson on all the above matters. Chief Anderson also believed Aitken guilty, and in addition, was afraid he might leave town, since there was nothing to hold him here. He had only a small room, was unmarried, had no particular strings to tie him here, and there was $25,000 worth of jewelry involved.

"Aitken was not abused or maltreated during his imprisonment. He was released from custody at 8:43 a. m. Monday, November 25, 1946, there being insufficient evidence upon which to base a complaint. At no time during the custody of Aitken was the City Court of Beverly Hills in session."

To the foregoing statement of facts respondent in his brief suggests the following additions:

"It was denied that on the morning of the loss Aitken had coffee with Sheldon. This information would appear to be in the category of other information Anderson claimed to have, to the effect that he had overheard conversation of Aitken with confederates on Aitken's telephone, whereupon he was told by the latter that he had no telephone. Occasional losses of jewelry in a jewelry store are not unusual. Brock's lost both jewelry and their strong-box when Aitken could not have possibly been responsible for such losses. Anderson did not believe Aitken would leave town, because his experience in this type of case was that the wrongdoer did not run away. Defendants knew that Aitken had property back east. Both White and Anderson were familiar with criminal law and arrests thereunder. They put Aitken in jail and held him while further investigating the case, and released him on Monday, having no greater information that day than they had on the day they put him in jail. No effort was made to take him before any magistrate."

Appellants' first ground for reversal is that the court erred in submitting to the jury the question of whether defendants had probable cause to believe plaintiff had committed a felony, for the reason that "probable cause" is a question of law to be determined by the court alone. They further contend that the court erred "in giving the jury a definition of probable cause and in effect instructing them to find for or against defendants according to whether or not they determine the facts to be within or without the definition."

The record discloses that the court instructed the jury with reference to "probable" or "reasonable" cause as follows:

"* * * The arrest having been made, the law presumes it unlawful unless the contrary is shown. The burden is upon the defendants to prove that they had reasonable cause to believe that the plaintiff had committed a felony.

"If you find from the evidence that the defendant police officers had reasonable cause to believe that the plaintiff, Roger M. Aitken, was guilty of a felony in view of all the circumstances disclosed by the evidence, your verdict should be in favor of the defendants unless you find that the defendants unreasonably delayed taking plaintiff before a magistrate, in which event your verdict should be for the plaintiff, notwithstanding that you may find that the defendants had reasonable cause to believe that plaintiff had committed a felony. * * *

"* * * In other words, in order for defendants to justify the arrest in this case, they must have had reasonable cause to have believed that plaintiff had committed this particular offense. Such reasonable cause cannot be based upon mere suspicion, nor can the arrest in question be based upon reasonable cause to have believed that plaintiff had, or might have, committed other offenses for which an arrest might have been legal.

* * * * * *

"You are instructed that in this case the arrest was not made with a warrant, nor did the loss of the jewelry occur in the presence of any of the arresting officers. Under such circumstances an arrest could have been legally made only if defendants had reasonable cause to believe that plaintiff had committed the felony of taking the jewelry. Under such circumstances, the arrest having been shown, the burden then devolves upon the persons making the arrest to show justification therefor. This defendants have attempted to do by proof of information alleged to have been given to them that it was claimed other jewelry was lost or disappeared while plaintiff was associated with Brock

& Company and with other firms in New York, and also that it was claimed that plaintiff had associated with one George Sheldon, a person known to the defendants to be a convict. Plaintiff denies such association except as a salesman in the store of Brock & Company.

"If, from the proof of such facts, you should find that the defendants did not have reasonable cause to believe that plaintiff had committed the felony of taking the jewelry, then you are instructed that defendants have failed to justify their act in making such arrest and you would be warranted in finding in favor of the plaintiff.

"Reasonable cause to believe a person has committed a felony is defined to be a state of facts or circumstances such as would lead to reasonable man of ordinary caution, acting impartially, reasonably, and without prejudice, to believe the person arrested to be guilty.

"When an arrest is made without a warrant by a peace officer or private person, the person arrested must, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the arrest is made and a complaint, stating the charge against the person, must be laid before such magistrate.

"If you find that the defendants, or either of them, in this case unreasonably delayed taking the plaintiff before such magistrate, then the detention was unlawful and you would be warranted in finding for the plaintiff, irrespective of whether the defendants had or had not reasonable cause in the first instance to believe that the plaintiff had committed the felony of taking the jewelry.

"You are instructed that an officer arresting without a warrant cannot justify himself in holding the prisoner for an unreasonable time before obtaining a warrant upon the ground that such delay is necessary to investigate the case."

The foregoing constitutes substantially the entire charge to the jury on the subject of reasonable cause.

[1] It is settled that, as contended by appellants, the question of reasonable or probable cause is one for the court, and not the jury. When the facts are admitted or beyond controversy, the question is to be determined by the court. When the facts are controverted or the evidence conflicting, then the determination of their legal effect by the court is necessarily hypothetical, and the jury are to be told that if they find the facts in a designated way, then such facts do or do not amount to probable cause. 3 Cal.Jur., "Arrest," Sec. 6; Miller v. Lee, 66 Cal.App.2d 778, 786, 787, 153 P.2d 190; Franzen v. Shenk, 192 Cal. 572, 578, 221 P. 932; Ball v. Rawles, 93 Cal. 222, 28 P. 937, 27 Am.St. Rep. 174; People v. Kilvington, 104 Cal. 86, 89, 90, 37 P. 799, 43 Am.St.Rep. 73.

[2] It is manifest, from a reading of the foregoing instruction, that by it the court submitted to the jury the entire question in reference to the evidence of probable cause on the part of appellants to arrest respondent. This placed upon the jury the obligation not only to find whether the facts relied upon by appellants to show such probable cause were true, but also, if true, to determine whether or not they were legally sufficient for that purpose. The instruction was therefore erroneous. In no case is it within the province of the jury to decide whether the circumstances which they may find the evidence establishes are sufficient to constitute probable cause. Unless the evidence out of which the question of probable cause arises is conflicting, its existence or non-existence is a pure question of law. And where, as here, the evidence was in conflict, it was the duty of the court to instruct the jury as to what facts, if established, would constitute probable cause, and only the question as to the existence of such facts should have been submitted to them. People v. Kilvington, supra, 104 Cal. at page 90, 37 P. 799, 43 Am.St.Rep. 73; Franzen v. Shenk, supra, 192 Cal. at pages 578, 583, 221 P. 932. The facts set forth in the foregoing instruction were not the only facts of which evidence respecting probable cause had been given to the jury. And the instruction left to the jury the function of determining the existence or non-existence of probable cause according to their judgment as to whether or not the

facts and circumstances in evidence came within the definition of probable cause as that term was defined in the instructions.

The rule in this respect is thus enunciated in Ball v. Rawles, supra, 93 Cal. at page 228, 28 P. at page 938, 27 Am.St. Rep. 174:

> "Neither is it competent for the court to give to the jury a definition of 'probable cause,' and instruct them to find for or against the defendant according as they may determine that the facts are within or without that definition. *Such an instruction is only to leave to them, in another form, the function of determining whether there was probable cause.* The court cannot divest itself of its duty to determine this question, however complicated or numerous may be the facts. *It must instruct the jury upon this subject in the concrete,* and not in the abstract, and must not leave to that body the office of determining the question; but must itself determine it, and direct the jury to find its verdict in accordance with such determination." (Emphasis added.)

See also Michel v. Smith, 188 Cal. 199, 206, 205 P. 113; Miller v. Lee, supra, 66 Cal.App.2d at pages 786, 787, 153 P.2d 190.

In the last of the two cases just cited it is said, 66 Cal.App.2d at page 786, 153 P.2d at page 194:

> "It is unquestionably the rule that the court must determine as a matter of law what does and what does not constitute probable cause but it is the function of the jury to determine on conflicting evidence whether or not those facts exist which must be established to constitute want of probable cause. The approved method is for the court to instruct the jury that if they find and determine certain questions of fact properly submitted to them to be true or untrue their verdict must be for the plaintiff, or for the defendant, as the case may be."

It is next urged that the court erred in entering judgment on the jury's verdicts against Anderson, White and Borders in the sums of $6,000, $4,000 and $10 respectively, for the reason that in an action against joint tort-feasors compensatory damages cannot be apportioned. In Oldham v. Aetna Ins. Co., 17 Cal.App.2d 144, 61 P.2d 503, the jury brought in a verdict against one defendant for $282 special damages and $6,000 general damages, and against another defendant for $282 special damages and $4,000 general damages, and judgment was entered against each defendant for the amount of the verdict against him. In the case just cited it was said, 17 Cal.App.2d at page 146, 61 P.2d at page 504: "The law appears to be well settled that where the action is for compensatory damages suffered on account of a wrong in which both defendants joined, the damages cannot be severed."

We are here confronted with the fact, however, that the trial court upon motion for a new trial, and with the consent of the plaintiff, entered but a single judgment against the two appellants herein for the sum of $4,000. It further appears that upon rendition of the verdicts the clerk, in accordance with his duty, entered the judgments in conformity with the verdicts. Code Civ.Proc. sec. 664. This entry was a clerical and not a judicial act. The verdicts returned were the decisions of the jury and not the result of the exercise of the judgment of the court. As was said in Phipps v. Superior Court, 32 Cal.App.2d 371, 375, 89 P.2d 698, 700:

> "If the court had directed the entry of a judgment wrong in law, it could not be corrected summarily (McKannay v. McKannay, 68 Cal.App. 701, 230 P. 214), but if the entry of judgment was made without judicial direction and was not in conformity with statutory provision, the court had an inherent right to cause the records to reflect the limitation of the legislative pronouncement; in other words, to make the judgment conform to the verdict rendered. The trial court had a right to construe the verdict. Snodgrass v. Hand, 220 Cal. 446, 31 P.2d 198. This right continued 'regardless of lapse of time' to any period within which it would be necessary to interpret the verdict. McKannay v. McKannay, supra. A nunc pro tunc order to make definite and clear the terms of the verdict was a proper method of procedure. Lauchere v. Lambert, 210 Cal. 274, 291 P. 412."

Subsequently, appellants herein made a motion for a new trial. In ruling on this motion the court made its order in part as follows: "The motion of defendants White and Anderson for a new trial is granted unless plaintiff within five days from the date hereof files with the clerk of this court his consent in writing to the making and entry of the following order, to-wit:

"It is ordered that the judgment entered May 4, 1948, in Book 1915, page 322, be and the same is hereby amended nunc pro tunc as of May 4, 1948, to read as follows:

"It is ordered, adjudged and decreed that plaintiff, Roger M. Aitken, have and recover from defendants C. H. Anderson and W. W. White, the sum of $4,000.

"It is further ordered, adjudged and decreed that plaintiff, Roger M. Aitken, have and recover from defendant Ray Borders the sum of $10.00.

"In the event plaintiff, within five days from the date hereof, files with the clerk of this court his consent in writing as aforesaid, the motion for a new trial is denied."

Respondent herein filed his consent to the making of the foregoing order and the court ordered that the judgment be amended nunc pro tunc as above set forth and denied appellants' motion for a new trial.

[3, 4] The general rule is that a jury cannot apportion damages between joint tort-feasors. Under the authorities, such a verdict should be sent back for amendment or correction by the jury. The trial court should have done so in this case, but did not, and that brings us to an aspect of the matter about which there is some difference of opinion and procedure. What must be done with such verdicts? In but very few jurisdictions are such verdicts held to be absolutely void. In most jurisdictions rules are followed which avoid the necessity of granting a new trial or reversing the judgment on appeal on this ground. We are inclined to the view that while the attempted apportionment was wrong, such a defect can be cured either by the trial court or by the appellate court without granting a new trial. Therefore, the trial court could with propriety and logic allow the verdict as to appellant White to stand and reduce the verdict as to appellant Anderson to $4,000, thereby allowing respondent a joint and several judgment against the two for $4,000. This is no infringement upon the constitutional rights of the litigants to a trial by jury. Merely the form of the verdict was wrong, and the trial court did not trespass upon the province of the jury in correcting that defect in form and ordering such judgment as should have been properly entered upon the verdicts. Dextone Co. v. Building Trades Council, 2 Cir., 60 F.2d 47; Ohio Valley Bank v. Greenebaum Sons Bank & Trust Co., 4 Cir., 11 F.2d 87, 90; Whitney v. Tuttle, 178 Okl. 170, 62 P.2d 508, 510, 108 A.L.R. 789; Weedle v. Loges, 52 Cal.App.2d 115, 119, 120, 125 P.2d 914; Phipps v. Superior Court, supra. Examination of the form of the verdicts returned in the instant case induces the reasonable inference that upon the issues presented the jury found for the plaintiff, fixing the damages to which he was entitled in the aggregate to the sum of at least $6,000, but their attempt to assess a greater amount against one defendant than the other may be treated as mere surplusage. Weddle v. Loges, supra, 52 Cal.App.2d page 119, 125 P.2d 914. In the case of Oldham v. Aetna Life Insurance Co., supra, relied upon by appellants, no attempt was made, as here, to correct the verdict and enter a proper judgment. It is therefore manifest that under the circumstances attending the case at bar appellants were not prejudiced by the entry of the judgment ordered by the court. It reduced the amount of the judgment to a total of $4,000 against the appellants jointly. As a result of the court's ruling each appellant has been subjected to a smaller judgment than would have been entered against him had a joint verdict been returned. The action of the trial court in ruling on the motion for a new trial was proper, and affords no ground for reversal of the judgment.

[5] Appellants next urge that the court erred in refusing to permit them to introduce into evidence a report from the Pinkerton Detective Agency concerning respondent and one George Sheldon, the latter of whom, according to information in

the possession of appellants, had been seen with respondent in a cafe and in Brock and Company's store that morning. This report was sent to appellants prior to and on the day of respondent's arrest. The ruling of the court was erroneous. In considering the question of probable cause upon the part of appellants to arrest respondent, the court is to look only at the facts and circumstances presented to appellants at the time they acted. The detective agency report was not admissible as to the truth of its contents, but on the question of whether it contained such information as would tend to show the good faith or probable cause on the part of appellants in arresting respondent. The reasonable ground for the suspicions of appellants was an issue in the case. Respondent's reputation and any prior acts of misconduct similar to the one of which he was suspected were receivable in evidence as affecting appellants' grounds of suspicion. The statement in question was relevant to a decision by the court as to the existence or non-existence of probable cause, and in that regard was not violative of the hearsay rule. Smith v. Whittier, 95 Cal. 279, 293, 30 P. 529; Werner v. State Bar, 24 Cal.2d 611, 621, 150 P.2d 892; Wigmore on Evidence, 3rd ed., Vol. 6, sec. 1766, p. 177; People v. Radley, 68 Cal.App.2d 607, 609, 157 P.2d 426; People v. Kilvington, supra, 104 Cal. at page 93, 37 P. 799, 43 Am.St.Rep. 73; Wigmore on Evidence, 3rd ed., Vol. 2, sec. 258, p. 78; People v. Kynette, 15 Cal.2d 731, 754, 104 P.2d 794.

In view of the foregoing conclusions which necessitate a reversal of the judgment and setting the case at large, it becomes unnecessary to consider or pass upon other contentions advanced by appellants, including their claim that the court erred in denying their motion for satisfaction of judgment as to them upon payment into court by defendant Ray Borders of the sum of $10 sought to be apportioned as his share of the damages awarded respondent.

The judgment appealed from is reversed and the cause remanded for a new trial.

DORAN and DRAPEAU, JJ., concur.

34 Cal.2d 176

DROTLEFF v. RENSHAW et al.

S. F. 17946.

Supreme Court of California, in Bank.

Aug. 10, 1949.

Rehearing Denied Sept. 8, 1949.

1. Appeal and error 🔑1004(1)

Amount of damages fixed by jury and approved by trial court in exercise of sound discretion will not be disturbed on appeal unless so disproportionate to any reasonable limit of compensation as to indicate passion, prejudice or corruption. Const. art. 6, § 4½.

2. Damages 🔑132(1)

$6,000 for injuries to knee with residual headaches and permanent facial scar was not excessive.

3. Damages 🔑127

In determining excessiveness of damages, currently deflated value of dollar must be recognized.

4. Appeal and error 🔑1170(6)
Trial 🔑133(6)

A casual reference by plaintiff's attorney to plaintiff's financial condition, made by informing jury that plaintiff could not afford expense of bringing certain doctor to testify, was improper, but not ground for reversal where there was no effort at repetition, and trial court promptly directed jury to disregard the statement and reprimanded attorney. Const. art. 6, § 4½.

5. Parties 🔑95(7)

Where amended pleading merely substituted defendant's real name for a fictitious name, and answer already in was sufficiently appropriate, service of such amended pleading was unnecessary. Code Civ.Proc. § 474.

6. Automobiles 🔑240(1)

Where complaint seeking damages for injuries suffered in automobile collision was amended after defendant's answer by substituting real name of truck owner for fictitious name "John Doe," the answer remained effective as denial of material allegations of amended complaint and questions of ownership and employment bearing upon such defendant's liability remained in issue as originally framed. Code Civ.Proc. § 474.

7. Automobiles 🔑244(26)

Truck driver's testimony was sufficient to establish that named defendant was his employer at time of collision.

8. Automobiles 🔑244(12)

Evidence authorized recovery from driver of truck and trailer unit which was being passed by another truck for damages arising out of collision with approaching automobile.

9. Continuance 🔑30

Where no request was made for time to answer amendment of complaint which substituted real name, alleged to have been recently discovered, for fictitious name, postponement of further trial pending joining of issues was not required.

10. Trial 🔑159

Motion of individual defendant doing business as "Dyer Trucks" for nonsuit, argued solely from premise that there was only hearsay testimony to establish that truck "was a Dyer Trucking truck", was properly denied where truck driver had testified that he was employed by "Dyer Trucks" at time and place of accident, though there was no other evidence connecting "Dyer Trucks" with individual defendant, in absence of motion for directed verdict because of such deficiency in proof. Code Civ.Proc. § 474.

11. Appeal and error 🔑1064(2)

Error in instruction assuming that individual defendant doing business as "Dyer Trucks" was employer of truck driver involved in collision was not prejudicial, despite lack of evidence that such defendant was in fact doing business as "Dyer Trucks", where such defendant did not move for directed verdict on that ground or offer testimony on the issue and requested and obtained instructions assuming that employer-employee relationship existed. Const. art. 6, § 4½.

12. Appeal and error 🔑1031(1)

Prejudice is no longer presumed from error. Const. art. 6, § 4½.

SCHAUER and EDMONDS, JJ., dissenting in part.

Appeal from Superior Court, San Mateo County; Aylett R. Cotton, Judge.

Action by Herbert J. Drotleff against Charles W. Renshaw and others, for injuries suffered in automobile collision. From a judgment on a verdict exonerating named defendant and another but finding in favor of plaintiff against other defendants, defendants Harold Dyer and another appeal.

◆

Affirmed.

Prior opinion 202 P.2d 847.

Dana, Bledsoe & Smith, San Francisco, and Morton B. Jackson, for appellants.

Waldier & Truce and L. John Waldier, San Carlos, for respondent.

SPENCE, Justice.

This is an appeal from a judgment for damages for personal injuries suffered in an automobile collision. By its verdict the jury exonerated defendants Charles W. Renshaw and Charles A. Langlais from liability but found in favor of plaintiff as against defendants Harold Dyer and Jack M. Edmonds in the sum of $6,000.00. The latter two defendants appeal, arguing these points: (1) excessiveness of the damage award; and (2) prejudicial misconduct of plaintiff's attorney. In addition defendant Harold Dyer urges one further consideration not applicable to his co-appellant: that his motion for nonsuit should have been granted on the ground of lack of "evidence" to "connect [him] in any way with the case * * * either as owner or employer" in relation to the vehicle driven by defendant Jack M. Edmonds. Correlated with this alleged insufficiency in the proof is a claim of error in one of the instructions to the jury. Careful examination of the record compels the conclusion that these respective objections cannot avail defendants as ground for reversal of the judgment against them. Const., art. VI, sec. 4½.

The accident appears to have happened in the following manner: Defendant Edmonds was driving a truck and trailer unit in a southerly direction on the westerly side of the Bayshore Highway. A Langlais Company pickup truck was proceeding in the same direction behind the Edmonds' truck. The automobile in which plaintiff was riding, driven by one Dias, was traveling north in the easterly lane. There was some confusion in the passing operations of the two trucks by reason of other traffic on the highway, resulting in an impact with the Dias automobile. As the sufficiency of the evidence establishing the negligence of Edmonds as the driver of one of the trucks is not challenged, the above recital is adequate for the purpose of discussing the points presented jointly by defendants Harold Dyer and Jack M. Edmonds on this appeal.

First to be noted is defendants' claim that the damage award for $6,000 is excessive and not justified upon the face of the record. In this connection they refer particularly to plaintiff's admission that his "medical bills as a result of this accident to the * * * time [of trial had] been $9" and that he had a "one day loss of work" on the per diem scale of $14—a total of $23. However, the evidence shows that plaintiff, by reason of the force of the collision, sustained cartilage and ligament damage to his knee, residual headaches, and a permanent facial scar; that these injuries had caused him protracted pain and suffering up to the time of trial, which was approximately one year and two months after the accident; that the impaired freedom of movement of his knee had decreased his efficiency in the performance of his work as a "weather-stripping mechanic," a troublesome restriction of problematical duration constituting a future threat to necessary physical activities incident to his regular employment; and that there were still added medical expenses to be met, for the family doctor, in detailing his findings from two examinations of plaintiff within the year, testified that he had yet to submit his bill therefor.

[1-3] The trial court and the jury had the opportunity to observe plaintiff's condition and the extent of his injuries. The matter of the excessiveness of the award was argued before the trial court as one of the grounds for a new trial, and the motion therefor was denied. As a matter determinable in the exercise of a sound dis-

cretion, the amount of damages fixed by the jury and approved by the trial court will not be disturbed on appeal unless the evidence shows that the award is so disproportionate to any reasonable limit of compensation as to indicate that it was the result of passion, prejudice or corruption on the part of the triers of fact. Roedder v. Lindsley, 28 Cal.2d 820, 823, 172 P.2d 353; Dodds v. Stellar, 77 Cal.App.2d 411, 424, 175 P.2d 607; Brown v. Boehm, 78 Cal.App.2d 595, 603, 178 P.2d 49; Couch v. Pacific Gas & Electric Co., 80 Cal.App.2d 857, 867, 183 P.2d 91. Such does not appear to be the situation here. The cases cited by defendants furnish no criterion on the present record, for they involve various factual considerations of distinguishing significance. Moreover, the currently deflated value of the dollar must be recognized, Dodds v. Stellar, supra, and while the award to plaintiff may be liberal, it cannot be regarded as without "the realm of reason" under all the circumstances to be considered. Freeman v. Nickerson, 77 Cal.App.2d 40, 52, 174 P.2d 688, 695; see, also, Butler v. Allen, 73 Cal.App.2d 866, 870, 167 P.2d 488.

[4] Nor is there any merit to defendants' second objection charging misconduct on the part of plaintiff's attorney which operated to their prejudice in relation to the fixing of the amount of the verdict. It appears that in his closing argument, plaintiff's attorney informed the jury that he did not bring a certain doctor to testify in the case because plaintiff could not afford the expense. Other physicians testified sufficiently to establish by a preponderance of the evidence that the particular injuries to plaintiff had occurred. While undoubtedly the mention of plaintiff's financial condition was improper and should not have been made, Ensign v. Southern Pacific Co., 193 Cal. 311, 322, 223 P. 953, that consideration alone will not justify a reversal here. 24 Cal.Jur. sec. 29, p. 746. The reference apparently was a casual one, with no effort at repetition to "aggravate the effect", see Carlston v. Shenson, 47 Cal.App.2d 52, 61, 117 P.2d 408, and the trial court acted promptly to correct the impropriety and remove any effect it might otherwise have had, not only in directing the jury to disregard the objectionable statement but in reprimanding plaintiff's attorney with an admonition to confine his remarks to the evidence in the case. Under such circumstances it may not fairly be said that the reference in question contributed to the amount of the verdict, and that the trial court's timely action was ineffectual in curing the impropriety. Tingley v. Times Mirror Co., 151 Cal. 1, 22–24, 89 P. 1097; Lanigan v. Neely, 4 Cal.App. 760, 779–780, 89 P. 441; Hansbrough v. Mann, 26 Cal.App. 261, 264, 146 P. 896. Moreover, the alleged consequences of the cited reference were fully but unvailingly argued before the trial court as a ground for a new trial. There appears to be no reason to disturb the trial court's conclusion on this point in negation of defendants' charge of prejudicial misconduct. Coppock v. Pacific Gas & Elec. Co., 137 Cal.App. 80, 89, 30 P.2d 549.

[5, 6] There now remains to be considered the additional ground of error assigned by defendant Harold Dyer—the premise of his liability upon the theory of respondeat superior in relation to the acts of defendant Jack M. Edmonds. This point of challenge requires careful examination of the record pertinent to the issue in question. The original complaint listed as defendants two "Does." It alleged, in part, that "at all times herein mentioned" the "defendant Jack M. Edmonds was the agent and employee of defendant First Doe and/or Dyer Trucking Company, a corporation, and * * * was acting in the course and scope of his said employment and said agency"; and that "the vehicle" which the "defendant Jack M. Edmonds" was then driving and operating was "a White truck and trailer unit * * * then and there owned by First Doe and/or Dyer Trucking Company, a corporation, and * * * at the time and place * * * alleged * * * was driven with the consent of the owner." Several weeks later but before the appealing defendants, Dyer and Edmonds, filed their joint answer, plaintiff amended his complaint "by inserting" the name "Harold Dyer, doing business as Dyer Trucks" in the place of "the fictitious name First Doe * * * where-

ever it appear[ed] in [the] complaint." Code Civ.Proc., sec 474. Thereafter defendants Harold Dyer and Jack M. Edmonds jointly answered the original complaint, denying, among other things, the allegations of ownership and employment as above quoted. Apparently the amendment to the complaint was not served on defendants Dyer and Edmonds, and first came to their attention in open court during the course of the trial. However, service of such amended pleading, involving merely the "substitution of the real name of a defendant for a fictitious name" was not required. Kittle v. Bellegarde, 86 Cal. 556, 563, 25 P. 55, 57. The amendment related only to "formal or immaterial matters" and did not "change the cause of action" nor affect the issues as presented by the original complaint, so that the "answer already in was as appropriate to the complaint as amended as before the amendment." Gray v. Hall, 203 Cal. 306, 311-312, 265 P. 246, 250; Steinbauer v. Bondesen, 125 Cal.App. 419, 428, 14 P.2d 106. Accordingly, defendants' answer, though not addressed to the complaint as amended, stood effective as a denial of the material allegations thereof, and the questions of ownership and employment bearing upon defendant Dyer's liability in this case remained, as originally framed, in issue as matters for trial between the parties. Harney v. Corcoran, 60 Cal. 314, 317.

[7, 8] Defendant Dyer did not testify at the trial. However, defendant Edmonds, called as a witness for plaintiff, testified as follows:

"Q. Jack Edmonds, you have heard the testimony of Charles Renshaw [another defendant], that on November 18th, 1946, you were present at the time of an accident involving a three quarter ton Chevy pickup operated by Charles Renshaw and another passenger car operated by Robert Dias [plaintiff's driver], and is it true you were present at the scene of that accident? A. Yes, sir.

"Q. You were then and there, at that time and place, immediately previous to and immediately after this accident operating a truck, semi trailer unit? A. Yes, sir.

"Q. At that time by whom were you employed? A. Dyer Trucks.

"Q. Dyer Trucks of Corcoran, California? A. Yes, sir.

"Q. For how long a time had you been in their employ? A. Over five years."

This testimony was given at the trial by Edmonds without objection. It was sufficient to support a finding that Dyer Trucks was the employer of Edmonds, the driver of the truck and trailer unit involved in the accident. Furthermore, other evidence unquestionably established that Edmonds as driver of such equipment was personally liable, and the judgment against him must be affirmed. However, plaintiff maintains that the uncontradicted testimony also binds defendant Dyer consistent with the amendment of the complaint to include as a defendant "Harold Dyer, doing business as Dyer Trucks."

[9] At the conclusion of plaintiff's case, counsel for defendant Dyer moved for "a nonsuit on the ground no evidence has been shown here to connect this defendant in any way with the case * * * nothing to prove that Harold Dyer or the Dyer Trucking Company was either the owner of that truck or the master of the driver of the truck." Plaintiff thereupon called attention to the fact that the complaint had been amended "to show that the person designated therein by the fictitious name of First Doe was discovered to be Harold Dyer, doing business as Dyer Trucks." In response to that point, defendant Dyer's counsel stated that he had not "seen or heard of that amendment * * * it was never served on us [the law firm acting as "attorneys for the defendants Harold Dyer and Jack M. Edmonds"]." However, no request was made for time to answer the amendment and, as above indicated, the nature of the amendment was such as not to require the postponement of further trial of the case pending the "joining of issues." Gray v. Hall, supra, 203 Cal. 306, 311, 265 P. 246.

[10] The motion for a nonsuit was denied. This ruling was proper, for it appears that counsel for defendant Dyer argued such motion solely from the premise that there was only certain "hearsay testi-

mony" in the record purporting to establish that "the truck [Edmonds was driving] was a Dyer Trucking truck." He accordingly coupled his nonsuit claim with a motion to strike such "hearsay testimony," which motion likewise was denied. Apparently he overlooked entirely the evidence adduced from the driver Edmonds on the point of his employment by "Dyer Trucks," as above quoted, and to which testimony plaintiff's counsel referred in his argument in opposition to the nonsuit. Defendants then proceeded with the presentation of their evidence, which, however, did not include any attempt on the part of defendant Dyer, by taking the witness stand or through other proof, to counteract the testimony of the driver Edmonds on the employment issue. Nor was there a motion for a directed verdict made on behalf of defendant Dyer because of any deficiency in the proof against him as an individual on the issue of liability for the happening of the accident. 24 Cal.Jur. sec. 163, p. 913.

Defendant Dyer argues that "mere statements that a truck belonged to and was being operated for Dyer Trucks constitute no evidence against" him as an individual, for there "was no evidence that Dyer Trucks was either a copartnership or a corporation * * * [that he] was either an officer of the alleged corporation or a partner or sole operator of a concern called Dyer Trucks." He connects with this alleged lack of proof a claimed error in one of the instructions given at the request of plaintiff and fixing the relationship of the defendants as follows: "While there are several defendants in this action, two (2) of them, Charles A. Langlais and Harold Dyer, have been sued herein because, as has been established, they were the principals for whom defendants Charles W. Renshaw and Jack M. Edmonds, respectively, were acting as agents, and within the scope of their authority, at the time of the events out of which the accident occurred. It follows, therefore, that if the agents are liable, the principals are liable." The impropriety of such instruction, he argues, rests upon the ground that it "assumes the existence of a fact which is not in evidence"—the employment relation between him and Edmonds—and so the "province of the jury [was] invaded" on a matter which should have been left for its determination. Clarke v. Volpa Brothers, 51 Cal.App.2d 173, 179, 124 P.2d 377.

[11] It may be argued that plaintiff's evidence connecting defendant Dyer as a responsible party in the case was somewhat ambiguous, resting wholly upon Edmonds' testimony as to his employment by Dyer Trucks at the time in question (1 Cal.Jur. sec. 8, p. 698) and without any attempt to substantiate the precise allegation in the amended complaint that "Harold Dyer" was "doing business as Dyer Trucks." Likewise, it is doubtful whether such testimony in and of itself would warrant the quoted instruction declaring the principal-agency status between Dyer and Edmonds had been established as a matter of law, and applying the principal of respondeat superior in holding the former liable for the acts of the latter under the employment relationship assumed to exist between Dyer as an individual and the driver Edmonds. 1 Cal.Jur. sec. 117, p. 837. However, conceding this instruction to have been erroneous, it does not appear to justify a reversal of the judgment against defendant Dyer in the light of other considerations in the record.

As above stated, defendant Dyer did not testify at the trial yet he knew prior to the presentation of evidence by the defense, and upon denial of his motion for a nonsuit, that plaintiff's complaint had been amended to include him as a party defendant, an individual "doing business as Dyer Trucks." With no attempt made by counsel for defendant Dyer to challenge the testimony of the driver Edmonds as to his employment by Dyer Trucks, there was no evidence before the jury indicating that Dyer as an individual should not be identified with the operation of Dyer Trucks pursuant to the allegation in the amended complaint. In line with this evidentiary consideration is the fact that defendants Edmonds and Dyer filed a joint answer—procedure which would seem strange on the face of the record if the former were not to be deemed the latter's employee—and their defense was handled throughout the case by the same law firm expressly appearing as "attorneys for the defendants Harold Dyer and Jack M. Edmonds." Moreover, as above noted, no motion for a directed verdict was presented on behalf of defendant Dyer.

[12] Consistent with these observations is the premise of the following instruction given by the trial court at the request of defendants Dyer and Edmonds: "I charge you that no liability exists against Harold Dyer or Edmonds unless defendant Edmonds was guilty of want of ordinary care. 'Ordinary care' as used in these instructions, is such care as an ordinarily prudent person in the same or similar business or transaction would exercise in the same or similar circumstances." Such instruction clearly implied that liability existed against Harold Dyer by reason of the accident if it existed against Edmonds —a theory of responsibility which could only be correlated with the employer-employee relationship between the two. Having requested and been granted this instruction impliedly authorizing the jury to find "Harold Dyer" liable for "Edmonds'" negligence, defendant Dyer is in no position to complain of the instruction consistently declaring the agency relationship to exist between them in the fixing of their responsibility to plaintiff. Like implications prevail with regard to another instruction given by the trial court at the request of defendants Dyer and Edmonds: "If you find that Mr. Edmonds drove his truck in a careful and prudent manner and that he was not careless or negligent, then I instruct you that he was not legally responsible for the accident and that no damages should be awarded against him nor against Harold Dyer." It does not appear that these defendants made any request for an instruction submitting the issue of respondeat superior to the jury for its determination or in anywise countering an assignment of liability against defendant Dyer premised upon such principle. As has been frequently said, "prejudice is no longer presumed from error", Anstead v. Pacific Gas & Electric Co., 203 Cal. 634, 640, 265 P. 487, 490, and in view of this examination of the record sustaining the propriety of the verdict and judgment rendered against defendant Dyer, it cannot be said that a miscarriage of justice has occurred. Const., art. VI, sec. 4½.

The judgment as entered against each defendant is affirmed.

GIBSON, C. J., and CARTER and TRAYNOR, JJ., concur.

SCHAUER, Justice (concurring and dissenting).

I concur in the judgment only insofar as it relates to the defendant Edmonds. It seems to me that on the face of the majority opinion it is obvious that there is a total lack of evidence to sustain the judgment as against Harold Dyer personally.

EDMONDS, J., concurs.

Rehearing denied; SCHAUER, J., dissenting.

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34 Cal.2d 196

PEOPLE v. POWELL.

Cr. 4976.

Supreme Court of California, in Bank.

Aug. 19, 1949.

1. Criminal law ⚷511(1)

In prosecution for abortion and murder, results of autopsy, extrajudicial admissions of defendant, dying declarations of decedent and testimony of doctors who subsequently treated decedent were sufficient corroboration of testimony of accomplice husband. Pen.Code, § 1111.

2. Criminal law ⚷409

In prosecution for abortion and murder, prosecution was required to make prima facie showing by evidence independent of extrajudicial admissions of defendant of corpus delicti, although admissions could be considered in connection with other evidence in determining whether all elements of the crime had been established beyond a reasonable doubt. Pen.Code. § 1111.

3. Criminal law 🔑510, 511(1)

In prosecution for abortion and murder, evidence of admissions of defendant given by an accomplice were required to be corroborated, although corroborative evidence did not of itself have to establish guilt of defendant. Pen.Code, § 1111.

4. Abortion 🔑11
Homicide 🔑250

Evidence supported convictions for abortion and manslaughter.

5. Criminal law 🔑486

In prosecution for abortion and murder, physicians' expert testimony based on case history and physical and laboratory examinations as to decedent's condition after abortion was admissible as against contention that testimony was based solely upon hearsay statements of accomplice husband.

6. Criminal law 🔑260(11)

Where county hospital records were received in evidence over objections that they contained hearsay statements and conclusions which were incompetent because not based upon personal knowledge of physician who made entries, and in overruling objections court stated it would consider only evidence which was admissible, and no specific objection was interposed, Supreme Court would assume that court considered only proper evidence, and in absence of showing to the contrary, defendant could not complain on appeal. Code Civ.Proc. § 475; Const. art. 6, § 4½.

7. Homicide 🔑18(2)

Homicide resulting from commission of felony of abortion is murder of the second degree.

8. Criminal law 🔑1186(4)

A defendant is precluded from complaining that he was convicted of a lesser offense than one of which he is guilty according to undisputed evidence or according to that view of the evidence which it indisputably appears the trier of fact accepted. Code Civ.Proc. § 475; Const. art. 6, § 4½.

9. Criminal law 🔑1186(4)

In prosecution for abortion and murder, defendant could not complain on appeal that conviction of manslaughter was unauthorized because prosecution's evidence warranted conviction for murder in absence of showing that court indulged in improper compromise by finding him guilty of lesser offense not shown by the evidence. Code Civ.Proc. § 475; Const. art. 6, § 4½.

10. Criminal law 🔑295

On a plea of double jeopardy or former conviction, extrinsic evidence is admissible on trial to identify crime of which a defendant has been convicted.

11. Criminal law 🔑1186(4)

Where offense of abortion was allegedly committed on or about October 23, and there was sufficient evidence to support finding that defendant committed an abortion on December 29, but defendant made no request at trial that prosecution elect date on which it proposed to prove the crime, the variance resulted in no prejudice and was not ground for reversal of conviction. Code Civ.Proc. § 475; Const. art. 6, § 4½.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Andrew J. Powell was convicted of abortion and manslaughter, and he appeals.

Affirmed.

Prior opinion, 202 P.2d 837.

Samuel L. Laidig, Los Angeles, for appellant.

Fred N. Howser, Attorney General, Frank Richards, Deputy Attorney General, William E. Simpson, District Attorney, and Jere Sullivan, Deputy District Attorney, Los Angeles, for respondent.

SCHAUER, Justice.

Defendant was charged with abortion (count 1) and murder (count 2) of Birda Johnson. The trial court, sitting without a jury, found that he was guilty as charged in count 1; on count 2 it found him guilty of manslaughter. Defendant appeals from the judgments of conviction and from an order denying his motion for new trial. An important prosecution witness was the victim's husband, an accomplice of defendant, who testified, among other things, to many admissions of defendant. Defendant contends that the testimony of the accomplice is not "corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense", as required by section 1111 of the Penal Code, and that the corpus delicti is not sufficiently established by evidence independent of the assertedly uncorroborated testimony of the husband to the admissions of the defendant. Defendant argues, further, that the evidence, if it shows any crime of homicide, shows that the count 2 offense is murder of the second degree and that the trial court, doubtful that the evidence sufficiently established that defendant had committed a criminal homicide, "exceeded his power" by a compromise determination that defendant was guilty only of manslaughter. We have concluded that the accomplice's testimony is sufficiently corroborated; that there is adequate evidence of the corpus delicti apart from defendant's extrajudicial admissions; and that, although defendant could have been convicted of the offense of second-degree murder, he cannot predicate a reversal on the fact that he was convicted only of manslaughter.

The evidence tending to show defendant's guilt of the charges, apart from the testimony of the accomplice, is as follows:[1] Birda Johnson died on January 23, 1948, of septicemia. She was 26 years of age. Prior to December 29, 1947, she had been in good health. She had borne seven children, six of whom were living. The two youngest children were born in March, 1946, and March, 1947, respectively; each of the births was normal and at the time of each the mother was in good condition.

On October 21, 1947, Birda and her husband borrowed $250 from a bank; the application for the loan, signed by them, states that the money was "to be used for the purpose of Doctor Bill." On October 23, Birda made her first visit to defendant, a chiropractor, and told him she believed that she was pregnant. A pregnancy test made on November 6, 1947, showed a negative result. On December 29, 1947, Birda went on a street car to defendant's office. There (according to a dying declaration of Birda made on January 22, 1948, one day before her death) defendant "put some packs in her * * *, he used a long instrument; when he put it inside of me it hurt so I fainted." When she came from defendant's office on December 29 Birda was ill. Defendant called a cab and the driver helped her from the office to the cab because "She couldn't make it downstairs." Defendant asked Birda's daughter, who had accompanied her to defendant's office, "to have my father call him." As she entered the cab and frequently thereafter Birda vomited.

On the evening of December 29 Birda's husband informed defendant by telephone that Birda was vomiting; defendant told the husband to call again on the following day. On December 30 the husband telephoned defendant and stated that his wife was still vomiting and that "I think my wife is still pregnant and I like to have a report." Defendant stated that he would send a doctor "For more of a further diagnosis." A pregnancy test made on December 31 by a laboratory technician whom defendant sent to Birda's home showed a negative result.

On January 1, 1948, at the request of Birda's husband, defendant arranged by telephone to have an ambulance take her to a private hospital. Defendant suggested by telephone to Dr. Donohue, the physician and surgeon who took charge of Birda's case, that she was suffering from dehydration and intestinal influenza. Dr. Donohue's examination of Birda disclosed, among other things, tenderness and distension of the lower abdomen and a brown, fetid, vaginal discharge; she was suffering from dehydration and her symptoms "could have been interpreted as intestinal flu." On January 2 Birda developed pelvic peritonitis which became constantly more severe despite massive doses of penicillin, which treatment was commenced some time after the "first 48 hours." The history of Birda's illness which her husband gave to Dr. Donohue was entirely different from the history given him by Birda herself and by defendant. Because Birda required blood transfusions which her family could not afford, she was transferred to the county hospital on January 12, 1948. Huge dosage of penicillin was there continued. Pelvic examination disclosed a "purulent, slightly bloody discharge" from the cervix; the cervix was soft, which "would indicate one of two things in her case, or both, either that she had been recently pregnant or that it was entirely the result of the inflammation and infection in the area." Despite treatment her condition grew worse.

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[1] A summary of the testimony of the accomplice husband is separately stated, beginning 208 P.2d 977.

On January 22 and again on January 23, 1948, Birda made the dying declaration that defendant "killed me." She died on the last mentioned date.

An autopsy disclosed that the uterus was "enlarged and soft. The external surface of the uterus did not show any obvious defect or any break in the contour but on cutting through the wall of the uterus there was a definite area of degeneration of tissue and the tissue at the top of the uterus has a necrosis which extended right down into the internal cavity of the uterus. * * * It was indicative of probable trauma, probable mechanical interference with the uterus * * *. [T]he lining of the internal cavity of the uterus was markedly congested, and fairly smooth except in the portion of the uterus at the top where that area of degeneration was, and there was also a little break in the lining there following the line of the degenerated tissue. * * * The cervix and the vagina showed no evidence of any trauma other than severe congestion." Because of the degeneration of tissue in the fundal area of the uterus the autopsy surgeon "couldn't tell * * * whether there was a perforation to originally start it. * * * [T]he appearance of the area of necrosis, and the arrangement of the necrosis in the tissue indicated that something has probably gone through the uterus there. * * * There were not any obvious openings except for the degeneration within the tissue itself."

Dr. Grant, who examined and treated Birda in the county hospital, testified that in his opinion it would be "extremely unusual, almost impossible" to find a necrosis so situated in the uterus unless it was caused by "some instrumentation or foreign matter." According to defendant himself (who testified that he did not perform an abortion by instrumentation or otherwise) necrosis can be caused by "mechanical instrumentation, trauma, which is the most important one of them all, and of course, secondary is bacterial toxins."

Defendant testified to an innocent explanation of Birda's visits to him, of Johnson's communications with him, and of his arranging the two pregnancy tests and Birda's removal to a hospital. The trier of fact, however, was warranted in considering it significant that, according to defendant's testimony, the only record of Birda's case which he made contemporaneously with examining and treating her was a general history and diagnosis of possible chronic peritonitis made on her first visit on October 23, 1947, and that when police officers came to his office and accused him of aborting Birda defendant did not produce even this limited history of her case. A stirrup table and instruments which could have been used to perform abortions were found in the office of defendant.

[1] The above recited evidence furnishes corroboration to the extent required by law (Pen.Code, § 1111) of the following testimony of the accomplice husband:

Prior to the events herein described Birda had been in good health. She was regularly employed. In October, 1947, she and her husband believed that she was pregnant. Johnson went to defendant's office and informed him that "my wife * * didn't want to have this baby." Defendant agreed to perform an abortion on Birda for $250; he said that "he was good at it, he had did that lots of times." Defendant also told Johnson that "after he got my wife unpregnant, that he would give me a button to put up in her, and once a month she would have to come back and he would take that button out and wash it out for $5.00 each time. * * * he told me that if I ever would have to carry her to the doctor, not to tell who put that button up in her." Johnson and Birda borrowed $250 from a bank to pay for the abortion. On October 22 (according to Johnson; October 23 according to other evidence) Birda went to defendant's office. Johnson telephoned the office and defendant told him, "She [Birda] is here now. I am taking care of her now * * *, not to worry, that * * * everything would be all right." That evening Birda had a small amount of watery, reddish vaginal discharge. She was "kind of puny" and did not go to work for two days. Johnson talked with defendant by telephone from time to time. About twelve days after Birda's visit to defendant, Johnson, pursuant to defendant's instructions given over the telephone, removed a cotton pack from Birda's vagina; "a little bloody water was running out of her." The next day Johnson telephoned to defendant; defendant told him to bring a specimen of Birda's urine to defendant's office. This Johnson did. Defendant said that "he was going to send it off to some kind of laboratory to test it."

Birda "still didn't menstruate"; Johnson repeatedly—"so much I don't remember"—talked to defendant by telephone as to this; and about the middle of November defendant stated that he wanted Birda to come to his office in order that could check her condition. Johnson also went to defendant's office and met Birda there. Defendant told them that "it would be about eight weeks before my wife started to menstruating normal like she should" and that a laboratory test had shown that she was not pregnant. Thereafter Johnson frequently communicated with defendant; on each of these occasions Johnson said that Birda had not menstruated, feared she was still pregnant, and did not want to have the baby. Defendant repeatedly assured Johnson that she would "come around" within a few weeks. On December 28, 1947, Johnson again reported to defendant, by telephone, that Birda believed she was still pregnant. Defendant said, "Have her come into the office in the morning about ten o'clock and I will check over and see what is the matter." On December 29, Johnson again telephoned defendant. Defendant said Birda "is here now." Johnson said, "whatever you do my wife don't want to have no baby." Defendant replied, "Don't worry, I will take care of it all right." That night when defendant came home he found his wife "flowing right smart," vomiting repeatedly and apparently very sick. He at once telephoned defendant, who said that she would be all right in two or three days; that "There was a clot at the tip of the womb and he opened her womb." Birda grew sicker. On December 30, when Johnson telephoned to report this to defendant, defendant said, "It just takes a little time. * * * Trust me. * * * I know what I am doing." On December 31 Johnson informed defendant by telephone that Birda's condition was still worse; defendant stated that he would send a doctor to see her. On January 1, 1948, Johnson visited defendant's office and told defendant that a physician who, at Johnson's request, had examined his wife would not treat her without a written release from defendant; defendant refused to give such a release. Johnson returned to his home and telephoned defendant that he planned to take Birda to a hospital. Defendant said that he would call an ambulance and would tell the hospital doctors "what is the matter with her." The ambulance came promptly and Birda was taken to a private hospital. On January 2, 1948, Johnson telephoned defendant and defendant said "not to worry, to keep quiet and not to be talking too much. * * * Dr. Powell told me if anything happened they might put me in jail. * * * He told me that every time I talked to him over the phone while my wife was so low sick, and he told me to keep quiet." Birda remained in the private hospital for 11 days, then, on January 12, was removed to the county hospital.

[2-4] There must be a prima facie showing, by evidence independent of the above quoted extrajudicial admissions of defendant, of the corpus delicti; i. e., that there was injury of the sort forming the basis of the crimes and that the injury was caused by a criminal agency (People v. Simonsen (1895), 107 Cal. 345, 347, 40 P. 440; People v. Jones (1898), 123 Cal. 65, 68, 55 P. 698); but the admissions may be considered in connection with the other evidence in determining whether all elements

of the crimes have been established beyond a reasonable doubt (People v. McMonigle (1947), 29 Cal.2d 730, 738, 177 P.2d 745). Furthermore, the evidence of the admissions of defendant, since it came from an accomplice, must be corroborated (Pen. Code, § 1111); but the corroborative evidence need not of itself establish the guilt of defendant (People v. Harper (1945), 25 Cal.2d 862, 877, 156 P.2d 249). Defendant's contention that the evidence apart from the testimony of his admissions is insufficient to establish the corpus delicti is based upon an analysis which does not consider the evidence as a whole but points out the insufficiency of each bit of testimony considered alone. Viewed as a whole, resolving those circumstances which are capable of either an innocent or a guilty explanation to support the findings of the trial court, the evidence is sufficient.

[5] Defendant particularly complains that no physician was able to testify, solely upon the basis of an examination of Birda, and without taking into account hearsay statements of the accomplice husband, that Birda had undergone a septic abortion which caused her death. Dr. Grant, who examined and treated Birda at the county hospital, and the autopsy surgeon, testified that in their opinion her condition was caused by an abortion. Both these physicians testified, further, that there were other possible causes of her condition and that their opinions that the cause here was instrumentation of the uterus were based in part upon her case history, which included the statement of her husband that she had undergone an abortion. Dr. Donohue, who examined and treated Birda at the private hospital, testified that he formed an opinion as to the cause of the peritonitis from which she was suffering, but he did not testify to what this opinion was. We must assume that, when it developed that Dr. Grant's and the autopsy surgeon's opinions as to the cause of Birda's illness and death were based in part upon the history of her case given by her husband, the trier of fact took this into consideration and did not view the opinions as if they had been based solely upon the doctors' own knowledge. However, the trier of fact had before him competent, corroborated evidence from which he could draw the same conclusion that the doctors assumed from the husband's hearsay statement; i. e., that Birda had in fact undergone an abortion. Having so concluded the trier of fact could conclude, further, guided by the doctors' expert testimony, that this abortion caused her sickness and death.

[6] The records of the county hospital concerning Birda were received in evidence over the objections that they contained hearsay and conclusions which were incompetent because not based upon the personal knowledge of the physicians who made the entries. In overruling the objections the trial court stated, "there perhaps will be hearsay testimony in there and due to the case being heard without a jury the court will only consider such testimony as is admissible. * * * I may be letting in some evidence that is incompetent, but the court will not consider incompetent evidence." No specific objection to this procedure was interposed and it must be assumed that the court pursued its announced intention to consider only proper evidence. Under such circumstances it cannot be held that defendant has sustained the burden of affirmatively showing prejudicial error. The hospital records include notations of the opinions of three physicians that Birda had undergone a septic abortion and was suffering from a perforated uterus. It is apparent that these opinions, like those of the physicians who testified, were based in part upon Birda's history as given by her husband, and defendant's principal objection to the admission of the hospital records is upon this ground. As in the case of the opinions given from the stand we must assume that the trial court did not consider these opinions as conclusions based solely upon the physicians' own knowledge; that it accepted the records for their correct evidentiary value; i. e., a detailed account of a deteriorating physical condition which was consistent with, but did not in itself constitute proof of, Birda's having undergone a septic abortion.

[7] Death resulting from the commission of the felony of abortion is held in this state to be murder of the second degree. (People v. Wright (1914), 167 Cal.

1, 5, 138 P. 349; People v. Northcott (1920), 45 Cal.App. 706, 709, 189 P. 704; cases collected in 13 Cal.Jur., Homicide, § 19; see also Pike, Second Degree Murder in California (1936), 9 So.Cal.L.Rev. 112, 118-119.) Defendant urges that the trial court did not have "the power to render a verdict of manslaughter where the only evidence presented tended to indicate that the defendant was guilty of murder in the second degree or of no crime whatsoever—i. e., that he caused decedent's death by performing an unlawful abortion upon her or that he did not commit the abortion and decedent died of some other cause not the fault of defendant."

[8] It cannot be doubted that a trier of fact has and often exercises the *power,* because of obvious extralegal factors or for no apparent reason, to find a defendant guilty of a lesser degree or class of crime than that shown by the evidence.[2] Furthermore, even if it be assumed that the trier of fact erred here when he found defendant guilty of manslaughter, defendant cannot invoke reversal on an error which is favorable to him. (See Code Civ.Proc. § 475; 2 Cal.Jur., Appeal and Error, §§ 493, 595; 8 Cal.Jur., Criminal Law, § 562.) An appellant is precluded from complaining that he was convicted of a lesser offense than the one of which he is guilty according to undisputed evidence, or according to that view of the evidence which, it indisputably appears, the trier of fact accepted. (People v. Barnhart (1881), 59 Cal. 381, 384; People v. Maroney (1895), 109 Cal. 277, 279, 41 P. 1097; People v. Muhlner (1896), 115 Cal. 303, 305, 47 P. 128; People v. Glab (1936), 15 Cal.App.2d 120, 122, 59 P.2d 195; People v. Blackwood (1939), 35 Cal.App.2d 728, 733, 96 P.2d 982; other cases stating this rule are collected in 13 Cal.Jur., Homicide, § 64.)

Defendant relies upon People v. Huntington (1903), 138 Cal. 261, 70 P. 284 (conviction of manslaughter reversed because the trial judge of his own motion instructed the jury as to manslaughter although the evidence showed either second degree murder in the commission of an abortion or, as defendant claimed, that he did not know deceased was pregnant, did not intend to abort her, and she died, probably from the effects of an anaesthetic, while undergoing a lawful surgical operation), and People v. Kelley (1914), 24 Cal.App. 54, 140 P. 302 (conviction of manslaughter reversed because the trial judge instructed the jury as to involuntary manslaughter where the evidence showed only an intentional killing, either in self-defense or with malice aforethought). Each of these decisions rests upon the undoubtedly correct rule that it is error to give instructions which have no application to the case at hand; in each it was determined that, in the circumstances, the giving of the inapplicable instruction was ground for reversal. (It may be noted, also, that each was decided before the adoption of section 4½ of article VI of the California Constitution, which requires that a conviction not be set aside on the ground of misdirection of the jury unless, after an examination of the entire cause, the court is of the opinion that the error resulted in a miscarriage of justice.) In People v. Long (1940), 15 Cal.2d 590, 603, 103 P.2d 969, 976, also relied upon by defendant, this court said, "we do not have to decide now whether in a case [of asserted murder by abortion] where no evidence of lack of due caution and circumspection is offered and received, a manslaughter verdict can be supported solely on murder evidence, or whether, in such a case, it is reversible error to instruct on manslaughter." The express reservation in the Long case of the first stated question does not, in our opinion, indicate that this court was then disposed to depart from the settled rule of the cases cited [208 P.2d

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[2] See People v. Lem You (1893), 97 Cal. 224, 228, 32 P. 11, quoted in People v. Macken (1939), 32 Cal.App.2d 31, 41, 89 P.2d 173, 179: "Of course, a jury, in rendering a general verdict in a criminal case, necessarily has the naked *power* to decide all the questions arising on the general issue of not guilty; but it only has the right to find the facts, and apply to them the law, as given by the court." See also the discussion by Pike, Second Degree Murder in California, supra, pp. 128–132 of 9 So.Cal.L.Rev., of probable extralegal causes for verdicts of second degree murder in California cases.

980], recognized in the Kelley case, supra,[3] that a conviction of an offense less than that which the evidence shows is, in the absence of a showing of prejudice, error favorable to defendant of which he cannot complain.

[9] Defendant here relies also upon the reasoning of a note in 14 So Cal.L.Rev. 189. This note, like the Huntington and Kelley cases, supra, concerns the effect of instructing a jury as to a crime less than that shown by the evidence. It is said (p. 191 of 14 So.Cal.L.Rev.) that "Instead of the defendant being fortunate to be convicted of the lesser crime it may well be that he would not have been convicted at all" if the inapplicable instruction had not been given; because of such instruction the jury may convict of the lesser offense where they are "almost, but not quite sufficiently, convinced" of the defendant's guilt of the greater offense which the evidence tends to show, or where they are "prejudiced against him in such a way that they desire to convict him of some crime but would not go so far as to inflict upon him the penalty for murder." The same reasoning, defendant urges, applies here, where the case was tried without a jury; the trial court, suspicious but not convinced of defendant's guilt, indulged in an improper compromise by finding him guilty of a lesser offense not shown by the evidence. We are of the opinion that we are not warranted, where, as here, the reason for the trial court's finding of manslaughter is not apparent, in seizing upon the explanation that the court deliberately found defendant guilty of manslaughter although it was not convinced beyond a reasonable doubt that he was guilty of any criminal homicide, rather than accepting one of the equally possible and far more probable explanations that the trial court, because of what technically may be extralegal considerations, such as mercy, tempered the harsh application of the law, or that, bearing the rigorous burdens of the trial process, he overlooked the cases which have decided that one who causes death by commission of a criminal abortion is guilty of second degree murder, not manslaughter.

[10, 11] Finally, defendant urges that his conviction upon count 1 (abortion) cannot stand because the offense was allegedly committed "on or about October 23, 1947," whereas if there was any sufficient evidence of an abortion it was of an offense committed on December 29, 1947. As we have seen, there was sufficient corroboration of the accomplice's testimony, under the rule of section 1111 of the Penal Code as applied by the cases, to support a finding that defendant committed an abortion on December 29. Defendant argues that the People, at the trial, should have elected the date upon which they proposed to prove the crime of abortion. However, he did not, at the trial, request that the People so elect, and the situation in this respect appears to be like that in People v. Williams (1945), 27 Cal.2d 220, 226, 163 P.2d 692, 695: "[I]n preparing his defense defendant was in nowise prejudiced by the alleged variance. Nor can he successfully maintain that he may be placed in jeopardy again for the same offense. It is well settled that on a plea of double jeopardy [or former conviction], extrinsic evidence is admissible on the trial to identify the crime of which a defendant has been convicted. [Citations.]"

Since no miscarriage of justice appears, the judgments, one more favorable to defendant than the view of the evidence taken by the trial court could support, should stand.

For the reasons above stated, the judgments and order appealed from are affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SPENCE, JJ., concur.

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[3] Ordinarily "a party will not be heard in an objection to a verdict of manslaughter against him under an indictment for murder, where it appears that, under the evidence, he in justness ought to have been convicted of the crime of murder * * *; the theory of that proposition being that there can in reason be no just cause of complaint by the defendant where the verdict is more favorable to him than is perhaps justified by the evidence" (at page 61 of 24 Cal.App., at page 305 of 140 P.).

34 Cal.2d 192

MILLSAP v. HOOPER et al.
(two cases).
L. A. 20818, 20819.

Supreme Court of California, in Bank.
Aug. 19, 1949.
Rehearing Denied Sept. 15, 1949.

1. Appeal and error ⚷345(1)
New trial ⚷163(2)

Effective date of an order of denial of motion for new trial is date of minute entry, and 30 day extension within which notice of appeal from judgment may be filed under rules on appeal does not begin to run until such entry. Rules on Appeal, rule 3(a).

2. Appeal and error ⚷345(1)

Where a motion for new trial has been denied by operation of law before date of minute entry, 30 day period of extension within which notice of appeal from judgment may be filed under rules on appeal, must be calculated from date of denial of motion by operation of law. Rules on Appeal, rule 3(a); Code Civ.Proc. § 660.

3. Appeal and error ⚷348(1)

Where notice of entry of judgment was mailed on January 9 and filed on same day, and notice of intention to move for new trial was filed on January 19, date of service of notice of entry was January 10, and 60 days thereafter, motion was denied by operation of law, and hence 30 day extension granted by rules on appeal expired on April 9, and notice of appeal filed April 13, was too late. Rules on Appeal, rule 3(a); Code Civ.Proc. §§ 12a(b), 660, 1013.

4. New trial ⚷155

Under the statute providing that if motion for new trial is not determined within 60 days from date of service of notice of entry of judgment, motion is deemed denied by operation of law, time is not to be calculated from date of physical receipt by counsel of notice of entry of judgment. Code Civ.Proc. § 660.

5. Time ⚷10(7)

Under statute providing that if motion for new trial is not determined within 60 days from date of service of notice of entry of judgment, motion is deemed denied by operation of law, Washington's and Lincoln's Birthdays are not to be excluded in computing the required period. Code Civ.Proc. §§ 12a(b), 659, 660, 1013; Political Code § 10.

6. Courts ⚷78

Rules on appeal are a valid exercise of the authority of the Judicial Council to adopt rules governing appellate procedure. Rules on Appeal, rule 3(a); Code Civ. Proc. § 961; Const. art. 6, § 1a.

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Appeal from Superior Court, Los Angeles County; Geo. A. Dockweiler, Judge.

Actions by H. C. Millsap, special administrator of the estate of Mary R. Doane, deceased, and by H. C. Millsap, special administrator of the estate of Matthew C. Doane, deceased, against Daisy D. Hooper and Lura H. Dresser. On plaintiffs' motion to dismiss appeals by defendants from an adverse judgment.

Appeals dismissed.

Paul J. Otto and Irvin C. Evans, Los Angeles, for appellants.

William Ellis Lady, Los Angeles, for respondents.

TRAYNOR, Justice.

Respondent moves to dismiss the appeals herein on the ground that the notice of appeal was filed too late.

Judgment for respondent was entered in the trial court on December 31, 1947. Notice of entry of judgment was mailed in Los Angeles on January 9, 1948 and filed on the same day. It was received at the office of counsel for the appellants on January 12th, and notice of intention to move for a new trial was filed on January 19th. The motion was denied by the trail court on March 9th, but the order of denial was not entered in the minutes until March 17th. Notice of appeal was filed on April 13th.

[1,2] The effective date of an order of denial of a motion for new trial is the date of the minute entry, and the 30 day extension within which notice of appeal from the judgment may be filed under Rule 3(a) does not begin to run until such entry.

Jablon v. Henneberger, 33 Cal.2d 773, 205 P.2d 1; Van Tiger v. Superior Court, 7 Cal.2d 377, 60 P.2d 851; Brownell v. Superior Court, 157 Cal. 703, 109 P. 91. The date of the order of denial was therefore March 17th. That order was ineffective, however, because the motion had been denied by operation of law under section 660 of the Code of Civil Procedure before the date of the minute entry. Lancel v. Postlethwaite, 172 Cal. 326, 156 P. 486; see Mellin v. Trousdell, 33 Cal.2d 858, 205 P.2d 1036. The 30 day period of extension must therefore be calculated from the date of denial of the motion by operation of law, and if notice of appeal was filed after the expiration of that period, the appeal must be dismissed. Mellin v. Trousdell, 33 Cal.2d 858, 205 P.2d 1036; Jablon v. Henneberger, 33 Cal.2d 773, 205 P.2d 1.

[3] Section 660 of the Code of Civil Procedure provides that if a motion for new trial is not determined within 60 days from the date of *service* of notice of entry of judgment, it is deemed denied by operation of law. Notice of entry herein was mailed on January 9th. With the allowance of an additional day for mailing within the Los Angeles city limits under section 1013 of the Code of Civil Procedure, it appears that the date of service was January 10th. 60 days thereafter, or on March 10th, the motion was denied by operation of law under section 660. The 30 day extension granted by Rule 3(a) began to run on that date and expired on April 9th. Notice of appeal was not filed until April 13th; it was therefore too late and the appeal must be dismissed.

Appellants seek to avoid this result by urging a different construction of the relevant statutes. They contend that the time within which the motion was to be decided by the trial court did not begin to run until physical *receipt* by counsel of the notice of entry of judgment on January 12th. That would make the date of denial of the motion for new trial by operation of law March 12th. They make the further contention that the time for determination was extended another 2 days under section 12a(b) of the Code of Civil Procedure,[1] because two holidays, Lincoln's and Washington's Birthdays, occurred within the 60 day period. These holidays would have extended the time for the trial court to rule until March 14th. Since March 14, 1948 was a Sunday, appellants claim that the motion for new trial was not denied until March 15th. The 30 day extension under Rule 3(a) did not expire until April 14th by their calculations, and the notice of appeal was timely since it was filed on April 13th.

[4, 5] These contentions cannot be upheld. It will be noted that not only does section 660 specifically provide for the running of the 60-day period from the date of *service* of notice of entry, but that when the Legislature intended a time limit to run from the date of receipt, as in section 659, it used language appropriate to that purpose. Its use of different language in section 660 shows clearly that the date of service, computed under section 1013, is controlling, and that the 60-day period runs from that time.[2]

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[1] "As to any act provided or required by law to be performed within a specified period of time, such period of time is hereby extended—

"(a) * * *

"(b) By such number of days as equals the number of holidays (other than special holidays) appointed by the President or by the Governor and which occur within or during such period."

[2] Even under appellants' contention that the period runs from the date of receipt of the notice of entry of judgment, the notice of appeal was filed too late. Section 12a extends time only when holidays appointed by the President or the Governor (i. e., irregular holidays whose date cannot be precisely foretold) intervene during the period in question. Holidays established by the Legislature under section 10 of the Political Code do not extend time under section 12a. Francis v. Superior Court, 68 Cal.App.2d 643, 157 P.2d 23; Lynch v. Harrell, 44 Cal.App.2d 863, 113 P.2d 261; Adolph Ramish, Inc. v. Behr, 40 Cal.App.2d 54, 104 P.2d 410. Washington's and Lincoln's Birthdays are holidays established by section 10 and did not, therefore, affect the time within which appellants could file their notice of appeal. The time extension granted by Rule 3 (a) having expired on April 9th, 90 days from service of notice of entry of judgment, the notice of appeal of April 13th was too late.

[6] There is no merit to appellants' contention that the Rules on Appeal are unconstitutional. Under Article VI, section 1a of the California Constitution and section 961 of the Code of Civil Procedure there can be no doubt of the authority of the Judicial Council to adopt rules governing appellate procedure in this state.

The appeals herein are dismissed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., concur.

34 Cal.2d 186

ACCOUNTING CORPORATION OF AMERICA v. STATE BOARD OF ACCOUNTANCY et al.

S. F. 17690.

Supreme Court of California, in Bank.

Aug. 16, 1949.

1. Licenses 🔑7(2)

In licensing and regulating a profession or occupation, legislature may properly classify persons on basis of their experience by fixing stated period of time as determining their qualification to continue in the activity without examination or other requirement designed to assure competence; but where statute discriminates against individuals or corporations solely because they are new to the field, and such discrimination does not appear to have any relation to the public interest, the statute disregards constitutional protections against arbitrary classification. Const.Cal. art. 1, §§ 11, 21; art. 4, § 25; U.S.C.A.Const. Amend. 14.

2. Constitutional law 🔑48

Every statute is presumed to be valid.

3. Constitutional law 🔑230(2)
Licenses 🔑7(3)

The statute requiring licensing of all persons engaged in practice of public accounting, which contains no provision enabling corporation to obtain license unless it was a domestic corporation in business for more than three years prior to effective date, in so far as it restricts corporate practice to those practicing for three years, is arbitrary with respect to the excluded corporations and violates provision of the Constitution guaranteeing equal protection of the laws. Business and Professions Code, §§ 5000–5132, 5062, 5082, 5091, 5115; Const.Cal. art. 1, § 11; U.S.C.A.Const. Amend. 14.

4. Statutes 🔑72

The statute requiring licensing of all persons engaged in practice of public accounting, which contains no provision enabling corporation to obtain license unless it was a domestic corporation doing business for more than three years prior to effective date in so far as it restricts corporate practice to those practicing for three years, violates provision of state Constitution declaring that laws of general nature shall have a uniform operation. Business and Professions Code, §§ 5000–5132, 5062, 5082, 5091, 5115; Const. art. 1, § 11.

5. Constitutional law 🔑205(5)
Licenses 🔑7(3)

The statute requiring licensing of all persons engaged in practice of public accounting which contains no provision enabling corporation to obtain license unless it was a domestic corporation in business for more than three years prior to effective date, in so far as it restricts corporate practice to those practicing for three years, violates provisions of the state Constitution prohibiting the granting of special or exclusive privileges. Business and Professions Code, §§ 5000–5132, 5062, 5082, 5091, 5115; Const. art. 1, § 21; art. 4, § 25.

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Appeal from Superior Court, San Francisco County; Herbert C. Kaufman, Judge.

Action by the Accounting Corporation of America, a California corporation, against the State Board of Accountancy of the state of California, and others, to enjoin the board from enforcing certain provisions of the business and professions code relating to the practice of public accountancy, and for declaratory relief. From the judgment, plaintiff appeals.

Judgment reversed.

For prior opinion, see 201 P.2d 575.

Sullivan, Roche, Johnson & Farraher, San Francisco, Wilkinson, Hall, Witwer & Moran, Chicago, Ill. and George Chadwick, Jr., San Francisco, for appellant.

Fred N. Howser, Attorney General, and J. Albert Hutchinson, Deputy Attorney General, for respondents.

SHENK, Justice.

By this action the accounting Corporation of America, a California corporation, sought to enjoin the State Board of Accountancy and the members thereof from enforcing certain provisions of the Business and Professions Code relating to the practice of "public accountancy." The complaint charged that those provisions deprive the plaintiff of equal protection of the laws and establish arbitrary classifications prohibited by the California Constitution. It prayed that the court declare the invalidity of the provisions and the rights and duties of the parties under them. The court sustained a general and special demurrer to the complaint without leave to amend and entered judgment in favor of the defendants.

The articles of incorporation of the plaintiff authorize it to engage in the practice of public accountancy and it has been so engaged since its incorporation in July of 1945, employing more than sixty persons. In 1945 the chapter of the Business and Professions Code relating to accounting was repealed and a new chapter was enacted which became effective on September 15th of that year. Stats. 1945, p. 2529, Bus. & Prof.Code, secs. 5000–5132. Provisions for the regulation and certification of certified public accountants were re-enacted in substantially the same form as in the prior chapter. Newly added were provisions recognizing and regulating a class of persons engaged in public accounting distinct from certified public accountants. These provisions directly bear upon the practice in which the plaintiff is engaged.

In general the pertinent sections of the new chapter provided that after six months from the date on which the chapter became effective, no person would be permitted to practice public accountancy unless he had been issued a permit by the State Board of Accountancy. Bus. & Prof.Code, sec. 5060. Individuals over 21 years were permitted to register as public accountants within six months of the effective date provided they 1) were engaged in the practice of public accountancy at the time of the enactment of the chapter or 2) had engaged for at least two years in private or governmental accounting in positions comparable to a given civil service classification, or 3) were high school graduates who had completed a course in accounting and had three years experience as employees of accountants. Members of the armed services between 1940 and 1946 are permitted to register until 1951 upon meeting certain requirements. Bus. & Prof. Code, sec. 5082. The statute did not provide for the issuance of permits to practice public accountancy in the future, except to those registered within the prescribed time limits. This controversy arises out of a proviso to section 5062 which declared: "Nothing contained in this chapter shall prevent any corporation which, at the effective date of this chapter, has been legally organized in the State of California and engaged in the practice of public bookkeeping and accounting for a period of three years prior to such date from continuing such practice under its corporate form and arrangement."

In view of the fact that the plaintiff had not been engaged in the practice of public accounting for a period of three years prior to the effective date of the new chapter, the defendant board threatened to enforce the penal provisions of the chapter which are directed against unauthorized practice (sec. 5115) and to prohibit the plaintiff from engaging in the practice of public accountancy.

It is the contention of the plaintiff that the proviso which purports to bar from the practice of public accountancy all corporations except those which had been engaged in the occupation for a period of three years before September 15, 1945, is discriminatory and in violation of the Equal Protection clause, Amend. 14, and the sections of the state Constitution declaring that laws of a general nature shall have a uniform operation (Art. 1, sec. 11) and prohibiting the granting of special or exclusive privileges. Art. I, sec. 21; Art. IV, sec. 25.

Public accountancy is in some respects comparable to the learned professions of law, medicine and dentistry in that a high degree of skill and integrity on the part of the practitioner is demanded. Proficiency in the examination, analysis and evaluation of financial records must be combined with a relationship of trust and confidence between an accountant and members of the public who consult him. This being the case, the Legislature might have, had it chosen, reasonably excluded corporations entirely from the practice of public accountancy. See Painless Parker v. Board of Dental Exam., 216 Cal. 285, 14 P.2d 67; People v. Merchants Protective Corp., 189 Cal. 531, 209 P. 363; Pacific Employers Ins. Co. v. Carpenter, 10 Cal.App.2d 592, 52 P.2d 992; Pilger v. City of Paris Dry Goods Co., 86 Cal.App. 277, 281,* 261 P. 328. But since the Legislature decided that at least some corporations are not disqualified from practicing public accounting, the sole question presented is whether it was reasonable to declare that only these corporations which had engaged in the practice for three years prior to the statute's effective date, should be permitted to continue as public accountants.

[1] In licensing and regulating a profession or occupation the Legislature may properly classify persons on the basis of their experience by fixing a stated period of time as determining their qualification to continue in the activity without examination or other requirement designed to assure competence. Such legislation has been justified on the ground that an individual who has engaged in an activity subject to regulation for a period of time may be assumed to have the qualifications which others can be required to prove by examination or by compliance with other conditions. In re Weisberg, 215 Cal. 624, 631, 12 P.2d 446; Ex parte Whitley, 144 Cal. 167, 77 P. 879, 1 Ann.Cas. 13; Elliot v. University of Illinois, 365 Ill. 338, 6 N.E. 2d 647; 12 Am.Jur. p. 164; 136 A.L.R. 207, 219. But where a statute discriminates against individuals or corporations solely because they are new to the field and such discrimination does not appear to have any relation to the public interest, the legislation disregards constitutional protections against arbitrary classification. Mayflower Farms v. Ten Eyck, 297 U.S. 266, 56 S.Ct. 457, 80 L.Ed. 675; Del Mar Canning Co. v. Payne, 29 Cal.2d 380, 175 P.2d 231; Van Harlingen v. Doyle, 134 Cal. 53, 66 P. 44, 54 L.R.A. 771; Soares v. City of Santa Maria, 38 Cal.App.2d 215, 218, 100 P.2d 1108; In re Fasset, 21 Cal.App.2d 557, 69 P.2d 865.

The Attorney General contends that the statute properly classifies corporations on the basis of their experience in public accounting. To state a truism, a corporation can "practice" public accounting only indirectly through its employees. The competence of a public accounting corporation depends, therefore, not upon the length of time the corporation has been engaged in the practice of accounting, but upon the experience, training and integrity of its personnel of the moment. There is no reason to believe that the personnel of a corporation practicing for three years necessarily will have qualifications which entitle that corporation to be preferred over more recent corporate entrants into the field which were also engaged in the practice of public accounting on the date the act became effective. The Code provision for corporate practice sharply contrasts with the statute held valid by the Wisconsin Supreme Court which provided in part for the licensing of a corporation existing at the effective date of the statute provided the manager and board of directors were certified public accountants or had received certificates of authority to practice as public accountants. Wis.Stats.1947 ch. 135.06

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* Only nine other states, Colorado, Georgia, Illinois, Iowa, Michigan, Missouri, North Carolina, Texas and Wisconsin, make any provision for corporate practice of accounting. (C.C.H., Accounting Law Reporter, pp. 1406, 1907, 2108, 2308, 3008, 3308, 4104, 5110, 5708.) In California, a corporation cannot qualify as a certified public accountant. (Bus. & Prof.Code, sec. 5091.)

(3); Wangerin v. Wisconsin State Board of Accounting, 223 Wis. 179, 270 N.W. 57.

The arbitrariness of the challenged proviso is emphasized by the fact that a corporation which had not engaged for three years in public accounting work is not merely required to offer more proof of its fitness but is permanently excluded from the practice of public accounting. It is not intended to imply that the Legislature is prevented from including in a class only those engaged in a pursuit on a given date, and making no provision for augmentation of the class, for "The Legislature, in adopting a policy, may adapt legislation to an existing situation." People v. Western Fruit Growers, 22 Cal.2d 494, 508, 140 P.2d 13; see cases therein cited. The purpose of the present statute was to reserve certain existing privileges but at the same time to attain higher standards in the future by requiring those desiring status as public accountants to meet the more rigid requirements prescribed for certified public accountants. The evil of the proviso to section 5062 is that it confers a privilege to remain in business upon a class of corporations arbitrarily selected from among those engaged in public accounting at the time the new accounting chapter became effective.

[2-5] The respondent board relies on the presumption that there is a reasonable basis factually supported for the classification which prefers corporations having three years' practice. People v. Wells, 33 Cal.2d 330, 202 P.2d 53; California Physicians' Service v. Garrison, 28 Cal.2d 790, 802, 172 P.2d 4, 167 A.L.R. 306; Lelande v. Lowery, 26 Cal.2d 224, 232, 157 P.2d 639, 175 A.L.R. 1109. The presumption of validity to which every statute is entitled will not alone compel the sustaining of a statutory provision which can only be characterized as arbitrary. Forbearance by the courts from hasty invalidation of legislation is imperative, but a statute which permits some corporations to continue operations as public accountants while denying others that privilege where no reasonable grounds exist for such favoritism, denies equal protection to the excluded corporations and grants unlawful special privileges to the favored.

Since the Legislature intended that some corporations should be permitted to practice accountancy, the entire proviso relating to corporate practice need not be nullified, but only the phrase which restricts such practice to those which had engaged in the practice "for a period of three years." Any corporation engaged in the practice of public accountancy in California at the effective date of the statute, may, under the valid portions of the proviso contained in section 5062 continue to engage in public accountancy.

The judgment is reversed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

ORLOFF v. LOS ANGELES TURF CLUB, Inc.

Civ. 16704.

District Court of Appeal, Second District, Division 3, California.

Aug. 12, 1949.

Rehearing Denied Sept. 7, 1949.

Hearing Granted Oct. 10, 1949.*

1. Theaters and shows 🔑1

Horse racing board has power to prescribe rules, regulations and conditions governing conduct of horse races where there is wagering. Civ.Code, §§ 50, 52, 53; Business and Professions Code, §§ 19420, 19561.

2. Theaters and shows 🔑4

The statute making it unlawful to refuse an adult admittance to a race course etc. upon presentation of a ticket unless person is of an immoral character creates rights which did not exist at common law. Civ.Code, § 53.

3. Constitutional law 🔑43(2)

A plaintiff who claims benefits that flow from a statute must accept limitations

* Subsequent opinion 227 P.2d 449.

which it imposes and cannot reasonably claim that these limitations unconstitutionally discriminate against him with respect to a claimed right which is not extended by the statute and which does not exist otherwise.

4. Injunction 🔑126

In action against race track proprietor to enjoin ejection of patron under the statute making it unlawful to refuse an adult admittance upon presentation of a ticket unless person is of immoral character and not intoxicated or boisterous, burden was upon patron to prove that he was neither intoxicated nor boisterous on occasion when he was ejected, and that he was a man of good moral character. Civ. Code, § 53.

5. Trial 🔑395(5)

A specific finding of an ultimate fact drawn from the specific facts found is unnecessary.

6. Evidence 🔑106(5)

In action against race track proprietor to enjoin ejection of patron under statute making it unlawful to refuse an adult admittance unless person is of immoral character, convictions of criminal offenses were to be considered only as proof of nature of conduct that led to the prosecutions and were to be considered only in reference to question whether repeated convictions of offenses wilfully committed proved patron to be a person of immoral character. Civ.Code, § 53.

7. Injunction 🔑126

Where patron brought action against race track proprietor to enjoin ejection under the statute making it unlawful to refuse an adult admittance unless person is of immoral character, and evidence was sufficient to prove that for ten years patron had been a person of immoral character, burden was upon patron to prove that he had accomplished a rehabilitation and change of character. Civ.Code, § 53.

8. Injunction 🔑128

In action against race track proprietor to enjoin ejection of patron under the statute making it unlawful to refuse an adult admittance unless person is of immoral character, evidence justified conclusion that patron at time of ejection was a person of such character, and hence injunction was properly refused. Civ.Code, § 53.

9. Evidence 🔑106(5)

Where it is the main rather than a collateral issue, an immoral character may be established by proof of specific acts involving moral turpitude.

10. Evidence 🔑106(5)

In action against race track proprietor to enjoin ejection of patron under statute making it unlawful to refuse an adult admittance unless person is of immoral character, evidence of convictions of patron for bookmaking and related activities was admissible to prove bad character. Civ.Code, § 53.

11. Evidence 🔑106(1)

Where inquiry runs to question of moral character, a court may receive any evidence which tends to show character for honesty, integrity or general morality.

12. Evidence 🔑106(1)

In action against race track proprietor to enjoin ejection of patron under statute making it unlawful to refuse an adult admittance unless person is of immoral character, evidence that between 1929 and 1939, patron was adjudged guilty of at least seven offenses consisting of forms of bookmaking and gambling was not objectionable as too remote, with respect to trial held in 1946, to furnish evidence of present character. Civ.Code, § 53.

13. Witnesses 🔑406

In action against race track proprietor to enjoin ejection of patron under the statute making it unlawful to refuse an adult admittance unless person is of immoral character, testimony that cafe operated by patron was known as place where bookmakers congregated and that patron still had reputation as a bookmaker was admissible to rebut testimony of patron and witnesses that cafe was patronized by people of high standing and reputation. Civ. Code, § 53.

VALLÉE, J., dissenting.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Morris Orloff against the Los Angeles Turf Club, Inc., and Raymond H. Williams, to enjoin ejection of plaintiff from race track premises. From the judgment, plaintiff appeals.

Judgment affirmed.

William Katz, Los Angeles, for appellant.

Victor Ford Collins, Los Angeles, for respondents.

Freston & Files, Los Angeles, amici curiae for respondents.

SHINN, Presiding Justice.

Plaintiff alleges that during the year 1946 he was wrongfully ejected twice from Santa Anita Park, operated by Los Angeles Turf Club, Inc. He seeks an injunction to protect his claimed right to attend the races, to lay bets on the horses and watch them run. He alleges that he has at all times conducted and comported himself in a proper manner, has not been under the influence of liquor or guilty of boisterous conduct, that he is not a person of lewd or immoral character, but upon the contrary is a property owner and taxpayer, operating a lawful business. The case was before the Supreme Court in 30 Cal.2d 110, 180 P.2d 321, 171 A.L.R. 913, following a judgment on demurrer, and upon the facts alleged plaintiff was held entitled to the injunction which he craves. Defendant answered, denied the allegations of the complaint with respect to plaintiff's good character and alleged that he is and long has been engaged in unlawful wagering, gambling and betting in the county of Los Angeles, and that by reason of such activities he is well known as an undesirable person whose conduct is detrimental to racing and the public welfare, and that he is a man of immoral character. It was also alleged that he had conducted unlawful bookmaking at the Park in January and February, 1946, and had been ejected in 1940 for bookmaking. It was not denied that defendant intends to exclude plaintiff from the Park in the future. The court found that plaintiff is and long has been engaged in unlawful gambling in the county of Los Angeles, and that his unlawful activities are well known; that he has been convicted seven times of bookmaking, illegal gambling and similar offenses and has a reputation as a bookmaker and illegal gambler, and of being a man of immoral character, and that he is "a known undesirable and is a person guilty of conduct detrimental to racing and to the public welfare."

It is made unlawful by section 53 of the Civil Code to refuse admittance to a race course, etc. of any one over 21 years of age who has a ticket or tenders the price of one, unless such person is under the influence of liquor, guilty of boisterous conduct or is of lewd or immoral character. The California Horse Racing Board has jurisdiction and supervision over licensed horse racing, Business & Professions Code, sec. 19420, and authority under section 19561 of the Code to prescribe rules and regulations with respect to the conduct of licensed gambling at horse racing tracks. One of the Board's rules requires such associations to properly police their grounds and to eject therefrom "known undesirables, touts, persons under suspicion or ruled off, persons of lewd or immoral character, and persons guilty of boisterous or disorderly conduct or other conduct detrimental to racing or the public welfare."

[1] Defendant contends, and the court found: "That said act (Horse Racing Act) is subsequent to and supersedes the provisions of sections 50, 52 and 53 of the Civil Code." The meaning of this is not at all clear. We suppose the point is that the Board is authorized to make rules under which persons may be excluded from race tracks for reasons other than those specified in section 53. To this extent the ambiguous finding is correct. The power to prescribe rules, regulations and conditions governing the conduct of horse races where there is wagering was upheld in Sandstrom v. California Horse Racing Board, 31 Cal. 2d 401, 413, 189 P.2d 17, 3 A.L.R.2d 90. There is a discussion in the briefs as to the effect of the finding that plaintiff is "a known undesirable and is a person guilty of conduct detrimental to racing and to the public welfare." Plaintiff in his closing brief contends that the terms, "known undesirables" and "persons guilty of * * *

conduct detrimental to racing" as used in the rule, are too vague and indefinite to be given effect as limitations upon his statutory right. It is said that the operators of a track might arbitrarily decide that any person is a known undesirable and eject him from the track for no valid reason. Defendant contends that it is the sole judge in such matters. This would be an important point for decision if the judgment rested upon a finding that plaintiff was a known undesirable, but it does not. The findings as a whole show only that the learned trial judge was of the opinion that a known gambler and bookmaker falls within the ban of the rule as a "known undesirable" and person "guilty of conduct detrimental to racing." The judgment is based upon the entire facts found, and not upon any mere descriptive label which the court believed to be justified by the facts. We note in this connection that appellant does not make any contention that the term "person of lewd or immoral character" is so vague as to render the exception of section 53 void for uncertainty nor do we think such a contention could be successfully maintained. One of the most common requirements for the enjoyment of privileges extended by law is that the applicant submit evidence that he possesses a good moral character. The validity of such requirements is self evident.

[2, 3] The court did not find specifically that plaintiff is a man of immoral character. No point is made of this omission on the appeal nor was it called to the court's attention on a motion for new trial. We think it is not fatal to the judgment. It was incumbent upon plaintiff to allege and prove facts which would entitle him to the rights and privileges guaranteed by section 53 of the Civil Code. He relies entirely upon that section and makes no claim that he has a constitutional right to attend horse races conducted by defendant and lay wagers thereon. He was seeking an injunction to enforce rights and privileges to which he would be entitled only by virtue of section 53. This section was enacted under the police power of the State and creates rights which did not exist at common law. Greenberg v. Western Turf Ass'n, 140 Cal. 357, 361, 73 P. 1050; Id., 148 Cal. 126, 82 P. 684, 113 Am.St.Rep. 216, affirmed 204 U.S. 359, 27 S.Ct. 384, 51 L.Ed. 520. Plaintiff in claiming the benefits that flow from the statute must accept the limitations which it imposes. He does not, and clearly could not reasonably claim that these limitations unconstitutionally discriminate against him with respect to a claimed right which is not extended by the statute and which does not exist otherwise. Ison v. Western Vegetable Distributors, 48 Ariz. 104, 59 P.2d 649, 655; Wilmont v. City of South Bend, 221 Ind. 538, 48 N.E.2d 649, 650; Becton v. Dublin, Tex.Civ.App., 163 S.W.2d 907, 910; Atkins v. Hertz Drivurself Stations, 237 App.Div. 31, 260 N.Y.S. 783, 785; Frazier v. Elmore, 180 Tenn. 232, 173 S.W.2d 563, 566. See also Gregory v. Hecke, 73 Cal.App. 268, 284, 238 P. 787; County of Sacramento v. City of Sacramento, 75 Cal.App.2d 436, 447-449, 171 P.2d 447 and cases there cited.

[4, 5] Accordingly plaintiff alleged that he conducted himself properly, was not intoxicated or boisterous upon either of the occasions when he was ejected from the grounds, and that he is a man of good moral character. The burden was upon him to prove these allegations. This he failed to do. The court found to the contrary, as already noticed. The finding that he is a person guilty of conduct detrimental to the public welfare would appear to have been intended by the court as a finding that he is of immoral character. One of the accepted definitions of immoral is "contrary to good order or public welfare; inimical to the rights or common interests of others: a legal and commercial sense." Century Dictionary. Warkentin v. Kleinwachter, 166 Okl. 218, 27 P.2d 160, 163; Jones v. Dannenberg Co., 112 Ga. 426, 37 S.E. 729, 731, 52 L.R.A. 271; Exchange Nat. Bank v. Henderson, 139 Ga. 260, 77 S.E. 36, 38, 51 L.R.A.,N.S., 549; Schuman v. Pickert, 277 Mich. 225, 269 N.W. 152, 154; People v. Dever, 242 Ill.App. 1, 4; 42 C.J.S., Immoral, page 395. The determination as to the morality of plaintiff's conduct involved considerably more than the application of definitions, but the one quoted fits the business of bookmaking. We need not inquire further into the sufficiency of the findings. Their sufficiency is not ques-

tioned, and, as will appear in our further discussion, the conclusion that plaintiff is a person of immoral character, within the meaning of section 53 of the Civil Code, necessarily follows from the findings which were made, since, as we shall see, one who engages in the business of bookmaking is, in a legal sense, a person of immoral character. A specific finding of the ultimate fact drawn from the specific facts found was unnecessary. Shepard v. Yale, 94 Cal. App. 104, 107, 270 P. 742; Horsman v. Maden, 69 Cal.App.2d 11, 16, 157 P.2d 882; 24 Cal.Jur., sec. 207, p. 974.

It was proved that between 1929 and 1939 plaintiff was adjudged guilty of at least seven offenses consisting of forms of bookmaking and gambling. There was testimony by police officers that he is known as a bookmaker and gambler, and also testimony that he is known as a former bookmaker, but is also presently known as a gambler. One police officer testified that plaintiff operates a cafe known as the Kiru, and that this is known as a congregating place for professional gamblers and bookmakers. The opinions expressed as to the reputation of Kiru's were based upon reports of police officers and statements of bookmakers to the witnesses. Arrests have been made there for such things as possession of lottery tickets and for suspicion of bookmaking. There was testimony that at Santa Anita Park plaintiff had been seen talking to people with criminal records.

The principal question, which is but lightly touched upon in the briefs, is whether there was substantial evidence to justify the implied finding that plaintiff is a person of immoral character. A great many definitions are to be found of "moral," "immoral," "immorality," and "moral turpitude." Strictly speaking, and as morality is frequently defined, any form of gambling is immoral. The meaning of "immoral" as applied to character and as used in the statute, however, may not be ascertained by resort to the definitions of lexicographers. As we shall see, to do so would probably result in giving an effect to section 53 of the Civil Code which was not intended by the legislature.

[6] Conviction of a criminal offense does not necessarily prove that the offender is a person of immoral character. Conduct which involves moral turpitude, whether it be criminal or not, may, of course, show an absence of good moral character. Plaintiff's conduct, as evidenced by his convictions, must be viewed in two aspects. The judgments should be considered, first, only as proof of the nature of the conduct that led to the prosecutions. In determining whether the several offenses involved moral turpitude we must look beyond the judgments to the proscribed acts themselves, the purpose in declaring them to constitute offenses, and the possible consequences of persistent and widespread violations of the law. Our first inquiry, then, is whether the business of accepting bets on horse races under conditions which do not render it lawful is immoral. The judgments should also be considered in reference to the question whether repeated convictions of offenses, wilfully committed, prove plaintiff to be a person of immoral character.

There is a great diversity of opinion as to whether gambling in all forms is immoral per se. Any discussion among several persons might as readily result in disagreement as in agreement on the point. It would be easy to lose sight of the legal questions involved if we should endeavor to find a basis in morals for permitting gambling within a race track enclosure and forbidding it elsewhere. We have no such intangible question, although it is necessary to point out the distinction between legal betting and illegal bookmaking.

Those who engage in pari-mutuel betting within race track enclosures do not thereby become persons of immoral character within the special meaning of section 53 of the Civil Code. Manifestly, pari-mutuel betting has been provided for their enjoyment, and with respect to the question now before us, lawful gambling by such persons is not a form of immorality for which they may be excluded from the tracks. Our concern is with the morality of unrestricted and widespread gambling which the business of bookmaking brings about, and which is forbidden by law. The first question is whether bookmaking is malum in se and well as malum prohibitum. We have reached the conclusion that it is malum in se. In so doing we distinguish between legal betting on horse races which, as we have seen, is not immoral in a legal sense, and illegal bookmaking which we hold to be malum in se, independently of its being also malum prohibitum.

In determining whether bookmaking is an immoral practice and a bookmaker is to be deemed a person of immoral character we must look beyond the nature of the act of mere betting on horse races to the purpose of the legislation which prohibits unrestricted betting. It will be seen that the law draws a distinction between a limited amount and an unlimited amount of betting on horse races. In medicine the same sort of distinction is drawn between small and large doses of strychnine, but for reasons which are not at all obscure. Illegality may be and frequently is based upon the circumstances under which an act is committed and not solely upon the nature of the act. The legislation on the subject of betting on horse races expresses the policy of the state. This appears to be that there is an insufficient amount of evil in pari-mutuel betting within the enclosures of race courses and under the supervision of racing associations to require its being made unlawful. Whether limited gambling was legalized upon the theory that only those who could afford to lose would patronize the tracks we would not undertake to say. It is true, however, that a comparatively small percentage of the entire population of the state attend the races. Those who do not attend are prohibited from placing their bets elsewhere. Presumably this is for their own protection. It may be inferred that although a limited amount of betting was allowed, unlimited and unsupervised betting was forbidden for the reason that too much harm would result if the public at large should be allowed to practice this form of gambling, without regard to the conditions and circumstances of those who might be attracted to it. This is not an uncommon basis for discriminatory legislation. Although a single act may not be deemed so harmful as to require that it be prohibited, frequent repetitions of the act, especially if carried on as a business, may result in such widespread detriment as to justify prohibitive legislation. We are not confronted with the question whether betting illegally on the races is immoral per se. However, those who make a practice of it are consistent violators of the law. There is no occasion here for a comparison of their culpability with that of bookmakers. But they clearly cannot justify what they do upon the ground that in the eyes of the law legalized betting is not immoral. Much less can a bookmaker lay claim to a good moral character for this reason.

We must bear in mind that casual conduct is not a true index to the ingrained qualities that go to make up character. A man's character is to be determined by the propensities which abide with him and which form the pattern of his life. The practice of unlawful bookmaking is generally considered to be pernicious and evil. It is notorious for the low character of the people who engage in it as a business. It encourages violations of law by persons who are otherwise law abiding and stimulates gambling among those who cannot afford to lose. It ensnares little people to do the work of the large operators, who remain under cover. It tends to breed the types of corruption that always develop to a greater or less extent wherever gambling or other forms of vice are conducted as a business. It has been outlawed as a practice inimical to the public welfare and has been made a felony. All these considerations lead to the conclusion that one who engages in unlawful bookmaking as a business cannot with any show of reason maintain that he is following a moral pursuit or is possessed of a good moral character.

Moreover, the record of his criminal convictions supports the inference that for many years plaintiff made a business of violating the law. A decent respect for the law is certainly one of the elements of good moral character. People v. One 1940 Chrysler Convertible Coupe, 48 Cal.App.2d 546, 120 P.2d 117. Wilful evasion and violation of law for personal gain involves moral turpitude. In re Hatch, 10 Cal.2d 147, 73 P.2d 885. Not only did plaintiff persistently violate the law for personal gain but, as we have seen, the acts which constituted the violations involved moral turpitude.

[7, 8] The evidence was clearly sufficient to prove that for a period of ten years, at least, plaintiff was a person of immoral character. When this was established, the burden was cast upon him to prove that he had accomplished a rehabilitation and change of character. It was for the trial court to determine whether he had foresworn illegal gambling and evil associations and acquired a genuine respect for the law. The evidence respecting his reputation as a bookmaker and gambler, and that he has been seen associating at the tracks with persons having criminal records, as well as the testimony that he tolerates the presence of gamblers and bookmakers in his cafe, all tended in some degree to disprove his claim that he had given up his former activities and associations. The fact that he has been engaged in legitimate businesses for several years did not prove that he had changed his character. The evidence along this line did tend to prove, however, that he has prospered. We cannot say that the evidence as a whole was insufficient to justify the conclusion that plaintiff at the times when he was ejected from Santa Anita Park was a person of immoral character.

[9-12] Plaintiff argues the question of the sufficiency of the evidence upon the theory that the court should not have considered his many convictions of bookmaking and related activities, and that it was error to admit such evidence over his objection. Two grounds of objection were urged, namely, that evidence of specific wrongful acts was not admissible to prove his bad character, and that his convictions were so remote to the date of trial as to furnish no evidence whatever as to his present character. Neither ground is sustainable and neither requires extensive consideration. In support of the first ground plaintiff cites cases which state the general rule that reputation may not be proved by evidence of specific acts of misconduct. The question here, however, was one of character and not merely of reputation. It is not necessary to point out the situations in which the two do or do not differ, depending upon the issue to be tried. Evidence of plaintiff's conduct extending over a period of years furnished the best index to his character. Where it is the main, rather than a merely collateral issue, proof of specific acts involving moral turpitude is the best method by which immoral character may be established. In re Stover, 65 Cal.App. 622, 224 P. 771; Klevesahl v. Byington, 1 Cal.App. 2d 671, 37 P.2d 179; Commonwealth v. Lyons, 142 Pa.Super. 54, 15 A.2d 851, 852; Hardesty v. Hine, 135 Ind. 72, 34 N.E. 701, 702; Stockwell v. Brent, 97 Ind. 474, 477; Rosencranz v. Tidrington, 193 Ind. 472, 141 N.E. 58, 59, 28 A.L.R. 1136; In re Williams, Mo.App., 113 S.W.2d 353, 369. See also, In re Cohen's Will, 164 Misc. 98, 298 N.Y.S. 368; Madsen v. Town of Oakland, 219 Iowa 216, 257 N.W. 549; McMahon v. Harrison, 6 N.Y. 443; 22 So. Calif.L.Rev. 341; 1 Wigmore, Evidence, 3rd Ed., sec. 202, p. 689. Engaging in gambling and the business of bookmaking gave plaintiff an immoral character. Proof that he was of immoral character therefore consisted of proof that he was a gambler and bookmaker. There was no error in the receipt of evidence of his convictions and pleas of guilty. The contention that his proved offenses were to remote to have a bearing upon his present character is likewise without merit. The objections were addressed to the weight of the evidence. Where the inquiry runs to the question of moral character the court may receive any evidence which tends to show character for honesty, integrity or general morality. In re Wells, 174 Cal. 467, 475, 163 P. 657; In re Weinstein, 150 Or. 1, 42 P.2d 744, 746. The scope of the inquiry was necessarily broad. Character is not something that necessarily changes with the passage of time. It would seem clear that one who comes into court asserting some right which depends upon proof that he is of good moral character opens the way to an unrestricted inquiry into his antecedents.

[13] A further claim of error is based upon the admission of the testimony concerning plaintiff's reputation and that of

his cafe. It was alleged in the complaint that plaintiff is and for several years has been engaged in conducting and operating as owner and part owner substantial business enterprises in the City of Los Angeles. He made an issue of his own reputation and that of his place of business. He testified, as did many witnesses, that his cafe is patronized by people of high standing and reputation. Numerous of his friends and patrons, including well known members of the bar, testified that he enjoys a good reputation which they thought had not been tarnished by his convictions of bookmaking and gambling. Upon these issues it was proper for defendant to prove that the cafe is known as a place where bookmakers and gamblers congregate and where bookmakers and holders of lottery tickets have been arrested. It was proper also to receive evidence that plaintiff still has a reputation as a bookmaker and gambler.

Other findings are attacked as being unsupported by the evidence. These claims do not require particular attention. The findings we have discussed are sufficient to support the judgment. We have considered other minor assignments of error and find them to be without merit.

The judgment is affirmed.

WOOD, J., concurs.

VALLÉE, Justice.

I dissent.

First. The majority strikes down one of the most sacred and fundamental rights of a citizen—personal liberty. The opinion lays down a most dangerous doctrine. In California, race tracks and horse racing, upon the results of which there is wagering, are to all intents and purposes controlled, operated, managed, and regulated by the State. Operators of race tracks are invested with and exercise quasi-public functions. They are, in effect, agencies of the State. They are under the public obligation to operate race tracks for the benefit of the public. This is the obvious legal effect of the statute and in accord with its spirit and intent. Bus. & Prof. Code, secs. 19 400–19 663. The trial court found: "the jurisdiction and supervision over meetings in this state of horse races on the result of which there is wagering are held or conducted and over all persons or things having to do with the operation of such meetings is vested in the California Horse Racing Board." The public have a right and interest in race tracks in California both from an amusement and economic point of view. It is reported that the State received in excess of $16,000,000 in the fiscal year ending June 30, 1949, as its share of the proceeds of pari-mutuel wagering at race tracks in the State. In addition, a substantial part of the proceeds must be devoted to charity. A race track in California is a public place in the same sense that a state building, highway, park, or beach is a public place. In my opinion, all citizens have a constitutional right to attend race tracks in this State and participate in their benefits so long as they behave themselves while there. The right is not a privilege extended by law. It is a right inherent in all citizens. It exists independently of Civil Code section 53. Cf. Ex Parte Smith, 135 Mo. 223, 36 S.W. 628, 33 L.R.A. 606, 58 Am.St.Rep. 576; City of St. Louis v. Gloner, 210 Mo. 502, 109 S.W. 30, 15 L.R.A., N.S., 973, 124 Am.St.Rep. 750; State v. Hunter, 106 N.C. 796, 11 S.E. 366, 8 L.R.A. 529; Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L. Ed. 220; Brown v. Memphis & C. R. Co., C.C., 7 F. 51; Pinkerton v. Verberg, 78 Mich. 573, 44 N.W. 579, 7 L.R.A. 507, 18 Am.St.Rep. 473; Milliken v. City Council, 54 Tex. 388, 38 Am.Rep. 629; City of Watertown v. Christnacht, 39 S.D. 290, 164 N.W. 62, L.R.A.1917F, 903; City of St. Louis v. Fitz, 53 Mo. 582; City of St. Louis v. Roche, 128 Mo. 541, 31 S.W. 915, 917; Putnam v. Broadway & S. Ave. R. Co., 55 N.Y. 108, 114, 14 Am.Rep. 190; Pearson v. Duane, 4 Wall. 605, 71 U.S. 605, 18 L.Ed. 447; Story v. Norfolk & S. R. Co., 133 N.C. 59, 45 S.E. 349; Terminiello v. Chicago, 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131; Saia v. New York, 334 U.S. 558, 68 S.Ct. 1148, 92 L.Ed. 1574; Winters v. New York, 333 U.S. 507, 68 S.Ct. 665, 92 L.Ed. 840; Marsh v. Alabama, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265; Tucker v. Texas, 326 U.S. 517, 66 S.Ct. 274, 90 L.Ed. 274; Thomas v. Collins, 323 U.S. 516, 530, 65 S.

Ct. 315, 89 L.Ed. 430, 440; Follett v. McCormick, 321 U.S. 573, 64 S.Ct. 717, 88 L.Ed. 938, 152 A.L.R. 317; West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628, 147 A.L.R. 674; Martin v. Struthers, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313; Bridges v. California, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192, 159 A.L.R. 1346; Schneider v. State of New Jersey, Town of Irvington, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155; Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213, 128 A.L.R. 1352; Hague v. Committee for Industrial Organization, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423; McKay Jewelers, Inc., v. Bowron, 19 Cal.2d 595, 122 P.2d 543, 139 A.L.R. 1188; In re Campbell, 64 Cal. App. 300, 221 P. 952. The record in this case may be probed and there will not be found an iota of evidence that appellant was guilty of the slightest impropriety of behavior at Santa Anita Park or that he conducted himself there in any manner other than as an orderly, law-abiding citizen. The exclusion of appellant from Santa Anita Park constitutes a deprivation of the rights and privileges guaranteed to him by the Constitution of California and the Fourteenth Amendment to the Constitution of the United States.

Second. Civil Code section 53, which makes it unlawful to refuse admittance to any person to a race track, provides that any person of immoral character may be excluded. No reasonable and ascertainable standard or guide is fixed or prescribed for determining whether a person is of immoral character. The statute is liable to great abuses and partial and unjust discriminations. Any person attending a race track must submit his good character to the judgment of some unidentified, undesignated person. The statute places the character, moral or not, of every citizen attending a public place on trial by such person. The reputation of the private life of the citizen may at any time be called in question by him. Such unidentified and undesignated person at a public place is made a censor and is permitted to arbitrarily classify citizens, without a hearing, according to his conception, more or less fastidious, of their moral character or want of it, when their manner, dress, and conduct are not offensive. The statute in this respect is so vague, indefinite and uncertain as to render it unconstitutional and inoperative. It is repugnant to the guaranty of liberty contained in Article I, section 1 of the Constitution of California and in the Fourteenth Amendment to the Constitution of the United States. See, Schneider v. State of New Jersey, Town of Irvington, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155, 166; Perez v. Sharp, 32 Cal.2d 711, 728, 198 P.2d 17; In re Stewart, 24 Cal. 2d 344, 348, 149 P.2d 689; In re Peppers, 189 Cal. 682, 209 P. 896; In re Harder, 9 Cal.App.2d 153, 49 P.2d 304. The same stricture applies to the rule of the Horse Racing Board providing for the exclusion of "known undesirables."

Third. I am unable to follow the finespun reasoning of the majority. There is no finding, express or implied, that appellant was on January 31, 1946, and February 2, 1946, the days he was ejected from Santa Anita Park, a person of immoral character. There is a finding that he was on those days a "known undesirable." It is apparent that the trial judge based his decision denying an injunction on this finding. He found that the Horse Racing Act is subsequent to and supersedes the provisions of sections 50, 52, and 53 of the Civil Code. The majority, apparently, agree, as they base their decision on their own finding that appellant is a person of immoral character. It is not unlawful, and therefore not immoral, to accept a wager on the result of a race under the pari-mutuel system within the inclosure of the race track. Bus. & Prof. Code, § 19594. It is also not unlawful, and therefore not immoral, to accept a wager from an agent of a principal who is not within the inclosure provided the wager is accepted within the inclosure under the pari-mutuel system. It is not unlawful, and therefore not immoral, for a person without the inclosure to send an agent to a race track to wager for the principal, provided the agent makes the wager within the inclosure under the pari-mutuel system. Bus. & Prof. Code, § 19595. It is not, say the majority, malum in se to accept one or a thousand wagers within the inclosure under the pari-mutuel system.

Just what renders one or more wagers outside of the inclosure malum in se, or what smog exists outside the inclosure that taints a person who so accepts one or more wagers, is not made clear. From the standpoint of morality, I cannot perceive any distinction between the acceptance of a wager on a horse race made by an agent inside the inclosure under the pari-mutuel system for a principal who remains outside the inclosure, and the acceptance of a wager outside the inclosure. I am not persuaded that a person is of immoral character because he accepts one or more wagers on horse races outside of the inclosure. A wager on a horse race is no more malum in se than is buying stock on margin or any other speculative transaction. It has been held that neither a horse race nor a wager thereon is immoral in itself. Ross v. Green, 4 Har., Del., 308, 309; Walker v. Armstrong, 54 Tex. 609, 615. The acceptance of one or more wagers on a horse race in this state except at a race track under the pari-mutuel system is wrong solely because it is prohibited by statute.

The burden was not upon appellant to prove "that he is a man of good moral character" as the majority assert. The law presumes that he is a man of good moral character. Code Civ.Proc., sec. 1963, subd. 1. The burden was upon respondents to prove that he was a person of immoral character on the days he was unceremoniously ejected from Santa Anita Park. The wagers (three of them) upon which the majority base their finding that appellant is a person of immoral character, were accepted by him more than ten years ago and over a ten year period. Four of the seven offenses of which the majority say appellant "was adjudged guilty" were under an unconstitutional statute. There is no evidence that appellant was ever engaged in the "business of bookmaking," or that he ever was in "the business of accepting bets on horse races," or that he was a bookmaker at any time after July, 1939, or "that for many years plaintiff made a business of violating the law," or that he "persistently violate[d] the law for personal gain," or that he is a "known undesirable," whatever that term means, or that he is a person "guilty of conduct detrimental to racing," whatever that phrase means. The fact that appellant was convicted of bookmaking more than ten years ago does not make him a person of immoral character now. If it be assumed that appellant was engaged in the "business" of bookmaking and was a person of immoral character in 1939, the date he was last convicted of bookmaking, it does not follow that he is now a person of immoral character and should be excluded from race tracks. It is beyond the power of respondents to permanently ostracize appellant from Santa Anita Park or exclude him from participation in its benefits. No right exists to bar forever from a public privilege a person whose only offense is that it was once proper so to do. There is no evidence of substance upon which to base a finding that appellant is now of immoral character except the three more-than-ten-year-old convictions.

Fourth. The prevailing opinion is vulnerable in a number of other respects. Appellant makes several points which appear to be important and if well taken, in my opinion, require a reversal. These are ignored. However as none of them involves a fundamental principle, no useful purpose would be served in discussing them here.

I would reverse the judgment.

Rehearing denied; VALLÉE, J., dissenting.

93 Cal.App.2d 101

JACKSON v. JACKSON.

Civ. 7643.

Sac. 6005.

District Court of Appeal, Third District, California.

July 28, 1949.

Hearing Denied Sept. 26, 1949.

1. Divorce 🔑253
Husband and wife 🔑264

Findings in divorce action determining which properties constituted community properties of the spouses were not objectionable as conflicting or as unsupported by evidence.

2. Divorce 🔑254

Where wife agreed to pay from her separate funds $1,500 toward purchase of 50 acre farm and husband agreed to put up balance of $25,000 purchase price, husband could not complain of divorce decree which merely required him to pay one-half of unpaid balance which remained due at time of the divorce trial.

3. Evidence 🔑462

Oral evidence was competent to show agreement or intention of the spouses that land would be acquired as community property even though deed was executed in their names as joint tenants.

4. Divorce 🔑253

Evidence established that wife was not awarded by divorce decree property of a value in excess of a fair proportion of community interests of spouses.

5. Divorce 🔑252, 286

In suit for divorce on ground of extreme cruelty trial court has a wide discretion to award innocent party such proportions of community property as it deems just, and in absence of evidence to contrary, even though bulk of community property has been awarded to innocent party, presumption will be indulged that court acted fairly and, except for an abuse of such discretion, award will not be disturbed on appeal. Civ.Code, § 146.

6. Divorce 🔑254

Divorce court, having authority to settle property rights between spouses, was justified, in its discretion, to require husband to pay one-half of obligation represented by joint and several note executed by the spouses after having first apportioned between the spouses the community property, and in addition was authorized to impose a lien on husband's separate property to secure such payment. Civ.Code, § 140.

7. Divorce 🔑254

The rule that a divorce court may not impose a lien on separate property of husband under statute relating to security for payments required under a divorce decree in order to secure payment to wife of a share in community property which is allotted to her does not apply where lien is sought to insure payment to wife of husband's separate obligation on a note which he has previously agreed to pay. Civ.Code, § 140.

8. Divorce 🔑254

A divorce court, in distributing community properties between spouses, may create a valid lien on community properties awarded to husband to secure proportions thereof or payments of amount awarded to wife. Civ.Code, § 146.

◆

Appeal from Superior Court, Merced County; H. S. Shaffer, Judge.

Action by Dorcas Jackson against James P. Jackson for divorce. From that part of an interlocutory decree of divorce which divided the community property, defendant appeals.

Affirmed.

Griswold, Winton & Mayes, Merced, for appellant.

Preston, Braucht & George, Merced, for respondent.

THOMPSON, Justice.

The defendant has appealed from an interlocutory decree of divorce which was rendered against him on the ground of extreme cruelty. The decree also divided the community property of the spouses between them. The appellant raises no question on appeal regarding the validity of the divorce. He thereby concedes the adequacy of the evidence to support the divorce on the ground of extreme cruelty.

The appellant, however, contends that the findings with respect to the community properties of the spouses are conflicting, and that the award of certain properties to plaintiff as her community properties are not supported by the evidence.

Plaintiff and defendant were married May 22, 1945. They were separated July 18, 1948. There were no children born as the issue of the marriage. At the time of the marriage Mr. Jackson owned 89 acres of farm land in Merced County containing 26 acres of grape vines, together with almond and fruit trees, upon which the spouses thereafter lived. They continued to operate the ranch. There is evidence that it was valued at $54,000. Defendant also owned ten acres of farm land, acquired by deed November 16, 1943, being the east one-half of Lot 36 of a tract called Fruitland Irrigation Colony No. 1, in Merced County, valued at $6,000. The spouses bought 50 acres of farm land in that county from James A. and Rose Orr, April 2, 1947. The deed was executed to them as joint tenants, but it was agreed between them that it would become their community property. It consisted of Lots 29, 30 and the East half of Lot 31, in Fruitland Irrigation Colony No. 1. The purchase price was $25,000. Plaintiff paid $1,500 thereof. A total sum of $9,000 was paid in cash and the spouses executed their note and trust deed thereon to secure the unpaid balance of the purchase price. The sum of $11,600 remains unpaid. A Packard automobile was purchased after the marriage for the sum of $3,800. They also bought a tractor for about $2,500, upon which $1,100 was paid in cash from their joint account. An almond huller was bought for $2,800, together with other farm equipment. They also purchased a radio, refrigerator, electric range and other household furnishings.

The defendant testified that the income in 1946 from the home place and the ten-acre ranch in the sum of about $34,300, together with the income therefrom in 1947, was paid into a joint bank account. He testified that during the first year of their marriage that account was kept in his name only, but that thereafter, except for a short time before the divorce was granted, it was kept in their joint names. Mrs. Jackson testified that he told her the amounts received from the proceeds of the ranches would be considered "as ours". She was asked, "As our income?" to which she replied "Yes". During the years 1946 and 1947 the spouses filed separate income tax reports in which they designated the proceeds from the ranches as "community income." The defendant testified in that regard:

"Q. Now your income tax return was prepared upon the basis of this, the figures in this worksheet, is that correct? A. Yes.

"Q. And did you and Mrs. Jackson file separate returns? A. We did.

"Q. And I note from the work sheet that you have attributed one-half of the total income to you and one-half to Mrs. Jackson. A. I understand that is customary.

"Q. And your income tax returns were filed on this same basis? A. Yes. * * *

"Q. And that was true for the income during the year 1946? A. Yes, and 1946 too. * * *

"Q. And is it true of your 1947 return * * *? A. Yes. * * *

"Q. And you reported half of it for yourself and paid the tax on that and you reported half of it for Mrs. Jackson? And paid the tax on that? A. Yes. She received that half."

The court adopted findings favorable to the plaintiff on all essential issues, and rendered an interlocutory decree of divorce in her favor on the ground of extreme cruelty.

The defendant filed an answer to the complaint, denying the material allegations thereof, except that it was admitted the 50-acre tract of land purchased by the spouses in 1947 "is community property belonging to the parties hereto," upon which an indebtedness for the purchase price remains unpaid in the sum of $11,600 which he agreed to pay. At the same time the defendant filed a cross-complaint for divorce on the ground of extreme cruelty. The plaintiff answered the cross-complaint, denying the material issues thereof and in paragraph I thereof affirmatively alleged that she had a community interest in the farms, machinery, equipment, household goods and money in bank.

The court found that the allegations of the complaint in paragraphs I to X, inclusive except paragraph V, and paragraph I of the answer to the cross-complaint were true; that the defendant's allegations in his answer were untrue, and his allegations in paragraphs IV and V of his cross-complaint were likewise untrue. In paragraph IV of the cross-complaint, which was found to be untrue, it was alleged, in effect, that the only community property which the spouses held was the 50-acre tract which was purchased in 1947. The court then found that the "90 acres" and the 10-acre tract, together with the Packard automobile, were the separate property of the defendant, but that "plaintiff and defendant mutually agreed between themselves that the rents, issues and profits of the above described real property and the crops and income received or to be received therefrom *would be and become their separate property*"; that the costs and expenses of maintaining all of said farms, and the money expended for machinery were paid from said community funds; that the rents, issues and profits derived from said farms were "treated by the parties as their community property and was so reported in the income tax returns;" that the money in bank, in the sum of $700 and the unpaid proceeds of sales of their crops, in the further sum of $2,700, together with the proceeds of the crops now growing on the farms, "are community property". The court further found that specifically mentioned farm machinery and household goods were purchased from the community funds, and "are the community property" of the spouses. It was also determined that the 50-acre ranch purchased in 1947 was and is community property, subject to an indebtedness of $11,600.

The court thereupon awarded to plaintiff in the interlocutory decree, as her share of the community property, the following, to-wit: The radio phonograph, electric range and frigidaire, together with the 50-acre tract of land purchased in 1947, being "Lots 29, 30 and the east half of Lot 31 according to map entitled 'Fruitland Irrigation Colony No. 1'," in Merced County. The decree also provides that the defendant shall satisfy and pay *one-half of the unpaid purchase price,* amounting to the sum of $11,600, of the said 50-acre tract of land awarded to plaintiff, represented by the joint promissory note of the spouses secured by trust deed. The court decreed that said obligation of $5,800 and accrued interest "be secured by a lien upon defendant's real property hereinafter described." The decree awarded all of the balance of the real and personal property to the defendant, including farm machinery, money on deposit in the bank in the joint names of the spouses, all unpaid moneys on sales of the crops of 1947, together with the 89-acre ranch and the 10-acre tract, being Lot 36 of the Fruitland Irrigation Colony No. 1, and the crops of 1948 growing thereon, subject only to the said lien on "said last described real property," to secure the payment of said sum of $5,800 and accrued interest, previously mentioned.

[1] We are satisfied the findings are not conflicting regarding the properties which are determined to be community properties of the spouses, and that those findings are adequately supported by the evidence. The only properties which were awarded to plaintiff as her share of the community properties were the phonograph, electric range, frigidaire, the 50-acre tract in Merced County, which was purchased by the spouses in 1947, and said sum of $5,800 and accrued interest which defendant is required to contribute pursuant to agreement upon the joint note for the unpaid portion of the purchase price of that land. The defendant conceded that the phonograph belonged to plaintiff. He testified, "I consider the radio was my wife's." He admitted that the 50-acre ranch was purchased by them as community property in spite of the fact that the deed was executed in their joint names. He testified that they had a "separate agreement" in that regard. The following colloquy occurred:

"Q. Well, what do you mean by separate agreement? A. An agreement whereby— * * *

"The Court: State what was said between you. * * * A. * * * That we would buy this [50-acre] place together, my wife had $1,500.00 in her account, a separate account, so she was to put that in *and I would put up the balance* and we would buy the Orr place, in which way she would have a community interest in this property, * * *." (Italics added.)

The court did not purport to distribute to plaintiff one-half interest only in the designated community properties. Both the findings and the decree distributed to plaintiff designated community properties and a definite sum of money derived from that source. The decree reads in that regard: "The community property of said parties shall be and is hereby *divided* and set aside to the parties in the following manner, towit:" The specified properties which each spouse was to receive were then designated, as we have previously stated. No separate properties of the defendant were awarded to plaintiff. The court definitely found that the radio phonograph, electric range and frigidaire were purchased "with community funds". That finding is adequately supported by the evidence. The defendant testified that "the stove cost them $189.00," and that the refrigerator cost "a little over $200.00;" that the total cost of those two items was $400 or $450.

[2] From the previously-quoted evidence of the defendant it appears that the spouses agreed that if plaintiff would pay from her separate funds $1,500 toward the purchase of the 50-acre Orr place, defendant would "put up the balance" of the purchase price of $25,000. She said $1,500 of her money toward the purchase price of that property. The unpaid balance, at the time of the trial, was $11,600. Therefore, the sum of $11,900 was paid in addition to plaintiff's $1,500. It is immaterial whether the $11,900 was paid from receipts from the crops, or from defendant's separate funds, for the agreement was that he would personally "put up the balance" of the purchase price. The evidence shows that defendant agreed to pay the entire unpaid balance of the purchase price in the sum of $11,600, and that it was to become their community property. The trial court favored the defendant in that regard, for the decree merely requires him to pay one-half of said unpaid balance of the purchase price. There is ample evidence that the spouses agreed that said ranch would become community property.

[3] Oral evidence is competent to show the agreement or intention of spouses that land would be acquired as community property even though the deed is executed in their names as joint tenants. Tomaier v. Tomaier, 23 Cal.2d 754, 757, 146 P.2d 905; Sloper v. Sloper, 91 Cal.App.2d 238, 204 P.2d 910.

The record shows that, in addition to the other two ranches which were defendant's separate property, there was awarded to him the Packard automobile, which cost $3,800, upon which $1,600 remains unpaid, the almond hulling machine which cost $2,800, the tractor which cost $2,489, upon which $1,300 remains unpaid, and other farm equipment and household goods. The defendant also purchased a life insurance policy of $1,000. The defendant therefore profited to the extent of $7,000 to $10,000 from the community funds by assignment to him of the last-mentioned items. He was also awarded $700 cash in bank, and unpaid returns from sales of crops in 1947, amounting to $2,392 together with all proceeds from the growing crops of 1948.

[4] The income tax reports show that the proceeds from the ranches in 1946, which were found to be community property, amounted to at least $34,300, of which sum the defendant admitted $9,676 was net income, and that the gross income from the farms in 1947, which was also found to be community property, was $27,434.95. Certainly those figures furnish ample evidence that plaintiff was not awarded property of a value in excess of a fair proportion of the community interests of the spouses.

[5] In a suit for divorce which is granted on the ground of extreme cruelty the trial court has a wide discretion to award to the innocent party such propor-

tions of the community property as it deems just under the circumstances and the conditions of the respective parties. In the absence of evidence to the contrary, even though the bulk of the community property has been awarded to the innocent party, the presumption will be indulged that the court has acted fairly and impartially and, except for an abuse of such discretion, the awards will not be disturbed on appeal. Civil Code, sec. 146; Crouch v. Crouch, 63 Cal.App.2d 747, 756, 147 P.2d 678; Tompkins v. Tompkins, 83 Cal.App.2d 71, 77, 187 P.2d 840; Fahnestock v. Fahnestock, 76 Cal.App.2d 817, 827, 174 P.2d 660; Cairo v. Cairo, 87 Cal.App.2d 558, 562, 197 P.2d 208; Quagelli v. Quagelli, 99 Cal.App. 172, 176, 277 P. 1089; Tipton v. Tipton, 209 Cal. 443, 288 P. 65.

[6] The appellant asserts that the court erred in imposing a lien on defendant's separate real property to secure the payment of one-half of a joint promissory note signed by the spouses and secured by a trust deed to the 50-acre tract of land which was awarded to plaintiff. The appellant assumes that the note for $11,600, one-half of which the defendant is required by the interlocutory decree to pay, is included in the distribution of community property to the plaintiff, and that Section 140 of the Civil Code does not authorize the court to impose a lien on defendant's separate property to secure that payment. We cannot agree with that construction of the findings and interlocutory decree.

We are convinced that the findings and decree first apportion between the spouses the community property, and then separately direct the defendant to pay one-half of the obligation represented by their joint and several note. Each spouse was bound to pay the entire debt by the terms of the note. The complaint asks for an allowance for support of plaintiff. Having the authority to settle the property rights between them, the court was justified, in its discretion, to require the defendant to pay one-half of that obligation. The findings first specifically divide between the spouses designated properties, including the 50-acre Orr ranch, as community properties. The decree, under a separate paragraph designated as "(c)", directs that "Defendant shall, and he *is hereby ordered to pay one-half of the unpaid balance of the promissory note* [of $11,600] * * * and that the payment of said sum * * * be secured by a lien upon defendant's real property hereinafter described." We conclude that the order for defendant to pay one-half of that note is separate and distinct from the preceding division of community properties. It is merely a separate equitable adjustment of the obligations of the spouses on that particular note.

With respect to the settlement of the property rights of the spouses in a divorce proceeding, Section 140 of the Civil Code provides that,

"The court may require the husband or wife, as the case may be, to give reasonable security for providing maintenance *or making any payments required under the provisions of this chapter,* and may enforce the same by the appointment of a receiver, *or by any other remedy applicable to the case.*" (Italics added.)

[7] It is true that our Supreme Court has held that a divorce court may not impose a lien on the separate property of a husband, under Section 140 of the Civil Code, to secure payment to the wife of the "share in the community property" which is allotted to her. Secondo v. Secondo, 218 Cal. 453, 458, 23 P.2d 752, 754; Sanguinetti v. Sanguinetti, 9 Cal.2d 95, 102, 69 P.2d 845, 111 A.L.R. 342. But the lien which was imposed in the present action was not to secure plaintiff *for her allotted share of the community property.* It was to insure payment to her of defendant's separate obligation on a promissory note which he agreed to pay.

In the Sanguinetti case, supra, plaintiff brought suit for divorce. The husband denied the material allegations of the complaint and filed a cross-complaint for divorce on the ground of extreme cruelty and for an annulment. The only property which the parties possessed was a house and lot in San Francisco valued at $4,000, which the court found to be the separate property of the husband. He was granted an annulment on the ground of extreme cruelty, and was awarded the real property. But the wife was given judgment for the sum of $1,250 for the value of her services performed during the time they lived together as husband and wife. She was given a lien on his said separate property to secure payment of that amount. Both parties appealed. The plaintiff's appeal was dismissed. The defendant contended on appeal that the wife was not entitled to a lien on his separate property to enforce payment of the judgment for $1,250 in her favor. The Supreme Court held that the lien was valid and affirmed the judgment against him, including the vesting of the lien, on the apparent theory that the award to the wife of $1,250 for her services was within the equitable powers of the divorce court to assure the wife of reasonable maintenance. The court said at page 102 of the opinion in 9 Cal.2d, at page 848 of 69 P.2d:

> "It cannot be held that the court was without right to decree a lien for the amount of $1,250 awarded plaintiff on the San Francisco real property of defendant. Under section 140, of the Civil Code, the award of alimony in divorce actions may be decreed a lien on separate property of the husband. [Citing authorities.]"

In that case the plaintiff did pray for alimony, but there were no specific findings nor was judgment for alimony awarded. The trial court, however, did render judgment for plaintiff in the sum of $1,250 "as the reasonable value of her services rendered to defendant while they lived together." In the present case the plaintiff prayed for an allowance for her maintenance, but the trial court did not specifically make an allowance for maintenance, but did, similar to the judgment in the Sanguinetti case, render judgment against the defendant upon his obligation under the terms of the note, for payment of the sum of $5,800 and interest thereon, to be secured by lien on his separate real property. We are convinced the divorce court was authorized to render that judgment, and that the lien is valid.

[8] It has been repeatedly held, and appears to be the established rule in California, that a divorce court, in distributing community properties between the spouses pursuant to Section 146 of the Civil Code, may create a valid lien on community properties awarded to the husband to secure proportions thereof or payments of the amounts awarded to the wife. Gaston v. Gaston, 114 Cal. 542, 46 P. 609, 55 Am.St.Rep. 86; Webster v. Webster, 216 Cal. 485, 488, 14 P.2d 522; Scheibe v. Scheibe, 57 Cal.App.2d 336, 343, 134 P.2d 835; Meyer v. Meyer, 184 Cal. 687, 195 P. 387; 27 C.J.S. Divorce, § 300 c, page 1151. The last-cited cases, however, do not fit the facts of this case, because the liens were there imposed on community properties and not on separate properties.

The cases cited by appellant on the preceding issue are distinguishable from and not in conflict with what we have held in that regard.

For the foregoing reasons the judgment is affirmed.

ADAMS, P. J., and SCHOTTKY, J. pro tem., concur.

Hearing denied; EDMONDS, CARTER, and SCHAUER, JJ., dissenting.

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PFINGST v. MAYER et al.

Civ. 13783.

District Court of Appeal, First District, Division 1, California.

Aug. 10, 1949.

Hearing Denied Sept. 29, 1949.

1. Appeal and error ⚷757(1)

Failure to give transcript references in statement of facts violated rules on appeal, but appellate court in the interest of justice would consider appeal on the merits and not exercise power to reject improperly prepared brief. Rules on Appeal, rules 15(a), 18.

2. Trial ⚷165, 178

A nonsuit or directed verdict for defendant may be granted only when, disregarding conflicting evidence, giving to plaintiff's evidence all the value to which it is legally entitled and indulging in every legitimate inference which may be drawn from such evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict for plaintiff.

3. Negligence ⚷56(1.3)

Corporation which contracted to service elevator could not be held liable for injuries sustained in fall down elevator shaft, where evidence showed that fall occurred because some one had moved elevator from first to sixth floor leaving first floor door open and there was no evidence that faulty condition of elevator or any negligence of service corporation proximately caused or contributed to accident.

4. Landlord and tenant ⚷167(1)

Landlord is generally not responsible for negligence of tenant causing injury to third persons on tenant's premises, if landlord has relinquished all control over the property, but landlord may be held liable for injuries suffered on a portion of premises over which landlord has retained control.

5. Carriers ⚷306(1)

The person or corporation in possession and control of operation of an elevator is liable for injuries resulting from negligence in its construction or operation.

6. Landlord and tenant ⚷167(8)

Tenant in possession and control of elevator, and not landlord, is liable for injuries sustained by invitee by reason of negligent maintenance or operation of elevator.

7. Landlord and tenant ⚷167(8)

Evidence established that tenant had contracted for and received exclusive use and control of elevator and that landlord had retained no control thereof and hence could not be held liable for injury resulting from negligent maintenance or operation of elevator. Civ.Code, §§ 1641, 1649, 1650, 1653.

8. Contracts ⚷176(1)

Where the facts to be considered in interpretation of contract are undisputed, court must direct a verdict in accordance with the construction placed on contract by court in the light of admitted circumstances.

9. Landlord and tenant ⚷167(8)

Where lease gave tenant exclusive use and control of elevator, landlord did not become liable for negligent maintenance or operation thereof by voluntarily paying for repairs which landlord was not bound to make under lease.

10. Landlord and tenant ⚷164(1), 167(1)

Landlord is not liable to tenant or others for injuries resulting from defects in leased premises in absence of direct contract to make repairs or fraud or deceit by landlord in concealing latent defects of which he had knowledge.

11. Negligence ⚷134(8)

Evidence failed to show any negligence of owner of building in not maintaining proper lighting facilities in hallway upon which liability of owner for injuries sustained in fall down elevator shaft could be predicated.

◆

Appeal from Superior Court, City and County of San Francisco; Edmund P. Morgan, Judge.

Action by Sigmund Pfingst against Joseph Mayer, individually, and Joseph Mayer, doing business under the firm name and style of Mayer Uniform Company, C. W. Marwedel, individually, and C. W. Marwedel, doing business under the firm name and style of C. W. Marwedel Company, and Otis Elevator Company for injuries sustained in a fall down an elevator shaft. From orders granting a nonsuit in favor of Otis Elevator Company and a directed verdict in favor of defendant Marwedel and from judgment based thereon, plaintiff appeals.

Orders and judgment affirmed.

Emmett R. Burns, San Francisco, Frank W. Prideaux, Jr., San Francisco, for appellant.

Charles V. Barfield, San Francisco, for respondent Marwedel.

Franklin A. Plank, San Francisco, Hoge, Pelton & Gunther, San Francisco, Leo V. Killion, San Francisco, for respondent Otis Elevator Co.

PETERS, Presiding Justice.

Appellant, Sigmund Pfingst, was seriously injured when he fell down an elevator shaft of the Marwedel building located on First Street between Market and Mission Streets, San Francisco. He brought this action against C. W. Marwedel, owner of the building, Joseph Mayer, a tenant, and the Otis Elevator Company, a corporation engaged in the business of repairing and servicing elevators and who had entered into a "service contract" with Mayer to grease and oil the elevator in the building periodically, and to render other minor routine services. At the time of the accident Pfingst was performing services gratuitously for Mayer. The trial court granted a nonsuit in favor of the Otis Elevator Company, and a directed verdict in favor of Marwedel. The jury rendered a verdict in favor of Mayer, but the trial court granted a new trial as to him on the ground of insufficiency of the evidence. Pfingst appeals from the orders and judgment based thereon in favor of Otis and Marwedel. Mayer has not appealed from the order granting the new trial, so that the propriety of that order is not here involved.

The accident occurred on April 29, 1944. The First Street entrance of the Marwedel building, which was the entrance used by appellant on the day of the accident, has two swinging doors with glass panels. The hallway from the street to the elevator is from 12 to 20 feet long, and, according to the testimony of appellant, was sufficiently illuminated by natural or artificial light to enable him to see "all right" at the time the accident occurred.

There are six floors in the building. The first floor consists of a hallway, a store occupied by a photographic service, and the entrance to the elevator. The second, third, fourth and fifth floors were rented to various tenants who used them for storage space. These tenants used a freight elevator in another part of the building and did not use the passenger elevator. The passenger elevator here involved stopped only on the first and sixth floors, as the doors leading to the other floors had been locked by Otis, acting upon the orders of Marwedel, shortly after January 1, 1944, when Mayer began occupancy under his lease. Thus, Mayer and his business guests and employees were the only persons to use the passenger elevator.

Mayer leased the sixth floor from Marwedel on December 30, 1943, and thereafter conducted there a uniform tailoring business. His main place of business, a retail store where naval uniforms were sold, was directly across the street from the Marwedel building. After a sale was made at the retail store, the uniforms were sent to the tailoring shop in the Marwedel building for alterations and pressing.

The rental agreement between Marwedel and Mayer contained the following paragraph: "J. J. Mayer is hereby granted permission to use the passenger elevator but he must maintain Otis Elevator service and inspection and pay necessary expenses for putting the elevator into service, repair and maintenance as well as carrying all necessary insurance to protect C. W. Marwedel from any and all liability."

The elevator was an old type manually operated Otis passenger elevator, known as an electric basement drum elevator. It had no automatic controls and could only be moved by operating a control level from within the cage. Normally, it could be raised or lowered only when the doors on all floors were tightly closed. However, within the cage there was an emergency button, required by law to be covered by a glass plate, which could be used to move the elevator when all doors were not closed. In order to move the machine in this manner, it was necessary for the operator to break the glass plate and to keep the emergency button depressed with one hand while he operated the control lever with the other. Frequently, when the elevator was not in use, the outer door at the floor where the elevator was resting (there was no inner door or gate) would close. If this occurred while the elevator was at the ground floor, the only means of entering was to reach through the grille work of the door and lift the latch from the inside. However, the door on the sixth floor was solid glass, and if it closed while the elevator was there, the only means of gaining access was to lower the elevator to the first floor by manipulating the jacks in the basement and then to open the first floor door in the manner above described.

About a month before the accident, Mayer had been notified by the Industrial Accident Commission that a guard plate should be installed on the first floor door in order to make it impossible to open the door by extending an arm through the grille. This plate was installed and was in place at the time the accident occurred. Thereafter, in order to gain access to the elevator when the door had closed, Mayer's employees made hook devices from wire coat hangers which enabled them to reach over the protective plate and "pick the lock," and thus release the door latch from the inside. Mayer testified that he destroyed these hooks whenever he found them because he had been warned by the Otis servicemen of the danger inherent in having such devices accessible to persons desiring to use the elevator. However, such a hook was found hanging on the wall of the ground floor hallway immediately after the accident by an insurance investigator.

There was evidence that several state safety laws governing elevator operation had been violated. Thus, the regulation requiring that an elevator operating at the speed of this one (200 feet per minute) must be manned by a regular operator had not been complied with, and Mayer had failed to secure a permit from the Industrial Accident Commission to operate the elevator as required by law. In addition, several witnesses testified that at the time of, and for some time preceding the accident, there had been no glass plate covering the emergency button. Although a light should have been burning inside the elevator during the hours it was in use, appellant testified that it was not burning on the day of the accident. An employee of Mayer testified that the elevator was often without light.

Several witnesses who had been, or were, employees of Mayer testified that there had been constant trouble with the elevator. It often stuck between floors, and Mayer would have to manipulate the jacks in the basement in order to free it. A witness who had, for a short time, been employed by Mayer to operate the elevator, testified that the traffic in the street caused vibrations which often closed the elevator doors, and also caused the elevator to drop several feet after it had been brought to a stop. Another employee testified that something went wrong with the elevator almost every day, sometimes several times a day.

At the time Mayer began occupancy under the lease, the elevator had been in disuse for six or seven years. When Mayer signed the lease, Otis was ordered to put the elevator in running condition, and this was done. At that time Mayer was informed by Otis that certain work would have to be performed on the elevator before Otis could give him a "maintenance contract," which would have entitled him, for a five-year period, to receive complete service, including the repair and replacement of worn out parts. Mayer refused to authorize this work which would have cost him approximately $500. It should be noted that there is uncontradicted evidence that the performance of this work was not necessary for the safe operation of the elevator. Grimes, a safety engineer and elevator inspector for the Industrial Accident Commission, who inspected the elevator three days after the accident occurred, testified that the general condition of the elevator was good, and that it was safe to operate. Similar testimony was given by Van Raam, the service salesman of Otis who gave the original estimate on the recommended work. Although Mayer refused to sign a "maintenance contract" with Otis, he did enter into a "service contract" with that company, under the terms of which Otis agreed to grease and oil the machine regularly, make minor adjustments, and furnish minor supplies.

Appellant had contracted with Mayer to embroider the name of the purchaser into any uniforms Mayer sold, the charge for this service to be divided between them. On the afternoon of the accident, appellant was embroidering in Mayer's retail store when Mayer telephoned him from the tailor shop in the Marwedel building and asked him to come over and run the elevator for a few minutes. Appellant had done this several times before as a favor to Mayer and had never been paid for such work.

He went over to the Marwedel building and waited on the sixth floor for his services as elevator operator to be needed. Within a few minutes, Mayer asked him to return to the retail store and bring back some suits for pressing. Appellant took the elevator to the ground floor, left the elevator door open, crossed the street, picked up the suits, re-crossed the street and stepped through the open elevator door. The elevator was no longer there, some one having taken it to the sixth floor, leaving the ground floor door open, and appellant fell some twelve feet to the bottom of the shaft. As a result of this fall he suffered severe injuries.

[1] Before directly discussing appellant's contentions on these appeals, it should be noted that his opening brief violates Rule 15(a) of the Rules on Appeal. The reporter's transcript comprises 1247 pages, and nowhere in appellant's "Statement of Facts" has he given a single transcript reference. Rule 15(a) requires that: "The statement of any matter in the record shall be supported by appropriate reference to the record." This failure to comply with the rule has imposed an unnecessary burden on this court. However, in the interests of justice, the court has determined not to exercise the power granted by Rule 18 to reject the improperly prepared brief, but to consider the appeal on its merits.

[2] As already pointed out, these are appeals from orders granting a nonsuit as to one respondent and a directed verdict in favor of the other. Such orders may be granted "only when, disregarding conflicting evidence, and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff" if such a verdict were given. In re Estate of Green, 25 Cal.2d 535, 546, 154 P.2d 692; Perera v. Panama-Pacific Int. Exp. Co., 179 Cal. 63, 175 P. 454; In re Estate of Caspar, 172 Cal. 147, 150, 155 P. 631; In re Estate of McDaniel, 77 Cal. App.2d 877, 881, 176 P.2d 952. With these rules in mind, we pass now to a discussion of the points raised by appellant.

Propriety of the nonsuit in favor of Otis Elevator Company.

[3] The theory of appellant is that Otis, knowing that certain work was necessary to put the elevator in perfect condition, was guilty of negligence in servicing it and allowing it to operate before such work was done. It may be conceded that there is evidence that in some respects this elevator was maintained in a defective condition, but there is no evidence at all that such negligence was the proximate cause of the accident. The evidence shows that the accident happened because some one moved the elevator from the first to the sixth floor and left the ground floor door open. Even if Otis were negligent in servicing a defective elevator, and all the evidence on this issue is to the effect that Otis was not negligent in this respect, there is not one word of testimony that indicates that any act of Otis, negligent or otherwise, was or could have been a proximate cause of the accident. There is no evidence that the work which Otis contracted to perform under the "service contract" was performed negligently. Neither is there any evidence that Otis failed to perform its duties under the contract, or that any such neglect contributed in any way toward the accident. There is no evidence that the accident was caused by the failure to perform the work recommended by Otis at the time Mayer began his occupancy under the lease. On the contrary, the testimony of Van Raam was to the effect that this work would have put the elevator in "perfect running condition," but even without this work the elevator was in "good running condition" and could be operated safely. This was confirmed by the testimony of Grimes, the safety inspector for the Industrial Accident Commission. The testimony of appellant's witnesses was that the elevator frequently stuck between floors, and occasionally dropped a foot or two. However, there was no evidence from which it might be inferred that this faulty condition could have caused the accident which resulted in appellant's injuries. It is apparent that the elevator was moved by some other person after appellant left the building and before he returned. At the moment the accident occurred, the elevator

was on the sixth floor. There is nothing in the record to indicate that the mechanical defects, if any, of the elevator were such as to enable it to rise without human intervention. In fact, all of the witnesses agreed that the elevator could not be moved while any of the doors were open unless the emergency button was depressed.

Appellant has presented no evidence from which it might reasonably be inferred that the accident was proximately caused by negligence on the part of respondent Otis. Therefore, the case of Dahms v. General Elevator Co., 214 Cal. 733, 7 P.2d 1013, upon which he relies, is not in point.

The Propriety of the Directed Verdict in favor of C. W. Marwedel.

[4-6] The general principles governing the liability of a landlord to third persons may be briefly summarized as follows: Although a landlord is generally held not responsible for the negligence of his tenant when an injury to third persons occurs on the tenant's premises (15 Cal.Jur. p. 734, § 145; 150 A.L.R. page 1373), an exception to this rule occurs when the injury is suffered on a portion of the premises over which the landlord has retained control. Johnston v. De La Guerra Properties, Inc., 28 Cal.2d 394, 399, 170 P.2d 5; Hamilton v. Union Public Market, 15 Cal.App.2d 340, 59 P.2d 459; Spore v. Washington, 96 Cal.App. 345, 274 P. 407; Hull v. Bishop-Stoddard Cafeteria, 238 Iowa 650, 26 N.W.2d 429; 15 Cal.Jur. p. 741, § 153; 58 A.L.R. 1411, 1412. But where the landlord has relinquished all control over the property he is generally not held liable for injuries suffered by third persons. Starr v. Sperry, 184 Iowa 540, 167 N.W. 531; Lake v. Emigh, Mont., 190 P.2d 550, 567. See, also, Restatement of the Law of Torts, §§ 355 to 362 for the general rule and exceptions. In reference to elevator accidents, it is the general rule that the person in control is liable for injuries caused by negligent maintenance or operation. The rule has been stated as follows: "The person or corporation in possession and control of the operation of an elevator is the one liable for injuries resulting from negligence in its construction or operation." (10 Cal.Jur. p. 224, § 13.) "If the tenant has the sole control and management of an elevator in a leased building, he, not the landlord, must give warning and look out for the safety of the persons whom he invites to use the elevator." (18 Am.Jur. p. 539, § 27.) "A lessee in possession, and not the landlord, is liable for injuries sustained by an invitee by reason of the negligent maintenance or operation of an elevator." 36 C.J. p. 246. See, also, 52 C.J.S., Landlord and Tenant, § 417, p. 37.

So far as this respondent is concerned, the question before us is whether or not it may reasonably be inferred that the landlord retained any control over the maintenance and operation of the elevator. The evidence demonstrates that no such inference is permissible. In the first place, as already pointed out, the rental agreement between Marwedel and Mayer contained the following clause: "J. J. Mayer is hereby granted permission to use the passenger elevator but he must maintain Otis Elevator service and inspection and pay necessary expenses for putting the elevator into service, repair and maintenance as well as carrying all necessary insurance to protect C. W. Marwedel from any and all liability." It is true, as appellant argues, that the phrase "permission to use" does not necessarily indicate the relinquishment of all control by Marwedel. However, the phrase cannot be construed apart from the general context (§ 1641, Civ.Code). Other statutory rules of construction that must be kept in mind are that: "Particular clauses of a contract are subordinate to its general intent" (§ 1650, Civ.Code); words inconsistent with the general nature and intent of the parties are to be rejected (§ 1653, Civ.Code); and, where the meaning of a particular phrase is uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it (§ 1649, Civ.Code).

[7] If these principles be applied to the contract before us, there is no doubt that Mayer contracted for and received exclusive use of the elevator, and not a mere "permission" to use it.

Under the terms of the agreement, Mayer was bound to pay all expenses involved in maintenance, repair, service and inspection, as well as insurance sufficient to cover any possible liability of Marwedel. It can hardly be inferred that he would have agreed to such a provision had there been an understanding between the parties that he was to share the control of the elevator with Marwedel. If there were any doubt as to the meaning of the contract on this question, which there is not, such doubt would be dispelled by the parties' own interpretation of the contract as revealed in the conduct of the parties after its execution. Shortly after Mayer began his tenancy, the elevator doors leading to all floors not used by him were padlocked on Marwedel's orders. Thus, all other tenants were prevented from making use of the elevator. In addition, Mayer testified, and there is no contradictory evidence, that he "was to be the only one to use it." The evidence of Mayer and several other witnesses is that in fact no other tenants did use this elevator.

[8] The action of the trial court in directing a verdict was therefore a proper application of the rule expressed in O'Connor v. West Sacramento Co., 189 Cal. 7, at page 18, 207 P. 527, at page 532, where the court said: "If the facts and circumstances to be considered in the interpretation of the contract are undisputed, there is nothing to submit to the jury, and the court must direct a verdict in accordance with the construction placed on the contract by the court in the light of the admitted circumstances." Upon undisputed facts a contract must be construed by the court. Huebotter v. Follett, 27 Cal. 2d 765, 770, 167 P.2d 193. From the undisputed facts in this case, it is clear that no reasonable mind could draw the conclusion that Marwedel had retained any control over the elevator, and therefore it was proper for the court to have withdrawn from the jury the question of exclusive control, and directed a verdict in Marwedel's favor. (24 Cal.Jur. 783 at p. 785, § 65, and cases cited.)

[9] In opposition to this undisputed evidence, appellant contends that the evidence shows that after the lease was executed, Marwedel paid Otis for the installation of the guard plate on the ground floor door, and after the accident occurred Marwedel paid for the installation of a governor cable. From this, appellant argues that Marwedel had not relinquished control, but retained a control which carried with it an obligation to pay for repairs. Such an inference cannot be drawn in light of the certainty and unambiguity of the provision of the contract on this point. It is clear that these payments were made voluntarily by Marwedel, and that he was not bound to make them under the contract. It cannot reasonably be inferred that, paying these bills, Marwedel assumed a liability from which he was unqualifiedly protected by the written contract. The Massachusetts court has stated: "The making of repairs by a landlord from time to time in response to the request of a tenant does not constitute an admission of responsibility on the part of the landlord. These are gratuitous acts which do not impose continuous liability." Conahan v. Fisher, 233 Mass. 234, 124 N.E. 13, at page 14. See, also, Andrews v. Leominster Savings Bank, 296 Mass. 67, 5 N.E.2d 50; 150 A.L.R. 1373, at page 1383.

[10] Appellant urges, however, that even if Marwedel was not in control of the elevator, he is nevertheless liable for appellant's injuries. The argument is unsound. If it be assumed that Mayer was guilty of negligence, there is no principle of law by which Marwedel, the landlord who was not in control of the premises, can or should be held liable. Such a holding would be contrary to the many cases generally holding that in the absence of fraud or deceit on the part of the landlord in concealing latent defects of which he has knowledge, and in the absence of a direct covenant to make repairs, the lessor is not liable to the tenant or others for injuries resulting from defects in the rented premises. Rider v. Clark, 132 Cal. 382, 64 P. 564; O'Leary v. Herbert, 5 Cal.2d 416, 55 P.2d 834; Mundt v. Nowlin, 44 Cal.App.2d 414, 112 P.2d 782; Shell Oil Co. v. Richter, 52 Cal.App.2d 164, 125 P.2d 930; Lippman v. Subway Terminal Corp.,

115 Cal.App. 363, 1 P.2d 1056; Nelson v. Myers, 94 Cal.App. 66, 270 P. 719.

[11] Appellant also contends that Marwedel was negligent in not maintaining proper lighting facilities in the hallway leading from the street to the elevator. Appellant's own testimony was that at the time he entered the hallway, he could see "all right." The record thus reveals no evidence from which negligence on the part of Marwedel may be inferred.

The other contentions of appellant are so unsubstantial as not to require discussion.

The orders of the trial court granting a nonsuit in favor of respondent Otis Elevator Company, and directing a verdict in favor of respondent C. W. Marwedel, and the judgment based thereon, are affirmed.

WARD and BRAY, JJ., concur.

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93 Cal.App.2d 327

WEBER et al. v. MARINE COOKS' & STEWARDS' ASS'N OF PACIFIC COAST et al.

No. 13987.

District Court of Appeal, First District, Division 1, California.

Aug. 16, 1949.

Hearing Denied Oct. 13, 1949.

1. Associations 🔑5

An association operating under a contract in the form of a constitution and by-laws does not have the fundamental right to choose a new constitution irrespective of provisions of pre-existing constitution, on sole ground that old constitution contains no special provision for repeal, if it does provide for method by which the old constitution may be made into a new controlling contract.

2. Associations 🔑5

Loose procedure in adoption of a new constitution for unincorporated association should not be upheld where by new constitution a change is made in the disposition of funds of the association.

3. Associations 🔑5

The contractual relation between a voluntary association such as a labor union and its members is based upon the constitution and by-laws of the association, and the rights and duties of the members as between themselves and in their relation to the association, in all matters affecting its internal government and the management of its affairs, are measured by the terms of such constitution and by-laws.

4. Associations 🔑5

A novation in contract between voluntary unincorporated association and its members consisting of constitution and by-laws of association may be attained only by the substitution of a new contract between association and its members either by abrogation or modification. Civ.Code, §§ 1531, 1532.

5. Trade unions 🔑3

Provisions of constitution of unincorporated labor unions prescribing the method of amendment thereof were mandatory and where purported amendment transferred control of expenditure of union funds from the membership to a general council, and resulted in expenditure of substantial funds of union without proper authority, irregularities of a procedural character in adoption of alleged amendment should not be disregarded.

6. Associations 🔑5

The procedure for amending the constitution of a voluntary association prescribed in such constitution should be followed in every requisite, if the personal or property rights of the members are at stake.

7. Trade unions 🔑3

Evidence sustained finding that in adopting proported new constitution of unincorporated labor union transferring control over expenditure of union funds from the membership to a general council mandatory requirements of old and controlling constitution prescribing the method of its amendment were not complied with.

8. Declaratory Judgment 🔑96

That new constitution of unincorporated labor union provided adequate means to safeguard against any grievance did not prevent members of union, who contended that new constitution was not adopted in accordance with requirements of old constitution and was therefore invalid, from seeking a declaratory judgment as to validity of new constitution.

9. Associations 🔑1

Where an organization has violated its own laws and arbitrarily violated a member's property rights, the rule of exhaustion of remedies by appeal to a higher tribunal within the organization need not be adhered to before direct resort to a judicial tribunal.

10. Declaratory Judgment 🔑2, 385

The purpose of action for declaratory relief, is to set at rest or at least quiet, until the occurrence of further events, the rights and relations of the parties and if a controversy exists and a complaining party is entitled to some relief, trial court may not refuse to declare the rights of the parties concerning the controversy.

11. Declaratory Judgment 🔑96

Contention of some members of unincorporated labor union that new constitution, transferring control over expenditure of union funds from the membership to a general council and resulting in expenditure of substantial funds of union without proper authority, was invalid because not adopted in accordance with provisions of old constitution providing method of its amendment presented a proper case for declaratory relief.

12. Appeal and error 🔑870(4)

Order denying plaintiffs' application for appointment of a receiver, from which no appeal was taken, was not reviewable on appeal by defendants from adverse declaratory judgment.

13. Appeal and error 🔑110

Appeal would not lie from order denying motion for new trial in action for declaratory relief.

14. Appeal and error 🔑870(6)

Motion to reopen case was reviewable on appeal from declaratory judgment, and portions of motion for new trial covering newly developed evidence would be recognized and considered in connection with such review.

15. Trial 🔑377(2)

A motion to reopen case after trial and before entry of judgment is addressed to discretion of trial judge.

16. Trial 🔑377(2)

Where failure to comply with requirements of constitution of unincorporated labor union in adoption of proposed new constitution was deliberate and officers made no attempt to comply with such requirements until more than two years later after trial court in action for declaratory relief had directed the preparation of findings upholding main contentions as to invalidity of new constitution, denial of motion to reopen case for introduction of evidence developed since trial as to alleged ratification of constitution in compliance with old constitution was not abuse of discretion.

17. New trial 🔑108(2)

Evidence as to alleged ratification of new constitution of unincorporated labor union in accordance with requirements of old constitution after trial of action for declaratory relief resulting in findings that new constitution had not been adopted in accordance with such requirements did not constitute "newly discovered evidence" for which a new trial might be granted. Code Civ.Proc. § 657.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Newly Discovered Evidence".

18. Costs 🔑172

Where a common fund is maintained for the benefit of members of association, whose personal and property rights are established by a contract between association and its members directing the course of action in changing such rights and an effort is made to break the contract and substitute another which impairs the rights of beneficiaries, successful maintenance by a few for the benefit of many of an equitable action resulting in protection of the contractual rights as originally established is ground for allowing attorney's fees, though no court order to return erroneously spent funds is made.

19. Costs ⚷172

Where a few members of unincorporated labor union successfully maintained action for declaratory relief to establish the invalidity of purported new constitution transferring control of union funds from the membership to general council, attorney's fees should be allowed plaintiffs' attorneys in an amount to be determined by trial judge.

◆

Appeal from Superior Court, San Francisco County; Samuel Finley, Judge.

Action by Carl Weber and others against Marine Cooks' and Stewards' Association of the Pacific Coast, an unincorporated association, and others for declaratory relief as to the status of the constitution and by-laws of defendant labor union. From an adverse judgment and order denying a new trial, defendants appeal.

Appeal from order dismissed, and judgment affirmed.

Gladstein, Andersen, Resner & Sawyer, San Francisco, Richard Gladstein, Norman Leonard, San Francisco, for appellants.

Aaron Sapiro, Los Angeles, G. C. Ringole, San Francisco, for respondents.

WARD, Justice.

This is an action for declaratory relief involving the status of the constitution and by-laws of defendant labor union, an unincorporated association. The complaint was filed by a group of members of the Marine Cooks' and Stewards' Association of the Pacific Coast, sometimes known as the National Union of Marine Cooks and Stewards, on behalf of all of the members who chose to join with them.

The trial court found that in the attempted adoption of the new constitution the association did not comply with the provisions of the original and controlling constitution. The first constitution may be referred to herein as Exhibit "A" or "A", and the second as Exhibit "B" or "B".

The complaint alleges that defendants purported to operate under an amended constitution by which the association name was changed. The officers remained practically the same. Exhibit "A" provides: "This Constitution may be amended in the following manner: Any member in good standing may, in any regular meeting, introduce any amendment, which shall be read, placed in the minutes of said meeting, and be laid over two weeks, awaiting amendments if accepted by the meeting at which introduced and by Headquarters. It shall then be voted on by a referendum ballot for six (6) consecutive weeks, and if it contains a majority vote it shall be declared adopted."

The complaint further alleges that at a regular meeting of the association a proposal was presented concerning the biennial holding of a general convention of delegates elected from ship and shore by general vote, "That at the said meeting, it was moved and seconded that the meeting concur with the foregoing resolution and that it be laid on the table for two (2) weeks for further amendment; and this motion was then amended to the effect that the matter be referred to a Constitutional Convention and upon vote, the said amendment was carried." The complaint also alleges that "a purported convention was held" and a new constitution presented.

Paragraph IX of the complaint lists the important points of difference between "A" and "B". In substance as alleged they are: (a) a reduction in time within which probationary members may become full members; (b) creation of a "General Council" under which all authority and power of the union between conventions is transferred to said "General Council"; (c) a removal of the limitation that officers of the union be American citizens; (d) a transfer of control of expenditures from the membership to the "General Council"; (e) a transfer of control of salaries and expense accounts of officers from the membership to the "General Council". Subparagraph (f) sets forth, "The primary difference between the constitution, Exhibit 'A', and the proposed constitution, Exhibit 'B', is that the original constitution, Exhibit 'A', retains all the power and control of the Union in the membership, with a democratic process for determining the policies and affairs of the Association; whereas, the provisions of Exhibit 'B' permit the control of the Association (or the Union) by a small committee of officers, without the democratic control by the membership; and that this control by a small Council of officers is particularly harmful to an Association like Defendant Association, where the vast majority of members are away at Sea at all times and are not able to participate directly in the immediate meetings of the Association." In further paragraphs of the complaint other violations of "A" are alleged and attorney's fees are requested, as is the appointment of a receiver to conduct the affairs of the union until new officers shall be elected under the provisions of "A".

The answer alleges lack of jurisdiction of the court; incapacity of the plaintiffs to bring the action; laches; and that since November 1, 1945, "the said Union has been governed by a new constitution duly and regularly adopted" and that "B" superseded "A". It denies that the two constitutions differ in important respects; admits that the probationary period for membership in the union is reduced from one year to six months; admits the creation of a "General Council" which is alleged to be somewhat the same as a former "Agents' Council" and that the acts of the "General Council" are subject to the approval or disapproval of the membership of the union; admits that under "B" American citizenship is not required in order to hold office in the union but alleges the change is for the benefit of the union; alleges that "control by the membership over the General Council, including the manner in which any expenditures of funds are made, is under the new constitution so great and substantial that it includes the right and opportunity for the membership to institute a recall against any member of the General Council upon the filing of a petition signed by 100 members, whereas the membership of the Union is approximately 15,000"; alleges that while under "A" it was provided that salaries and expense accounts of officers should be fixed "as the Union should determine", "B" provided that the general council may determine salaries and expense accounts of elected officers subject to the subsequent "approval of a majority of the membership voting at the port meetings" and thus no change has occurred in the control of such remuneration; and "that a referendum ballot on the matter of accepting the new constitution was conducted among the rank and file membership of the Union, and that the members of the Union did cast ballots thereon."

For a separate defense the history of the organization is set forth. It is alleged that the chief committee at the convention held in San Francisco in July 1945 was the committee on the constitution. "The official vote on the (new) constitution was 75 in favor of adoption, six against adoption, and one abstaining. * * * During the entire month of August, 1945, and the first two weeks of September, 1945, opportunity for discussion and consideration of the forthcoming referendum vote was given. Also during this period throughout August and the first two weeks of September, 1945, in issues of the Union's official newspaper, notices were carried of the forthcoming vote upon the constitution and the general tenor of all articles and notices was to the effect that the widest possible vote without prejudice was being sought." The answer alleges that the vote was by secret referendum ballot and the result of the referendum was that an overwhelming majority of the members voted in favor of adopting the new constitution. The answer further alleges that the union through its general council donated certain funds and sent a representative as a delegate to a convention "fighting against racial discrimination", and that the membership subsequently approved the action of the general council.

It is not necessary to narrate in detail the evidence covering 953 pages of the reporter's transcript. The findings, except in a few instances, which will be mentioned when material, are supported by the evidence. The court found that plaintiffs were members of defendant association of approximately 15,000 members, all of whom have a joint ownership interest in this action; that it is proper to bring this action on behalf of all who choose to join with plaintiffs on behalf of the unincorporated association, which is a labor union; and that the "National Union of Marine Cooks and Stewards is the same organization" as the "defendant Association".

The court found that the constitution ("A") provides for amendments as alleged in the complaint. The court further found that defendants failed to take steps required by constitution "A" for amending such constitution and "that they, in particular, failed to introduce the said constitution, Exhibit 'B', at a regular meeting of the members; and that the said officers and the said defendant Association likewise failed to read the said Constitution, Exhibit 'B', at the said legal meeting or at any legal meeting of members; and that the said officers and said Association failed to place the said Constitution, Exhibit 'B', in the minutes of any meeting of the members of the said Association; and that the said officers and said Association failed to lay over the resolution containing the said Constitution, Exhibit 'B', for two weeks, awaiting amendments, all as provided in Article XXI of the original constitution, Exhibit 'A', herein"; that a referendum ballot was taken but was not conducted in accordance with the provisions of "A" covering balloting and the duties of the "Balloting Committee" and the "Ballot Counting Committee".

It was found that the association was operating under a new name with the new constitution as a guide, but business was conducted with the funds, amounting to approximately $600,000.00, of the original association, "and that these plaintiffs and the members represented by these plaintiffs have a substantial interest in the said funds and properties of the Association and in the privileges and rights pertaining to them as members of the said Association, which funds and properties are now being improperly administered and expended by defendants, under the purported new Constitution, Exhibit 'B' herein." The court also found that "a dispute and actual controversy has arisen between plaintiffs and defendants with respect to the said document, Exhibit 'A', and the said document, Exhibit 'B', herein, and the rights, responsibilities, duties and legal obligations of the parties hereto under the said documents."

The following conclusions of law should be mentioned: "That all the activities and expenditures of the defendant Association and the defendant officers, conducted in accordance with the proposed Constitution, Exhibit 'B', and contrary to the terms of the original constitution, Exhibit 'A', have not been duly authorized and were made in violation of the provisions of the constitution and by-laws of the association. * * * That the plaintiffs have shown due diligence in filing the complaint herein, and that there is no laches on the part of the plaintiffs or any of them." Judgment followed in accordance with the findings of fact and the conclusions of law.

It appears that in 1941 a constitutional convention had been mentioned. The evidence shows that at a conference of the port agents in the fall of 1944 the administrative heads of the branches of the association in various cities considered the matter of a constitutional convention to be held in 1945. One of the officers of defendant association identified a copy of "Voice", the union's publication, dated October 6, 1944, which contained a sample ballot sent to the members of the union. This ballot read in part, "This vote to be taken at headquarters and the branches starting October 5, 1944 and concluding October 20, 1944. Balloting should be for two (2) weeks, Monday through Friday of each week." The balloting period was not six weeks, as required by "A" for a referendum on amendments to the constitution. The results of the balloting are not the subject of dispute. 729 voted for and 228 members voted against the calling of the convention. The vote was approximately 10 per cent of the total membership of 15,000, many of the members being out at sea and unable to vote.

Defendants' main grounds of appeal may be stated as follows: that the old constitution did not provide for its own repeal or for the adoption of a new constitution and that the members of the union were privileged to utilize any fair or reasonable method to adopt a new constitution; that irregularities of a procedural nature may be disregarded if there is a substantial compliance with justice and fair play; that the members of the union had the authority as a fundamental right to adopt any constitution they might choose for its government "irrespective of the provisions of the pre-existing constitution".

[1, 2] An association operating under the provisions of a contract in the form of a constitution and by-laws does not have the fundamental right to choose a new constitution "irrespective of the provisions of the pre-existing constitution" upon the sole ground that the old constitution does not have a special provision for "repeal" if there are provisions directing the method by which the old may be made into a new controlling contract. It may be true that a broad construction could be invoked when only irregularities of a procedural nature appear and it is plain that the change is in accordance with justice to all of the members, but when a change is made in the disposition of funds, the property of the association, which in turn the members own, then a loose procedure in adoption should not be upheld.

[3, 4] The contractual relation between a voluntary association such as a labor union and its members is based upon the constitution and the by-laws of the association. Smetherham v. Laundry Workers' Union, 44 Cal.App.2d 131, 111 P.2d 948. In Bush v. International Alliance, 55 Cal.App.2d 357, there appears on page 364, 130 P.2d 788, on page 792, the following quotation from Dingwall v. Amalgamated Ass'n, 4 Cal.App. 565, 569, 88 P. 597: "The constitution and rules and by-laws of a voluntary unincorporated association constitute a contract between the association and its members, and the rights and duties of the members as between themselves and in their relation to the association, in all matters affecting its internal government and the management of its affairs, are measured by the terms of such constitution and by-laws." See Smith v. Kern County Medical Ass'n, 19 Cal.2d 263, 120 P.2d 874. Until "A" has been repealed in accordance with its provisions, the rights and duties of the members must be measured by its terms. Accepting the doctrine that the constitution and by-laws of a voluntary unincorporated association constitute a contract between the association and its members, a novation in such contract may be attained only by the substitution of a new contract between the association and its members, Civil Code, §§ 1531, 1532, either by abrogation or modification. In the present instance "B" purports merely to be a modification of "A". The "Proposed Constitution" does not repeal "A". There is a change in designation of title from "Marine Cooks' and Stewards' Association of the Pacific Coast" to "National Union of Marine Cooks and Stewards". The date of the original organization in "A" and "B" is given as 1901. A marked similarity of intent and purpose is seen in the "Foreward" and "Preamble" of "B" when compared with the "Preamble" of "A". Evidently the same "Headquarters" was retained. The membership under "A" automatically became the membership under "B". There was no liquidation of the assets of the association under "A"; they were just assumed to be the property under "B".

It is true that at the convention in 1945 a motion was made to delete the whole of the old constitution and substitute the new proposal. However, the convention went on record as recommending the concurrence of the union at a referendum ballot. The proposed constitution, "B", was published in the organization's official publication and "thereby distributed to the membership". Six weeks after the convention a referendum election commenced.

The provisions of "B" differ from those of "A" primarily, (1) by removing the limitation that officers be American citizens, and (2) by transferring the control of expenditures. Discussion herein may be confined to the transfer of control of assets in the form of salaries and expenses from direct membership to the authority of a "General Council" subject to the approval of a majority of membership voting at port meetings. "B" provided that the administrative body of the union in the periods between conventions shall be the "General Council". The "General Council" was to consist of the President, the Vice President, the Secretary-Treasurer, and the Port Agents, but "The highest governing body in this Union shall be the

Convention, consisting of the members of the General Council and delegates elected from the Branches and the ships." (Art. 2, § 1 of "B".) The convention at which "B" was purportedly adopted consisted of approximately 90 delegates.

The convention purportedly adopted "B", thereby changing the primary power of the members of the association to fix and expend certain funds, and giving such power to the "General Council". "A", in Article XII, bestowed the power to fix the remuneration of officers "from time to time" in the union, and Article XVII enumerated running expenses and further provided in section five of the same article that, "No other than said running expenses shall be incurred unless so ordered by a ballot vote taken at Headquarters and Branches, of which at least a two-thirds majority must vote in the affirmative." In contrast, "B" provides, in Article II, § 8, "In addition to its general authority as the administrative body between conventions, the General Council shall have power to receive and act upon the reports of any of its members, to prepare, approve or modify the budget, and to formulate plans and take actions for the effectuation of the decisions and policies of the Convention."

There is some evidence from which an inference may be drawn that at regular meetings the membership voted in favor of making certain "donations". In some instances the record shows membership approval without notation of the vote. Proof concerning membership voting is silent on the question of a "ballot vote" as required by "A". It is not necessary to enumerate the various donations made to persons and organizations as political contributions nor to determine in this case whether they are within or without union activities. There is evidence to sustain the court's finding that without "proper authority * * * substantial funds belonging to this Association" have been expended. In other words, not only was there an attempt to change the provisions of the governing authority, the constitution, but an actual change in the disposal of funds became effective, which is important in determining the main issue, the validity of the method of amending the constitution.

[5] A constitution which maps a course to follow to change its terms may be held to be either directory or mandatory. Decisions holding each way are available and have been presented by the respective parties, but each case is a replica of justice applied to the facts of that particular situation. The facts of this case require that irregularities of a procedural character should not be disregarded. The rules of "A" could have been followed. It must be held that those rules were mandatory.

A referendum ballot on the matter of the acceptance of "B" was held sometime subsequent to the convention, but the balloting was not conducted, as found by the court, in accordance with the provisions of sections 3 and 4 of Article VI of "A". There is conflicting evidence as to the manner in which the balloting was conducted. Plaintiffs refer to certain pictures, introduced in evidence, which it is claimed are evidence that the balloting was not "secret". All five members of the balloting committee were not always in attendance. One of the officers testified that they were enlarging the office and thus were prevented from having the usual balloting arrangements. One witness testified that he voted on the balloting committee's table as there were no voting booths.

There is merit in plaintiffs' contention that the referendum vote on the holding of the convention of July 23, 1945, was neither a referendum for the election of delegates under "A" nor a referendum on the expenditure of funds for equipment or unusual expenses. Technically, "Headquarters" was required to set the length of the referendum vote at not less than six weeks. However, a more vital question is presented, namely,—was an attempt made to change the constitution so that a small body at a convention or a group designated as the "General Council" might map the course and policy of the association, particularly on the subject of the expenditure of funds, by expending and subsequently attempting to obtain approval by referendum to the membership, whereas under "A" the members should have the right to vote in advance of the adoption of new policies and the disposition of the funds by first calling a referendum addressed to the real owners of the funds?

[6, 7] Whether the requirements of "A" were satisfied presents both a factual and a legal issue. Factually the findings are supported by substantial evidence. As a matter of law, where a constitution of a voluntary association is amended the procedure prescribed therein should be followed in every requisite if the personal or property rights of the members are at stake. Schou v. Sotoyome Tribe, No. 12, 140 Cal. 254, 73 P. 996; Stoica v. International etc. Employees, 78 Cal.App.2d 533, 178 P.2d 21. The findings of the trial court in this respect must be approved.

[8] In addition to other contentions, defendants urge that plaintiffs have no standing to complain and that there are remedies in the new constitution which offer adequate means to safeguard against any grievance. The answer to the last contention is that the so-called safeguards are built on an unsound foundation if "A" instead of "B" is the governing constitution. Plaintiffs could not be expected to cure the evil through the passage of measures under the provisions of "B", an invalid instrument.

[9] The objection that plaintiffs have no standing to complain includes the suggestion that plaintiffs have not exhausted their internal remedies. In Simpson v. Salvation Army, 49 Cal.App.2d 371, 121 P.2d 847, a limited exception was recognized. It was held that where an organization has violated its own laws and arbitrarily violated a member's property rights the rule of exhaustion of remedies by appeals to a higher body within the organization need not be adhered to before direct resort to a judicial tribunal. See 49 Cal. App.2d page 375, 121 P.2d 847.

In the closing brief some mention is made of laches. This point was raised by demurrer and answer. The court found that plaintiffs were not guilty of delay in filing the complaint. Maguire v. Hibernia Savings & Loan Soc., 23 Cal.2d 719, 146 P.2d 673, 151 A.L.R. 1062. In addition, the court found, based on evidence in the record, "That it is true that plaintiffs have made efforts to correct the said violations of the Constitution, Exhibit 'A', and have made protests against the said improper actions and steps taken as aforesaid by the said named defendants and the Association, defendant herein; and that the protests of plaintiffs were ignored; and that several of the said objecting members were expelled from the Association, defendant herein; and that plaintiff, Carl Weber, presented objections in writing to the defendant Association; and that plaintiffs, * * * orally and otherwise, objected to the illegal steps and proceedings followed by the said officers and Association, defendant herein; but that the defendant officers and the defendant Association refused to correct the aforesaid violations of the Constitution Exhibit 'A'."

[10, 11] If a controversy exists as in this proceeding and a complaining party is entitled to some relief a trial court may not refuse to declare the rights of the parties concerning the controversy. Lord v. Garland, 27 Cal.2d 840, 168 P.2d 5. The purpose of the action is to set at rest or at least quiet, until the occurrence of further events, the rights and relations of the parties. Columbia Pictures Corp. v. DeToth, 26 Cal.2d 753, 161 P.2d 217; 162 A.L.R. 747. In this case the court found that a substantial injury had occurred to plaintiffs and others and rendered declaratory judgment on the controversial issues presented. This is an example of conditions wherein declaratory relief is applicable.

[12] Plaintiffs argue that a receiver should have been appointed. Plaintiffs did not appeal from the order denying their application for a receiver and therefore the point may not be considered.

[13, 14] Defendants' purported appeal from the order denying their motion for a new trial should be dismissed. However, to the end that all of the facts may be presented, certain portions of the motion for new trial covering newly developed evidence will be recognized and considered on the motion to reopen the case, as the latter motion is reviewable on appeal from the judgment.

Defendants claim that the denial of the motion to reopen the record before formal findings, conclusions and judgment were entered was error. The purpose of undertaking or starting a new procedure of adoption of the constitution was to comply with the provisions of "A". The main ground of the motion was that newly developed evidence might be offered which could not be presented in the former trial. It could have been presented in the trial if it had been developed at the proper time, that is, if the provisions of "A" originally had been followed. The failure to follow the provisions of "A" was not an inadvertent omission, but was a deliberate act based on legal advice.

For the purpose of submitting such contention, defendants assume that the action is one for declaratory relief and that in such action all phases of the controversy must be disposed of so that the judgment will be complete and final. Assuming, as the motion for new trial shows, that defendants purported to proceed under "A" after the trial court had directed that findings should be prepared upholding plaintiffs' main contentions and that defendants' action was an admission that, technically, defendants had not complied with "A" but desired to proceed in accordance with it, a ratification by referendum in effect was an attempt by amendment to substitute the whole of "B" for "A". This occurred approximately two years and a half after the convention. Such a substitution at that late date would not return to the association the donations, legislative or otherwise, of funds taken from the treasury of the association. However, an approval of these expenditures is shown in the motion for new trial, but it is a blanket approval of expenditures, contracts and "all other matters", as shown in the affidavit of the president. The ratification of the "invalid" expenditures would result in establishing a practice and initiating a precedent that the general council could expend and subsequently ask for approval from the membership. The distinction between "A" and "B" in this respect is that "B" authorizes the council to expend and then to ask the membership approval, while "A" requires approval of the membership before expenditure.

[15-17] The judgment in this proceeding was filed before the termination of the proposed referendum to amend "A". The trial court could not be aware of the result of any proposed referendum. A motion to reopen after trial and before entry of judgment is a matter that rests in the discretion of the trial judge. 24 Cal.Jur. 768. This court is unable to say that there was an abuse of such discretionary power in denying the motion to reopen the case for the introduction of evidence, not new, but developed since the trial, which could have been developed before the trial. For the same reason the motion for new trial was denied. It was not newly discovered evidence as that term is used in Code of Civil Procedure section 657.

[18, 19] When a common fund is maintained for the benefit of a number of persons bound together by association and a contract exists between the association and its members directing the course of action in changing the personal and property rights of the members, and an effort is made to break the contract and substitute another which impairs and injures the rights of the beneficiaries, then the successful maintenance by a few for the benefit of many of an equitable action resulting in the protection of the contractual rights as originally established is ground for allowing attorney's fees to those who battle to redress the wrong and maintain the previous personal rights although no actual court order to return the erroneously spent funds has been made. The record discloses that benefits have been bestowed upon those who would have suffered loss but for the appearance of the plaintiffs in this case. Attorney's fees should be paid plaintiffs' attorneys. Winslow v. Harold G. Ferguson Corp., 25 Cal.2d 274, 153 P.2d 714. The amount of such fees is left for the determination of the trial judge. Adams v. California Mut. Bldg. & Loan Ass'n, 18 Cal.2d 487, 116 P.2d 75.

The appeal from the order denying the motion for a new trial is dismissed. The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

93 Cal.App.2d 255

FIRST NAT. TRUST & SAVINGS BANK OF SAN DIEGO v. CERVENY et al.

Civ. 3947.

District Court of Appeal, Fourth District, California.

Aug. 5, 1949.

1. Appeal and error ⚷846(2, 5), 931(5)

Where findings of fact and conclusions of law were waived, all intendments were in favor of upholding judgment, and it was presumed that every fact essential to support it was proved and found by the trial court.

2. Judgment ⚷470

Where court had jurisdiction of persons and subject matter, judgment was not subject to collateral attack.

3. Homestead ⚷97

Where homestead was declared after defendants had fraudulently procured all of plaintiff's funds and after such funds had been used in construction of residence upon defendants' land, homestead declaration could be attacked on ground of fraud.

4. Trusts ⚷375(1)

Where action to recover money advanced pursuant to fraudulent misrepresentations and to impress a trust on proceeds of funds turned into improvements on realty resulted in judgment for plaintiff which did not provide for sale of realty or means by which decree could be carried into effect, receiver could subsequently be appointed to carry judgment into effect and order sale of realty. Code Civ.Proc. § 564, subds. 4, 7; Civ.Code, § 2224.

5. Equity ⚷39(1)

An equity court retains jurisdiction to dispose of an entire controversy and may adjust all differences between parties arising from the cause of action in order to do complete justice and prevent further litigation.

◆

Appeal from Superior Court, San Diego County; Dean Sherry, Judge.

Action by First National Trust & Savings Bank of San Diego, as executor of the last will of Isabelle Amor Grainger, deceased, against Sam Cerveny and Lillian Cerveny to impose a trust on certain realty. From an order appointing a receiver to carry judgment for plaintiff into effect and ordering a sale of realty, defendants appeal.

Order affirmed.

Charles B. De Long, San Diego, for appellants.

Miller, Higgs & Fletcher, San Diego, for respondent.

MUSSELL, Justice.

Isabelle Grainger, an incompetent of the age of 77 years, by and through her guardian obtained a judgment against the defendants herein for the sum of $4400.00, plus interest and costs. The judgment provided that any right, title or interest which the defendants, or either of them, held in and to certain real property therein described was held in trust for plaintiff to secure to her the payment of the sums found due. It was ordered that no execution issue until the expiration of 90 days from the date of entry of the judgment. The decree contained a recital that the parties through their respective counsel stipulated that the judgment and decree as ordered should be entered. Subsequent to the entry of the judgment, Isabelle Grainger died and the First National Trust & Savings Bank of San Diego was substituted as plaintiff in the action.

The complaint contained two causes of action. In the first it was alleged that on November 30, 1945, Isabelle Grainger was adjudged an incompetent and a guardian was appointed for her; that she was mentally and physically unable to properly manage and take care of herself or her property, which fact was known to defendants; that defendants after gaining the confidence of Isabelle Grainger, and after having falsely professed deep affection and friendship for her, fraudulently procured the delivery to them of all her property, which consisted of $4591.00 cash; that defendants promised and agreed to use the funds so obtained to construct a home on their property and that they would care for her the remainder of her life; that the funds were used in the construction of the home on defendants' real property, therein described, but defendants failed to perform their agreement and Isabelle Grainger became a public charge. The prayer was that it be decreed that the real property be held in trust for Isabelle Grainger and that defendants be required to convey it to her. The second cause of action is based on a common count.

[1] No appeal was taken from the judgment and it became final. Findings of fact and conclusions of law were waived and the judgment was that the defendants hold title to the real property in trust for plaintiff to secure the payment to her of the sum of $4400.00 All intendments are therefore in favor of upholding the judgment and it is presumed that every fact essential to support it was proved and found by the court. Bekins Van Lines, Inc., v. Johnson, 21 Cal.2d 135, 137, 130 P.2d 421; Smith v. McKinstry, 69 Cal.App.2d 95, 96, 97, 158 P.2d 262.

[2] The judgment herein was for a definite sum of money to secure the payment of which a trust was established in specific real property. The court had jurisdiction of the persons and subject matter and its judgment is not subject to collateral attack. Wells Fargo & Co. v. City and County of San Francisco, 25 Cal.2d 37, 40, 44, 152 P.2d 625.

It appears from the record before us that, subsequent to the appointment of a guardian for Isabelle Grainger, but prior to the filing of the instant action, the defendants recorded a declaration of homestead on the property here involved; that after an order had been entered that an execution be issued on March 3, 1947, both defendants filed a voluntary petition in bankruptcy and were adjudged bankrupts; that in the bankruptcy proceedings defendants attempted to set aside the property here involved as exempt property, but the referee in bankruptcy, and later the District Court, held that the action in which the judgment was secured was one in fraud and therefore not dischargeable in bankruptcy. The defendants refused to pay the judgment and thereafter an order to show cause why a receiver should not be appointed was issued. Affidavits were filed and the matter was heard by the court after which it appointed a receiver with power to sell the property involved, subject to confirmation of the court.

Defendants contend that the trial court, in entering a money judgment, erred in imposing a lien on the property superior to the declaration of homestead and that the court was without authority to appoint a receiver to sell the premises.

It is apparent that the first cause of action stated in the complaint was an action in equity to recover money advanced pursuant to fraudulent misrepresentations and to impress a trust on the proceeds of said funds when turned into improvements made on real property (Civil Code, Sec. 2224) and the final judgment creating the trust is not subject to collateral attack. Wells Fargo & Co. v. City and County of San Francisco, supra.

[3] The declaration of homestead in the instant case was recorded on or about December 6, 1945, after defendants had fraudulently procured all of the funds of Isabelle Grainger and after such funds had been used in the construction of a residence upon defendants' property. Such a homestead may not be used in a court of equity to preserve to them the fruits of their fraudulent acts. Under such circumstances the homestead may be successfully attacked on the ground of fraud. Kemp v. Enemark, 194 Cal. 748, 754, 230 P. 441.

[4] In view of the fact that the judgment did not provide for a sale of the property, or the means by which the decree of the court should be carried into effect, we conclude that the order appointing a receiver was proper. Section 564 of the Code of Civil Procedure provides, in part, that a receiver may be appointed:

> "3. After judgment, to carry the judgment into effect;
>
> "4. After judgment, to dispose of the property according to the judgment, * * * or when the judgment debtor refuses to apply his property in satisfaction of the judgment; * * *

"7. In all other cases where receivers have heretofore been appointed by the usages of courts of equity."

The affidavits filed in support of the order to show cause show that the defendants refused to apply their property in satisfaction of the judgment; that there is a prior trust deed on the property involved securing a note which is in default and that the appointment of a receiver is necessary to carry the judgment into effect.

[5] The action being one in equity the court retains jurisdiction to dispose of the entire controversy and may adjust all the differences between the parties arising from the cause of action in order to do complete justice and prevent further litigation. 10 Cal.Jur. page 496; Sears v. Rule, 27 Cal.2d 131, 149, 163 P.2d 443.

Under the circumstances here shown we see no error in the granting of the order appointing a receiver to carry the judgment into effect and ordering a sale of the property.

Order affirmed.

BARNARD, P. J., concurs.

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93 Cal.App.2d 236

POHL v. MERCURIO et al.

Civ. 3937.

District Court of Appeal, Fourth District, California.

Aug. 4, 1949.

1. Trial 🔑142

A verdict may be directed for defendant only when, disregarding conflicting evidence and giving plaintiff's evidence all value to which it is legally entitled, and indulging in every legitimate inference which may be drawn therefrom, the result is a determination that there is no evidence of sufficient substantiality to support verdict for plaintiff, but, when there is no substantial evidence to support verdict for plaintiff, after indulging in inferences in plaintiff's favor and disregarding conflicting evidence, trial court must then grant defendant's motion for directed verdict.

2. Brokers 🔑54

Right of broker with whom realty was listed for sale to a commission did not accrue until he found a purchaser ready, able and willing to purchase listed realty upon terms set forth by owners at time of listing.

3. Brokers 🔑49(3)

Where prospective purchaser of realty listed for sale with broker was financially able to purchase realty, but would only purchase upon a new lease executed by tenant and containing terms which tenant would not accept, and demanded easements and rights of way which were not in original terms of listing, and presented terms of payment not in accordance with terms contained in listing, broker was not entitled to commission although sale was not consummated because owners refused.

4. Brokers 🔑10

Owners of realty who listed realty with broker for sale could revoke broker's authority at any time before broker had completed performance of his contract.

5. Brokers 🔑86(2)

In action for broker's commission, evidence did not establish that owners acted in bad faith in terminating broker's authority to sell the realty when a sale was in progress and there was a strong likelihood of its being successful.

Appeal from Superior Court, San Diego County; Dean Sherry, Judge.

Action by Julian Pohl against Fred Mercurio, Arthur L. Glore and J. B. Jennings, a copartnership, for real estate broker's commission and for reasonable value of services rendered. From an adverse judgment and from an order granting motion for directed verdict, plaintiff appeals.

Judgment and order affirmed.

J. A. Donnelley & Richard P. MacNulty, San Diego, for appellant.

Atherton & Atherton, San Diego, for respondents.

MUSSELL, Justice.

This is an action for real estate broker's commission and for reasonable value of services rendered.

Defendants, as partners, owned certain real property in the city of San Diego, upon which a business was conducted known as Van's Market. On March 13, 1946, defendants by letter gave plaintiff, a real estate broker, an exclusive listing to sell the property for a net price of $50,000.00. It was provided in the letter that the listing would be automatically cancelled unless plaintiff had a "deal in Escrow or one pending satisfactory to the writer as of March 28th, 1946." There was a further condition that there be no advertising of any nature as to the sale of the property. On April 11, 1946, defendants wrote to plaintiff confirming a previous telephone conversation wherein it was agreed that plaintiff would no longer have an exclusive listing on Van's Market. At the time of the listing, and the letter of April 11th, the premises were occupied by Van's Market, a corporation, under a lease at a monthly rental of $185.00, terminating on May 14, 1947. No mention was made in the listing of the lease but its existence was known to plaintiff and he accepted the listing with the understanding that he was not to contact the tenant. Sometime in February, 1946, defendants had commenced negotiations with the tenant for a new lease and that fact was known to plaintiff, but he took no part in the negotiations and no agreement as to a new lease was entered into during the time of the listing. Plaintiff contacted Dr. E. P. Chartres-Martin as a prospective buyer and the Doctor was interested in purchasing the property, provided that a new lease be secured which was satisfactory to him. On May 1, 1946, the Doctor signed a written offer of purchase, "Subject to existing lease expiring in May, 1947, and also to be subject to a new lease to be executed and approved by the buyer herein, thru this escrow or above deposit ($2500.00) to be returned." Defendants then secured a tentative lease from Van's Market for a term of ten years, providing for a monthly minimum rental of $400.00, or a sum equal to 2% of all sales made from the premises. The document also contained the following provisions in Article 3:

"Improvements:

"The parties hereto agree that the present building is too small for the Lessee's needs, and it is understood that as soon as it is possible to obtain materials and priorities, the Lessor is going to enlarge the building and make such other improvements as are agreed upon between the Lessee and the Lessor."

The tentative lease was submitted to Dr. Chartres-Martin but he would not accept it and insisted that an amendment be added to Article 3, as follows: "And it is further agreed that when said building is enlarged and such other improvements are made as are agreed upon, an adjustment in the rental shall then be made, so as to compensate the Lessor for his increased investment in the property." The Doctor also insisted on the insertion of this amendment and condition in the escrow instructions and in the addition thereto of the following language: "It is understood and agreed by all parties that this escrow and the closing thereof is contingent upon and subject to the following: That a lease of the above described property for a period of six years shall be executed by the present tenant of said property wherein the above purchaser shall be the Lessor. Said lease and all the terms and conditions thereof shall be approved in writing by the said purchaser before the closing of this escrow. Seller to grant a permanent easement over adjoining 15 feet directly south of this property as a driveway in exchange for a similar 10 foot easement over the rear of this property."

The tentative lease, as amended by Dr. Chartres-Martin, was presented to Van's Market but the corporation refused to enter into such a lease providing for additional rent in return for improvements, and no lease was ever executed satisfactory to Dr. Chartres-Martin. After ascertaining that the tentative lease as amended would not be executed by Van's Market and that the Doctor insisted on the provisions contained in the amendment and in the escrow instructions, defendants notified plaintiff that there could be no further negotiations as to the sale of the property and that it was being withdrawn from the market. About a week later defendants executed a lease with Van's Market without the amendments and alterations insisted upon by Dr. Chartres-Martin and the ownership of the property was retained by defendants.

Trial of the action was had before a jury and, after plaintiff had presented his evidence and had rested his case, the trial court granted a motion for a directed verdict in favor of defendants. The verdict was returned as directed and this appeal is taken from the judgment on the ground that the court erred in taking the case from the jury and directing a verdict.

[1] The settled rule is that a court may direct a verdict only when, disregarding conflicting evidence and giving plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn therefrom, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff. Burgess v. Cahill, 26 Cal.2d 320, 321, 158 P.2d 393, 159 A.L.R. 1304; Imperial-Yuma etc. Credit Ass'n v. Shields, 88 Cal.App.2d 328. However, when there is no substantial evidence to support a verdict in favor of plaintiff, after indulging in the inferences in his favor, and disregarding conflicting evidence, it is then the trial court's plain duty to grant a motion for an instructed verdict. Carpenter v. Los Angeles Gas & Electric Corp., 41 Cal.App.2d 369, 374, 106 P.2d 916.

[2] Plaintiff's right to recover a commission in the instant case is dependent upon proof that he found a purchaser who was ready, able and willing to purchase the property listed with him, upon the terms and conditions set forth by the owners at or during the time of the listing. 4 Cal.Jur. Sec. 53, page 626. As was said in Naylor v. Ashton, 20 Cal.App. 544, 546, 130 P. 181, 182: "The duty assumed by the broker is to bring the minds of the buyer and seller to an agreement for a sale, and the price and terms on which it is to be made, and until this is done his right to commission does not accrue." Colton v. O'Brien, 217 Cal. 551, 553, 20 P.2d 43; Clements v. Rankin, 83 Cal.App.2d 779, 785, 189 P.2d 725; Fitzpatrick v. Underwood, 17 Cal.2d 722, 731, 112 P.2d 3.

[3] The evidence before us shows conclusively that the terms of a sale were never agreed upon by plaintiff's prospective purchaser and the defendants. The purchaser was financially able to buy the property but it is undisputed that he would only purchase it upon a new lease being executed by Van's Market providing for additional rent in the event the buyer was required to make any improvements as called for in the tentative new lease. The prospective buyer at all times refused to purchase the property subject to the original lease, and also refused to buy subject to the only lease agreeable to the tenant in possession of the property. Plaintiff's client further demanded certain easements and rights of way which were not in the original terms of the listing, and presented his own terms of payment, not in accordance with those contained in the listings. Under such circumstances plaintiff was not entitled to a commission.

[4] Plaintiff argues that defendants acted in bad faith in terminating his authority to sell the property; that plaintiff was entitled to his commission since he was prevented from making the sale by the arbitrary action of the owners when a sale was in progress and there was a strong likelihood of its being successful. These contentions are without merit. Defendants had authority to revoke plaintiff's authority at any time before plaintiff had completed performance of his contract. Elevator Operators, etc., Union v. Newman, 30 Cal.2d 799, 807, 186 P.2d 1; Heffernan v. Merrill Estate Co., 77 Cal.App.2d 106, 113, 174 P.2d 710.

[5] There is no substantial evidence in the record of bad faith in the termination of plaintiff's authority. The tenant, Van's Market, refused to execute any lease other than the tentative one submitted to plaintiff's client, and he refused to accept

it. The parties could not and did not agree. The evidence shows that an effort was made by defendants to get the tenant to accept the amended lease as proposed by Dr. Chartres-Martin but he as well as the tenant took a definite stand and no sale could be or was completed. There was no evidence of any likelihood of the consummation of an agreement of sale at the time of the terminations of plaintiff's authority. We conclude that the action of the trial court in granting the motion for a directed verdict was proper under the evidence presented.

Judgment and order affirmed.

BARNARD, P. J., concurs.

CONROY v. WOLFF et al. (STEFFEN et al., Interveners).

Civ. 14082.

District Court of Appeal, First District, Division 1, California.

Aug. 16, 1949.

Hearing Granted Oct. 13, 1949.*

1. Municipal corporations 🔑184(5)

Where charter of the City and County of San Francisco in providing that in examinations by the Civil Service Commission for promotions in police department, credits should be allowed for meritorious public service made no provision for a "cutting off date" for credits which commission should consider in a particular examination, the "cutting off date" is properly within the scope of administrative decision by commission.

2. Mandamus 🔑168(4)

In mandamus proceeding by lieutenant in police department to compel Civil Service Commission to credit lieutenant in promotional examination for captaincy with a meritorious award received by lieutenant after what was stated in circular of the commission as the beginning date of the examination but before actual written examination, evidence was insufficient to establish that commission had previously and regularly given credit for meritorious awards received up to time of actual writing of examination.

3. Municipal corporations 🔑184(5)

Ruling of the Civil Service Commission of the City and County of San Francisco that, in examination for promotion in police department, the "cutting off date" by which meritorious awards must be received by member of police department, to be considered in a particular examination, is the "beginning date" of the examination as stated in circular of commission rather than date of actual written examination, is not unreasonable.

4. New trial 🔑64

Denial of motion for new trial on ground that opinion of court was based on evidence which had been properly excluded was not an abuse of discretion, where matter to which the evidence related was of no great importance.

5. Mandamus 🔑175

Where judgment denying writ of mandamus to compel Civil Service Commission to credit petitioner with a meritorious award received after beginning date of promotional examination, was correct, alleged erroneous assumption of court that seniority in service and meritorious service were synonymous under city charter, did not require the granting of a new trial.

6. Mandamus 🔑175

Court did not abuse its discretion in denying petitioner a new trial of mandamus proceeding to compel Civil Service Commission to credit petitioner with a meritorious award received after beginning date of promotional examination, when petitioner filed an affidavit setting forth that after the trial, commission in a certain promotional examination gave an applicant credit for meritorious service occurring after beginning date set for examination, where one of the members of the commission filed an affidavit contradicting the affidavit of petitioner.

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* Subsequent opinion 214 P.2d 529.

Appeal from Superior Court, City and County of San Francisco; Edward Molkenbuhr, Judge.

Mandamus proceeding by Peter Conroy, petitioner, against Harry K. Wolff, Allen W. Charles, and Milton S. Maxwell, individually and as constituting the Civil Service Commission of the City and County of San Francisco, a municipal corporation, respondents, to compel respondents to give the petitioner in a promotional examination for Captaincy in police department credit for a meritorious award received after beginning date of examination, wherein August G. Steffen and others intervened. From an adverse judgment and from an order denying a new trial, the petitioner appeals.

Judgment and order affirmed.

Charles P. Scully, San Francisco, Thomas Mulvihill, San Francisco, for petitioner and appellant.

Dion R. Holm, City Atty., San Francisco, Walter A. Dold, Deputy City Atty., San Francisco, for respondent.

James C. Purcell, San Francisco, William E. Ferriter, San Francisco, for intervenors.

BRAY, Justice.

In a promotional examination for captaincy in the Police Department of the City and County of San Francisco, held under civil service rules, the Civil Service Commission refused to credit petitioner with a meritorious award received after the "beginning date" of the examination. He applied to the superior court for a writ of mandate to compel the commission to give him such credit. From the denial of such writ, petitioner appeals.

Facts.

On July 7, 1946, the Civil Service Commission published an "Official Announcement—Promotional Examination" for captain in the police department, stating that applications of those entitled to participate in the examination must be received by October 15th, and that the "Beginning Date of Examination" was November 8, 1946. However, "Applicant should not appear personally for any part of this examination until notified to do so by mail." The announcement (hereinafter referred to as the "scope circular") stated that, in addition to points given for the written examination, certain points would be allowed for "Seniority of Service" and certain points for "Ascertained Merit and Meritorious Public Service," credits under both headings to be allocated in accordance with the provisions of section 146 of the charter.

Petitioner, a member of the police department for 22 years, and with the rank of lieutenant for two and a half years, filed an application in due form. His application was accepted. No written examination was held on November 8th. Petitioner was notified to appear on December 12th at which time the examination was held. On November 16th (after the "Beginning Date of Examination" but prior to the actual holding of the written examination) petitioner rendered a service in making an arrest for which, on December 5th, the Meritorious Award Board awarded him a meritorious award, first grade. On December 5th petitioner requested the commission to allow him credit in the examination for such award. On December 18th the commission wrote the chief of police for data concerning awards to the listed participants in the examination, of whom petitioner was one. One December 30th the chief of police sent the commission the requested data, including reference to petitioner's meritorious award above mentioned. The commission refused to give petitioner the requested credit on the ground that the award was made after the "beginning date" of the examination. Petitioner is now 15th in rank on the list of eligibles for captain. If the requested credit were allowed him, he would be about 8th in rank.

Question Involved.

Respondents concede that under the charter, credits for meritorious service in these promotional examinations are compulsory. However, they contend that the charter does not provide a "cutting off date" after which the commission is not required to consider such credits; that the commission has the right to establish such date, and that it has designated the "beginning date" as such "cutting off date," and that such designation is reasonable. Petitioner contends (1) that the charter provides that the actual date of the written examination rather than the "beginning date" is the "cutting off date"; (2) that the commission itself had established the actual date as the "cutting off date"; and (3) that the designation of any date prior to the actual day of the examination as the "cutting off date" is unreasonable.

1. *The Charter Does Not Establish a "Cutting Off Date."*

Section 146 of the Charter of the City and County of San Francisco provides in part as follows: "Whenever it deems it to be practicable, the civil service commission shall provide for promotion in the service on the basis of such examinations and tests as the commission may deem appropriate, and shall, in addition, *give consideration to ascertained merit and records of the city and county service of applicants.* The commission shall announce in the examination scope circular the next lower rank or ranks from which the promotion will be made. Except as specifically provided in other sections of this charter, all promotions in the uniform forces of the police and fire departments, respectively, shall be made from the next lower civil service rank attained by examinations, as herein set forth, *giving consideration also to meritorious public service and seniority of service.* * * *

"Fifteen per cent of the total credits obtainable under any promotive examination for eligibles for the police or fire department shall be allowed for seniority of service, which said credits shall be distributed as follows:

"Examinations for Eligibles for the Police Department.

"(a) For Promotion to the Rank of Sergeant of Police:

"One per cent of the total credits allowed for the entire examination shall be allowed for each year of service in the department. * * *

"(b) For Promotion to the Rank of Lieutenant of Police:

"Six-tenths of one per cent of the total credits allowed for the entire examination shall be allowed for each year of service in the department. * * *

"(c) For Promotion to the Rank of Captain of Police:

"Forty-five hundredths of one per cent of the total credits allowed for the entire examination shall be allowed for each year of service in the department until a total of nine per cent of said total credits for said examination is reached, and in addition thereto six-tenths of one per cent of the total credits allowed for the entire examination shall be allowed for each year of service in the rank of lieutenant until a total of six per cent of the credits of the entire examination is reached.

"(d) *In addition* to the foregoing credits for seniority, *ten per cent of the total credits* allowed for said examination *shall be allowed for ascertained merit and meritorious public service;* sixty per cent of said ten per cent to be allowed to each applicant for a clean record in the department, and forty per cent of said ten per cent shall be the maximum which may be allowed for acts of meritorious public service according to the judgment of the commission." (Emphasis added.)

[1] Obviously, an examination of the above section of the charter shows that it does not purport to state a "cutting off date." It provides that credit for meritorious public service must be given in totalling the credits for the examination. Petitioner argues that this necessarily means that the time for allowing this credit must be up to the actual taking of the written examination, for there is no promotional examination until that is taken. However, this is reading more into the charter provision than is actually there. The charter deals with broad principles. The time within which the awards must be received to be applicable to a particular examination is not dealt with and is properly one within the scope of administrative decision.

2. *Had the Commission Heretofore Established a "Cutting Off Date?"*

Petitioner argues that the commission had regularly given credit for awards received up to the time of *actually writing* the examination. In 1941 the Civil Service Commission adopted the following rule: "Scope circulars for promotional examinations provide that employees who hold their position and have served their probation in said position on the beginning date of the examination, may participate. It seems to us that as the beginning date is used to determine the probationary period, it should also be used to determine seniority of service.

"It is therefore recommended that the closing date for the receipt of applications be used in figuring experience and that the official beginning date as stated on scope be used to rate seniority of service.

"Upon motion duty made and seconded, it was unanimously ordered that the report of the examining division be adopted, provided, however, that seniority in promotional examinations shall be computed to the date set in the scope-circular as the official beginning date, without regard to the date on which the examination might actually have been held due to postponements, continuances, or other circumstances."

This rule deals with *seniority*. A witness for the commission gave testimony which rather weakly indicates that it followed the same rule with reference to meritorious service and demerits. Petitioner bases his contention that the commission accepted meritorious service up to the actual writing of the examination principally upon the case of Uhte v. Rosenthal, 37 Cal.App. 519, 174 P. 83, in which the notice of examination stated that applicants claiming credit for meritorious acts must present such claims prior to "January 8, 1916, the date of the beginning of this examination." However, in that case the "beginning date" and the actual writing date were the same. The case is not of much help, as the question was not discussed. Petitioner relies upon the recital in the notice rather than on anything said by the court. However, the language of the notice supports the respondents' position more than it does that of petitioner. It indicates that even in 1916 the commission regarded the "beginning date" as the "cutting off date." The commission contends that the policy became settled in 1941 by the adoption of the seniority rule.

[2] Petitioner contends that the letter to the chief of police sent after the actual writing date of the examination, and which letter did not limit the requested information to awards made prior to the "beginning date," indicates that it did not use that date as the "cutting off date." This fact is very little, if any, evidence of the commission's policy in this respect. It very well could be the practice of the commission to get from the chief of police a complete list of awards, whenever granted, and then apply its own time limitations. The evidence of a definite practice of the commission as to a "cutting off date" for meritorious service, as distinguished from seniority, is not too strong. It is doubtful if it actually proves an established practice. However, it favors the position of the commission more than that of petitioner.

3. *Is the Adoption of the "Beginning Date" as the "Cutting Off Date" Unreasonable?*

Obviously, there must be some date beyond which the commission will not consider meritorious service in grading the examinations. Petitioner concedes that were the "beginning date" and the date of writing the examination the same, it would not be an unreasonable requirement that such date be the "cutting off date." But, he contends that where, as here, considerable time may elapse between the "beginning" and the "writing" dates, it is unreasonable not to allow credit for merit earned in the meantime. Here the actual difference in time was approximately 35 days. There is no limit provided by the charter as to the time which may elapse between the "beginning date" and the "writing date." It could be six months or more. However, can we say, as matter of law, that the commission was unreasonable in this case in refusing to consider meritorious service after the "beginning date"? No cases are cited, either holding that it is beyond the commission's power to fix the "cutting off date," or holding that this one is an unreasonable one. Petitioner cites Klevesahl v. Byington, 1 Cal.App.2d 671, 37 P.2d 179, 180. It is not in point. There the Civil Service Commission had adopted a list of persons eligible to appointment as policemen, including the petitioner's name. Later, the Board of Police Commissioners held a hearing at which they considered acts of the petitioner subsequent to his certification by the Civil Service Commission reflecting on his honesty and sobriety. It then refused to appoint him and requested the Civil Service Commission to remove him from the eligible list. The commission held hearings and then removed him from the list. In a mandamus proceeding brought to compel the commission to restore him to the eligible list, the court, in upholding the action of the commission, pointed out that the commission, when it adopted the eligible list, inserted in it the proviso that it was "subject to moral character investigation to be made by chief of police." Moreover, section 9 of the charter provided that the commission should cancel the certification of a person upon subsequently finding him to be otherwise than of good character. The court was not considering the matter of a "cutting off date," and the decision is not inconsistent with the commission's requirement here that merits and demerits may be considered only up to the scheduled "beginning date," subject, of course, so far as demerits are concerned, to the application of section 9.

[3] A situation somewhat analogous to the establishment of the "beginning date" as the "cutting off date" existed in connection with the San Francisco Charter rules as to residence requirements of employees as shown in the case of Dierssen v. Civil Service Commission, 43 Cal.App.2d 53, 110 P.2d 513. It was there held that the commission's ruling that the charter requirement of a year's residence meant a year prior to the closing date for filing applications to take the examination, and not prior to appointment, was a proper interpretation of the charter. The court in discussing other phases of the case, used language applicable to the situation here. It said, 43 Cal.App.2d at page 63, 110 P.2d at page 518: "A reading of the various sections of the Charter above referred to demonstrates that San Francisco, exercising its plenary power with regard to the method and manner of appointments, has set up a complete scheme for the making of such appointments. It is further apparent that the complete administration of this plan has been conferred upon the commission. The obvious intent of the sections as a whole is that power has been conferred on the Commission to pass on the qualifications of examinees, including not only such qualifications as are disclosed by the examination, but also such other qualifications such as age, residence, experience, etc. It is also quite clear that it is the intent of the charter that the administration of this plan should not be interfered with by the courts unless it be shown that the Commission acted fraudulently, capriciously or arbitrarily, or in violation of the provisions of the charter." So here, in order to hold that the ruling of the commission that it would not consider meritorious service subsequent to the "beginning date" is invalid, we must, as matter of law, find that the ruling was capricious or arbitrary. This we cannot do. Moreover, it must be borne in mind that, while the commission's rules require that petitioner take a written examination only, the promotional examination referred to in the scope circular includes more than just the written examination. It includes the examination by the commission, as said in the Dierssen case, supra, 43 Cal.App.2d at page 62, 110 P.2d at page 519, not only of "such qualifications as are disclosed by the [written] examination, but also such other qualifications such as age, residence, experience, etc." and, as set forth in the scope circular, claims for preference as war veterans. The circular further provides that only those who are lieutenants on the "beginning date" are eligible. That date is the one on which the commission commences its examination of the applicant. It is reasonable that it be made the "cutting off date" for data concerning him. It explains, too, why the circular, after fixing the "beginning date," instructs the applicant not to appear personally until notified.

No Abuse of Discretion in Denying Motion for New Trial.

Petitioner contends that his motion for a new trial should have been granted because (1) the original opinion of the court was based (a) upon evidence which had been properly excluded; (b) upon the alleged assumption that seniority in service and meritorious service are synonymous under the charter; and (2) of newly discovered evidence.

[4] (1) (a) In his opinion the trial judge stated that the secretary of the commission had testified that acts of merit and demerit are part of seniority of service. He then referred to the fact that certain testimony of the secretary had been stricken out, and said, "the Court is of the opinion that it was the proper interpretation for the Commission to place or policy to adopt. * * * Following the stricken testimony the secretary testified somewhat vaguely to the effect that the same policy was followed with demerits as with merits; namely, that acts occurring after the "beginning date" would not have been considered. This question is not of great importance for the reason that either there was no established practice, in which event the commission would not be bound to any particular date and could choose any reasonable one, or, if there was an established practice, petitioner produced no evidence that it was of the type claimed by him, and there was evidence to the contrary.

[5] (1) (b) The judge's opinion states that seniority of service includes meritorious service. This error is not of sufficient moment to require the granting of a new trial. The court's order was correct, and as said in Rapp v. Southern Service Co., 116 CalApp. 699, 706, 4 P.2d 195, 197, quoting from Davey v. Southern Pac. Co., 116 Cal. 325, 329, 48 P. 117: "'No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.'" See also 2 Cal.Jur. 809.

(2) *Newly Discovered Evidence.*

[6] Petitioner filed an affidavit in which he set forth that subsequent to the trial, the Civil Service Commission, in a promotional examination for the office of police sergeant, gave an applicant credit for meritorious service occurring after the "beginning date" set for that particular examination. An affidavit by one of the respondent members of the Civil Service Commission was filed contradicting this affidavit. In view of this fact, we cannot say that the court abused its discretion in denying a new trial.

The judgment and order are affirmed.

PETERS, P. J., and WARD, J., concur.

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93 Cal.App.2d 215

BRUNONI et al. v. BRUNONI et al.

Civ. 7572.

Sac. 5965.

District Court of Appeal, Third District, California.

Aug. 1, 1949.

1. Deeds 🔑68(1½)

The rules governing capacity to execute a deed are in general the same as those governing testamentary capacity.

2. Deeds 🔑68(3)

Old age does not render a person incompetent to execute a deed, nor will sickness, extreme distress or debility of body affect the capacity of a grantor to make a conveyance, if sufficient intelligence remains.

3. Deeds 🔑211(1)

In action to cancel a deed, on ground that grantor lacked mental capacity, evidence that she was 80 years old, that she suffered intense pain from cancer, and that she was forgetful, was insufficient as a matter of law to sustain finding that she lacked mental capacity to execute deed.

4. Deeds 🔑68(1½)

Fact that mother sold realty worth $20,000 to son for $6,500, did not establish that she lacked mental capacity to execute the deed.

5. Deeds ⚿68(1½)

Fact that 80 year old woman was incapacitated from properly attending to her business, did not establish that she lacked mental capacity to execute a deed, since ability to transact business is not a test of capacity to execute a deed.

6. Escrows ⚿13

Though a deed must be delivered inter vivos, if a valid escrow agreement is created, and the death of the grantor intervenes prior to delivery by escrow agent to grantee, delivery relates back to delivery by grantor to escrow agent and thus constitutes an inter vivos delivery.

7. Escrows ⚿1, 8(1)

A valid underlying contract of purchase and sale constitutes a complete and binding escrow when deposited with escrow holder, and there is in effect an inter vivos delivery of deed, though death of grantor intervenes prior to delivery of deed by escrow agent.

8. Deeds ⚿1, 13

Where mother informed attorney that she wished son to have realty for certain price, and she signed a letter instructing attorney to deliver deed to son on his payment of that amount, and son went to attorney's office and executed a document agreeing to pay such sum for realty and to perform promise to support mother for balance of her life, a valid escrow was created, and there was in effect a valid inter vivos delivery of deed to son when son paid agreed amount after death of mother and deed was then given to him by attorney.

◆

Appeal from Superior Court, Stanislaus County; B. C. Hawkins, Judge.

Action by Max Brunoni and others against Antonio Brunoni and others to cancel and set aside a deed. From a judgment for the plaintiffs, the defendants appeal.

Judgment reversed.

James F. Boccardo, San Jose (Jean M. Blum, San Jose, of counsel), for appellants.

Fowler & Fowler, Modesto, for respondents.

PEEK, Justice.

This action was instituted by certain of the heirs of Mary Brunoni, deceased, to cancel and set aside a deed executed by her conveying certain real property to her son, Antonio Brunoni. The complaint alleged that the decedent lacked the requisite capacity to execute the deed; that she was incapacitated from properly attending to her business by reason of old age and ill health; that the deed was obtained by the fraud and undue influence of the grantee and that the deed was not delivered to the grantee during the lifetime of the grantor. The foregoing allegations were denied by the answer, and the issues so raised were tried by the court sitting without a jury. The court adopted findings generally in accordance with the allegations of the complaint except that it found the deed was not obtained by the fraud and undue influence of the grantee. The grantee's motion for a new trial was denied and judgment accordingly was entered directing him to convey the property to the executor of the estate of Mary Brunoni, deceased. The present appeal is taken from the judgment so entered.

Appellants contend that there is not sufficient evidence to sustain the findings adopted by the trial court and that the finding that the decedent was incapacitated from properly attending to her business does not support the judgment.

The evidence disclosed by the record herein reveals that Mary Brunoni died on June 23, 1946, at which time she was approximately 80 years old. In 1944 she was afflicted with a disease diagnosed as cancer for which she underwent treatment, but the immediate cause of death according to the death certificate was a coronary occlusion. She resided on a 40 acre ranch near Patterson with her son Antonio, one of the appellants herein, who had purchased the adjoining 40 acres from his father's estate and operated the combined ranches as a single unit. Said appellant paid the taxes upon both properties and the maintenance and other costs in connection with the upkeep of decedent's property and residence.

According to the testimony of her other children, the respondents herein, she suffered intense pain for several years preceding her death, experienced difficulty in breathing and had lapses of memory. While said witnesses testified as to her state of health and memory on various occasions, none of them testified that she was mentally incompetent. As to her mental capacity none of them were more specific in their testimony than to state that she was forgetful. At the time the deed in question was executed the decedent was residing in San Jose with her daughter Mabel, one of the appellants herein. The physician who attended decedent testified that he found her well nourished, with good color, up and walking around the house, mentally alert and with no disease that indicated imminent death.

[1-5] It is readily apparent that the foregoing evidence does no more than show that the decedent was aged, suffered pain and was forgetful. The rules governing capacity to execute a deed are in general the same as those governing testamentary capacity. Hughes v. Grandy, 78 Cal.App. 2d 555, 177 P.2d 939. "Old age does not render a person incompetent to execute a deed. Nor will sickness, extreme distress or debility of body affect the capacity of the grantor to make a conveyance if sufficient intelligence remains." 9 Cal.Jur., sec. 22, p. 119. See Nessen v. Nessen, 218 Cal. 59, 61, 21 P.2d 415. Hence the foregoing evidence is insufficient as a matter of law to sustain the finding that the decedent lacked the capacity to execute the deed in question. Nor is such finding supported by the further finding that the value of the property was not less than $20,000.00 since the uncontradicted evidence (infra) shows that decedent was advised of its increased value but nevertheless desired appellant to have said property for $6,500.00. Likewise the finding that the decedent was incapacitated from properly attending to her business does not support the judgment as it is equally well established that the ability to transact business is not a test of capacity. In re Estate of Sexton, 199 Cal. 759, 251 P. 778.

Inasmuch as the trial court found against respondents upon the issue of undue influence the sole remaining question concerns the sufficiency of the evidence to sustain the finding that the deed was not delivered.

The record in regard to the execution of the deed discloses that at decedent's request the attorney for appellants herein called upon her at her daughter's home in San Jose on June 17, 1946. The decedent informed him that she desired to make a will leaving her property to her children in equal shares, with a provision that her son Antonio could purchase her ranch for $6,500.00 which was the identical price paid for the 40 acre ranch which he had purchased previously from his father's estate. When he advised her that the value of the land had increased during the intervening years she stated that she nevertheless wished Antonio to have it for $6,500.00. The attorney then recommended that decedent sell the property to Antonio for that price and execute a will dividing her estate equally among her children. She assented to this suggestion and upon the following day executed the will and deed. She also signed a letter instructing the attorney to deliver the deed to Antonio upon his payment of the purchase price. These instructions were subsequently modified by requiring the attorney to obtain a promise from Antonio to support her for the balance of her life as an additional consideration for the conveyance, and by releasing Antonio from any claim for rent for the use and occupancy of her ranch. These instructions were signed by the decedent and together with the deed were delivered to the attorney. On June 20, 1946, Antonio went to the attorney's office and executed a document by which he agreed to purchase the ranch for $6,500.00 and to perform all of the terms of the instructions previously given the attorney by the decedent. No part of the purchase price was paid by Antonio prior to decedent's death on June 23, 1946, but the full $6,500.00 was paid to the attorney on July 1, 1946, who in turn delivered the deed to Antonio and on the following day it was recorded.

[6-8] While it is elementary that a deed must be delivered inter vivos, the rule is also well established that when a valid escrow agreement is created and the death of

the grantor intervenes prior to the delivery by the escrow agent to the grantee, the delivery relates back to the delivery by the grantor to the escrow agent and thus constitutes an inter vivos delivery. 10 Cal.Jur. 584. Thus the real question for consideration is whether or not a valid escrow was created. Again the rule is well established that a valid underlying contract of purchase and sale constitutes a complete and binding escrow when deposited with the escrow holder. Rianda v. San Benito Title Guar. Co., —— Cal.App.2d ——, 207 P.2d 624. In the present case such a contract arose when Antonio accepted his mother's offer to sell by agreeing to all of the terms set forth by her.

The judgment is reversed.

ADAMS, P. J., and THOMPSON, J., concur.

JONES v. POLLOCK et ux.

Civ. 16984.

District Court of Appeal, Second District, Division 1, California.

Aug. 4, 1949.

Rehearing Denied Aug. 24, 1949.

Hearing Granted Sept. 29, 1949.*

1. Appeal and error 🔑1008(3)

Where parol evidence is introduced in aid of interpretation of a contract and conflicting inferences may be drawn therefrom, appellate court will adhere to interpretation of contract adopted by trial court.

2. Contracts 🔑232(1)

Whether contractor is entitled to extra compensation depends on whether work and material claimed as an extra is included in contract.

3. Contracts 🔑232(1)

Where work is done beyond what was originally contemplated by parties to contract, it is an extra, outside scope of contract and may be recovered as such.

4. Appeal and error 🔑1177(8)

Where trial court found that contractor suing for work and materials furnished in construction of house and garage was entitled to $13,100 under contract, that owners had paid $10,480, that contractor performed services and provided materials in addition to contract price amounting to $1,763.52 and judgment was rendered for contractor for $1,951.79, the findings and judgment were so hopelessly at variance that contractor was entitled to a new trial.

◆

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Action by J. Elbert Jones against James Pollock and wife to foreclose a mechanics' lien and for value of work, labor and materials furnished to defendants. From a judgment for plaintiff for less than the sum demanded, plaintiff appeals.

Reversed.

Bruce Mason, Long Beach, for appellant.

Raymond J. Kirkpatrick, Moses E. Lewis, Jr., Long Beach, for respondents.

DRAPEAU, Justice.

Plaintiff is a building contractor. Defendants, husband and wife, own a lot upon which the plaintiff built a dwelling house and garage. The work was done under the terms of a written agreement between the parties.

The actual cost of the house and garage, expended by the plaintiff builder, was $20,421.87. This sum defendants refused to pay. Plaintiff brought his action to foreclose a mechanic's lien upon the lot, and in a separate count, for the value of work, labor, and materials furnished to the defendants.

After several days of testimony the trial court found that the agreement limited the cost of the improvements to $13,100 and that defendants had paid $10,480 on account. Then the trial court also found that the plaintiff had performed services and provided materials in addition to the contract price, amounting to $1,763.52. And then the court rendered judgment for the plaintiff for $1,951.79.

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* Subsequent opinion 215 P.2d 733.

Plaintiff appeals, contending that the judgment should have been for his total cost, plus 15% commission agreed upon in the contract and minus $10,480 paid on account, amounting to $13,027.

We have, therefore, three propositions to consider: First, was the plaintiff's recovery under the contract limited to $13,100; secondly, could the trial court award plaintiff anything additional to the contract price for "extras"; and, thirdly, does the evidence support the findings, and do the findings support the judgment.

1. The language of the contract relative to the first proposition is as follows: "1. That said Contractor agrees for the consideration hereinafter named to furnish the necessary labor and materials, including tools, implements and appliances, required, and to perform and complete according to this agreement, and the plans and specifications, the buildings described, in a good workmanlike and substantial manner, and within the estimated cost of $13,100 and the contractor shall receive for his services 15% of cost of construction which is included in estimated cost."

Later on in the contract, with respect to the same subject matter, appears the following: "* * * That the cost of the construction of said building as made in conformity with said plans and specifications shall be understood as an estimate only by the contractor, who, in no way shall be responsible for the fluctuation of prices of labor or materials."

Webster's New International Dictionary, Second Edition, defines "within" as follows: "4. Under that number or amount." "Within" means not beyond. French v. Powell, 135 Cal. 636, 68 P. 92; Battersby v. Shepeard, 89 Cal.App. 756, 265 P. 506.

[1] Assuming that the second sentence above quoted from the contract made it ambiguous in this respect, a finding of a trial court either way, based upon evidence before it, will not be disturbed by a court of review. Where parol evidence is introduced in aid of the interpretation of a contract, and conflicting inferences may be drawn therefrom the appellate court will adhere to the interpretation of the contract adopted by the trial court. In re Estate of Rule, 25 Cal.2d 1, 152 P.2d 1003, 155 A.L.R. 1319; Reid v. Johnson, 85 Cal.App.2d 112, 192 P.2d 106; Lori, Ltd., v. Wolfe, 85 Cal.App.2d 54, 192 P.2d 112; Taylor v. J. B. Hill Co., 31 Cal.2d 373, 189 P.2d 258.

2. With reference to "extras," the contract provided: "* * * No alterations or deviations from plans or specifications shall be had or done without written consent of the owner and the increase or extra charge therefor agreed to."

The contractor went ahead and added a number of extras to the house and garage as originally planned—all without any written agreement therefor. He testified that he was run ragged by the lady defendant, who came on the job early and late almost every day, and time and again had to have this done or that changed. For instance, the house was to be a duplicate of one in which the defendants were then living and which they liked very much. The first thing that happened was the discovery that drainage problems on the new lot caused by duplicating the old house plans required extensive excavations and filling. Then, among other things, the new house was made a foot larger in at least one dimension; there had to be a cathedral ceiling in the living room, extra courses of shingles were put on to enhance the appearance of the structure; a basement for the furnace was excavated and lined with concrete, due to change in the plans for heating the house, and, for looks, an extra gable was built on the garage. These changes materially added to the cost of construction. And there was a decided increase in the cost of material as the building progressed. The defendants testified that most of the changes in the plans were agreed upon when the contract was made and were included within its terms.

[2, 3] Whether or not the contractor is entitled to an extra depends upon whether or not the work and material claimed as an extra is included in the contract. Bowman v. Maryland Casualty Co., 88 Cal.App. 481, 263 P. 826. And where work is done beyond what was originally contemplated by the parties, it is an extra, outside the scope of the contract, and may be recovered as such. 12 Am.Jur. 879.

[4] 3. Regardless of what has been said relative to the two foregoing propositions, the findings and the judgment are so hopelessly at variance with each other and with the evidence in the case that a new trial becomes essential. The plaintiff was entitled in any event to $13,100 under the contract. The judgment gives him $1,951.79. This latter sum, together with $10,480 paid on account by the defendants amounts to $12,431.79—considerably less than what the contractor was entitled to, eliminating consideration of extras entirely. Then the findings are that the contractor furnished extras not called for by the contract, amounting to $1,763.50, but the judgment gives him nothing for these.

We think the procedure more likely to result in impartial justice as to these parties is to have the case go back to the Superior Court for a new trial in order that the court may determine all of the issues.

The judgment is reversed.

WHITE, P. J., and DORAN, J., concur.

93 Cal.App.2d 244

FIREMAN'S FUND INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 13930.

District Court of Appeal, First District, Division 2, California.
Aug. 5, 1949.

1. Workmen's compensation 🔑1488

A workmen's compensation award based solely on evidence tending to prove only a possibility of industrial causation is conjectural and cannot be sustained.

2. Workmen's compensation 🔑1420

Expert evidence of a medical possibility taken with other evidence of a nonexpert character may be sufficient to support an inference of medical probability.

3. Workmen's compensation 🔑1545

Evidence sustained finding of Industrial Accident Commission that employee, while working in employer's shipyard, inhaled dust which aggravated a previous condition of employee's lungs causing temporary total disability.

◆

Proceeding by Fireman's Fund Indemnity Company, insurance carrier of Permanente Metals Corporation, employer, to annul an award of workmen's compensation, made by the Industrial Accident Commission in favor of William Whitaker.

Award affirmed.

Leonard, Hanna & Brophy, San Francisco, for appellant.

T. Groezinger, John A. Rowe, Jr., Gladstein, Andersen, Resner & Sawyer, San Francisco, for respondent.

DOOLING, Justice.

Petitioner seeks to annul an award of workmen's compensation to respondent Whitaker. Whitaker was employed from 1942 to 1945 in Richmond Shipyard No. 1 of the Permanente Metals Corporation. He was working with steel parts and averaged about 3 hours per working day grinding steel upon grindstones. About 2 months after his discharge Whitaker sought employment as a carpenter with the U. S. Government and an examination disclosed that he was suffering from pneumoconiosis to an extent which incapacitated him for physical labor. The commission found that while working as a grinder in the shipyard Whitaker inhaled dust which aggravated a previous condition of his lungs causing a temporary total disability. Petitioner claims that this finding rests on no substantial evidence.

Whitaker had worked as a miner doing dry drilling underground for about 4 years ending in 1921 and X-rays of his chest taken at the San Francisco Hospital in 1933 showed "spotty densities associated with long standing pneumoconiosis." However he was not disabled from working by this condition and in 1937 while in the San Francisco Hospital for treatment of cellulitis of the right leg and hernia the record shows: "Clinical examination of the chest at this time showed nothing remarkable."

Whitaker was examined by Dr. Farber who reported:

"The patient has approximately a five-year history extending from 1916 to 1921, during which time he was intermittently exposed to fine sandstone. There is an excellent possibility that this patient's pulmonary difficulties began at that time. His three-year history of exposure to dust from grinding wheels of several types between 1942 to 1945, brings up the possibility that this patient's lungs received additional insults during this time. He states that he wore no mask or respirator. If it is possible, it would be advisable to obtain an expert opinion on the types of dust that this man was exposed to and the possible concentrations. If these concentrations were marked and this patient had adequate exposure to silicosis-producing irritants, then it is reasonable to consider that this patient's lungs received additional trauma during his work between 1942 and 1945."

It was not possible to get expert opinion as to the types and concentrations of dust to which Whitaker was exposed since no record had been made and the plant was dismantled at the time of the hearings.

Another medical witness, Dr. Wiper, reported: "In all probability the patient's silicosis was acquired while working as a dry rock driller * * * between 1915 and 1918. Aggravation of this silicotic process could have been accomplished at the Permanente Company-Richmond Shipyards, while working as a shipfitter only if the dust concentration in this employment had reached pathological levels."

[1, 2] Petitioner points out that the medical witnesses testified to no more than a possibility that Whitaker's pneumoconiosis was aggravated by the inhalation of dust while working as a grinder. As stated in Travelers Ins. Co. v. Industrial Acc. Comm., 33 Cal.2d 685, 687, 203 P.2d 747, 748: "An award based solely upon evidence tending to prove only a possibility of industrial causation is conjectural and cannot be sustained." However expert evidence of a medical possibility taken with other evidence of a non-expert character may be sufficient to support an inference of medical probability. See cases collected in the note in 135 A.L.R. commencing at p. 532.

In De Filippo's Case, 284 Mass. 531, 188 N.E. 245, 247, also a silicosis case, the court said: "Where the relation of cause and effect between two facts has to be proved, the testimony of an expert that such relation exists (citation) or probably exists (citation), has been held enough. But the testimony of an expert that such relation is possible, conceivable or reasonable, without more, leaves the issue trembling in the balance. (Citation.) Slight additional circumstances, however, may tip the scale. Expert testimony that an accident would be an adequate cause of subsequent disease has been held 'sufficient, taken in connection with the plaintiff's testimony that his health was good before the accident.'"

In this case Whitaker testified that he engaged in active physical labor without pulmonary difficulty until after he had started working in the shipyard; that a great amount of dust was created in the grinding operation, a wheel nine inches in diameter being worn away in about five days; that he would feel the particles striking his face and "if I was perspiring, a certain amount of it would stick to my skin * * * I know when I blew my nose or anything of that kind or if I coughed and spit, I know I get plenty of black marks on my handkerchief and whatever I spit up would be discolored to some extent"; and that after he had worked at the shipyard for a considerable period of time "I noticed myself not feeling good * * * short of breath and tired. My legs were so tired I just crawled along. That was in the later period of my employment there."

[3] We cannot say that the evidence of the amount of dust breathed in by Whitaker and the history of his increasing lassitude and shortness of breath as he continued to work as a grinder, coupled with the medical testimony above quoted of the possibility of aggravation of his pneumoconiosis by breathing dust in undue quantities, do not reasonably support the

finding of the commission. Although there is no direct proof that the dust was silica-bearing, since no such proof is available, the inference from Whitaker's reaction that it was cannot be held unreasonable.

Award affirmed.

GOODELL, J., concurs.

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93 Cal.App.2d 307

SUTHERLAND et al. v. PALME et al.

Civ. 3936.

District Court of Appeal, Fourth District, California.

Aug. 11, 1949.

1. Insane persons ⇨19

Court has inherent power in a proper case, to dismiss insanity proceeding without a formal hearing, though statute makes no provision for such dismissal. Welfare and Institutions Code, §§ 5000 et seq., 5050.9.

2. Malicious prosecution ⇨35(1)

Dismissal of insanity proceeding upon advice of county psychiatrist without a formal hearing constituted "favorable termination" of proceeding as a prerequisite to maintenance of action for malicious prosecution. Welfare and Institutions Code, §§ 5000, et seq., 5050.9.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Favorable Termination".

3. Malicious prosecution ⇨32

In action for malicious prosecution, malice may be inferred from want of probable cause.

4. Malicious prosecution ⇨56

In action for malicious prosecution, plaintiff had the burden of showing want of probable cause for instituting insanity proceeding against her.

5. Malicious prosecution ⇨71(2)

Conflicting evidence was sufficient to take action for malicious prosecution to jury on question of probable cause for instituting insanity proceeding against plaintiff.

6. Judgment ⇨199(3.6, 3.11)

A judgment notwithstanding verdict may not be entered unless evidence on material issues is undisputed, or where contrary inferences might be drawn in favor of other party.

7. Appeal and error ⇨1177(1)

Upon reversal of judgment notwithstanding verdict entered on motion made under the alternative procedure provided by statute, a judgment upon the verdict must be entered, but the matter of granting a new trial may then be presented within required time after notice of entry of such judgment. Code Civ.Proc. § 629.

◆

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Action for malicious prosecution by Martha Sutherland and another against Lennert Palme and another. Judgment for defendants notwithstanding verdict in favor of plaintiffs and plaintiffs appeal.

Judgment reversed with directions to enter judgment on the verdict.

Pat A. McCormick, Los Angeles, Luce, Forward, Lee & Kunzel, San Diego, for appellants.

Maurice M. Myers, John F. Martin, Encinitas, Edgar B. Hervey, San Diego, Henry F. Walker, Los Angeles, for respondents.

BARNARD, Presiding Justice.

This is an appeal from a judgment notwithstanding the verdict in an action for malicious prosecution.

About noon on October 4, 1946, Mrs. Sutherland was taken into custody and confined in the psychopathic ward upon an order of detention based upon a petition prepared by Dr. Andrews, the county psychiatrist, and verified by the defendant Palme. The matter was set for hearing on October 10, but she was released about noon on October 6 on the suggestion of Dr. Andrews, with the approval of the judge. On October 10, the proceeding was dismissed without a hearing, and without the knowledge of the respondents.

In this action which followed, the defendants raised issues as to probable cause, malice and favorable termination. At the conclusion of the testimony they moved for a directed verdict in their favor, which was denied. A jury returned a verdict for $12,000 in favor of the plaintiffs. After notice of entry of judgment the defendants filed notice of motion for judgment notwithstanding the verdict, setting forth seven grounds, and reserving the right to apply for a new trial in the event that motion was denied. They also filed notice of intention to move for a new trial on all of the statutory grounds. In granting the motion for judgment notwithstanding the verdict, the judge expressed the opinion that no legal termination of the prior proceeding sufficiently appeared, since the provisions of the Welfare and Institutions Code had not been followed. However, he specifically stated that he was granting the motion upon six of the seven grounds relied on and that "the question of damages has not been considered." A judgment notwithstanding the verdict was entered which recites, among other things, that it was granted upon the grounds: that the motion for a directed verdict should have been granted; that the evidence was insufficient to justify the verdict; that the verdict was contrary to the law and to the evidence; that the preponderance of the evidence was in favor of the defendants; and that they are entitled to judgment as a matter of law. This appeal followed.

The Sutherlands and the Palmes owned adjoining homes at Rancho Santa Fe. The Sutherlands had 18½ acres and the Palmes 26 acres. Mr. Sutherland was employed as a writer in Hollywood and was usually at home only on weekends. The trouble first started in 1943 when Palme erected a fence about a foot on his side of the line between the two properties. Mrs. Sutherland complained that this fence was unsightly, although from the picture in evidence it appears to be an ordinary woven wire fence with iron posts. She continued to complain, repeatedly, because Mr. Palme kept in his pasture at various times some goats, cows, horses and turkeys. She also complained to the authorities that water overflowed from his septic tank and some of it flowed over on her property, with a bad odor. In July, 1945, the county sanitation officer wrote to Mr. Palme stating that he had received complaints and had investigated, that two places were breeding mosquitoes, and that the condition must be corrected within ten days or legal proceedings would be brought. Mr. Palme testified that he corrected the conditions at considerable expense and no further defect in this regard appears.

There is a great deal of evidence, confirmed in part by her own testimony, that Mrs. Sutherland remained very angry and behaved in an abnormal manner, especially in view of the nature of the things at which she took offense. There is evidence that she repeatedly directed vile and offensive names at the Palmes, in talking to them and to others; that she frequently disturbed them by denunciations and wild talking; that on two occasions she threatened to shoot them; that she knocked the Palmes' small boy off his bicycle; that she frequently left the telephone off the hook, which prevented the Palmes from using the party line; and that she did many other things which could hardly be considered as rational.

On the stand, Mrs. Sutherland admitted that she deeply resented the building of fences and the keeping of animals on the Palme property. As she testified, her own animal husbandry was confined to the keeping of dogs. She admitted that she left her phone off the hook, stating that she did this in order to have it available when she wanted to use it herself; admitted that she drank some, but claimed that this was not to excess; and admitted, as we read the record, that she once knocked the Palme boy off his bicycle. Except for the septic tank matter, she makes no complaint against the Palmes, in her entire testimony, other than with respect to their normal use of their own property. She does not charge that they ever quarreled with her, or retaliated in any manner.

There is ample evidence that Mr. Palme became genuinely alarmed for the safety of his family. In June, 1945, he consulted the local justice of the peace and asked what could be done. The justice told him he could put Mrs. Sutherland under a peace bond but he doubted whether it would do any good, and advised him to see a lawyer. On June 11, 1945, this lawyer wrote a letter to Mrs. Sutherland stating that she had made repeated threats against Mr. Palme, in one instance threatening to shoot him, and that she had otherwise disturbed the peace, including the use of offensive language in the presence of his family and others. The lawyer further stated that he had advised Mr. Palme to have her arrested but that Mr. Palme was unwilling to take such action. The letter went on to express the hope that she would correct the situation, and to state that if this was not done court action would be taken.

A final incident arose over some pigeons which had been acquired by Mr. Palme's son. Mrs. Sutherland testified that she observed these pigeons flying over her property and alighting on her roof; that she got very angry; that she got a stick and yelled at them and they went down in the pasture; and that for about ten minutes she "tried to chase the pigeons off my property." When asked by her counsel to describe what occurred on this occasion she replied: "Well, I have gone through an awful lot with the Palmes, with the turkeys and the goats and the cows and the bull and the horses; everything else on the place. They were a nuisance. This day I saw the pigeons flying over on my roof, then I just said, 'Well, I am just going to raise the dickens about these pigeons.'"

The defendants' version of this incident is somewhat different. Mr. Palme testified that he was in his office when he heard shouts and screams from the other side of the fence; that he went out and saw Mrs. Sutherland patrolling up and down with a shotgun under her arm, repeatedly shouting that she was going to shoot and that somebody would be sorry; that his wife came out and when she saw the shotgun she rushed in and telephoned to a deputy sheriff. Mrs. Palme testified that she heard Mrs. Sutherland shouting in the loudest and most threatening voice she had ever used; that it "struck terror to her heart" and she felt something was very wrong; that she went outside and saw Mrs. Sutherland walking "by our fence with a shotgun under her arm"; that Mrs. Sutherland repeatedly shouted she was going to shoot and somebody would be sorry; and that she went in and telephoned to the deputy sheriff. Another witness also testified that he saw the shotgun.

Two deputies sheriff came out and Mr. Palme asked them to go over and take the shotgun away from Mrs. Sutherland. One of them later went over and Mrs. Sutherland told him that although her husband had a shotgun it was in a case, and that she had been armed only with a stick. Palme had a great deal of conversation with the officers who said there was nothing they could do, and also again talked with the justice of the peace. Palme testified that both the officers and the justice advised him to bring an insanity charge, and gave him the name and telephone number of Dr. Andrews of whom he had never before heard. The justice and the officers denied that they had advised such an action. One of the officers testified that Mr. Palme asked them to go to Mrs. Sutherland's house and take the shotgun away from her "because he was afraid for the safety of his wife and children"; that this was all he asked them to do; that he later told Palme that he did not see any gun over there and that Mrs. Sutherland had assured him that she was yelling at the pigeons and had had a stick; that he told Palme he did not think there was anything the officers could do; that Palme protested that something ought to be done and said that Mrs. Sutherland acted like a crazy woman; and that the other officer replied "That is not for the sheriff's department, if that is what you think you had better see Dr. Andrews about it."

Mr. Palme phoned to Dr. Andrews for an appointment and went to see him on October 3. The defendant Bach, who had lived in Mrs. Sutherland's house or a part of it for some months, went with him. Mr. Palme told his story and Bach told the doctor of some peculiar and unusual incidents which had occurred while he lived there.

Dr. Andrews condensed the information given him and gave them a short typed statement, which reads: "Without adequate cause, is given to making noisy charges against others—has threatened violence with and without shotgun in hand—a mental examination is now sought." He sent them to a county office where one of his assistants prepared a petition in which this statement was copied as the factual basis for the belief that Mrs. Sutherland was mentally ill and in need of supervision, care or treatment. Mr. Palme signed the petition, an order for detention was issued, and Mrs. Sutherland was taken into custody and kept in the psychopathic ward for two days.

Dr. Andrews testified that Mr. Palme, when he came to him, showed a very definite concern for the safety of his family; that he interviewed Mrs. Sutherland at the psychopathic ward on October 4 and October 5; that the papers were first issued on what Mr. Palme told him "but in her interviews with me she gave me the impression that she engaged in conduct which called for this act on his part. She was very candid—and recognized that she had overacted. I talked that all over with her. Over-reacted to her grievances"; that the reaction was "way in excess of what the average person would do under the same circumstances"; that this represented an "abnormal reaction to whatever grievance existed"; that he concluded that "she was not sufficiently far out on the line to have suffered a psychosis" but that she "was a psychopathic personality who was apt to do annoying things when she drank," and that this condition would be aggravated if she was left alone a great deal; that because of this he advised Mr. Sutherland to be with his wife as much as possible "to prevent a recurrence of the conduct which she admitted"; that on October 6 he told Mr. Sutherland that his wife had been candid enough to admit that her conduct with reference to some of these complaints had been of a disturbing character; that he advised Mr. Sutherland strongly to safeguard her in the future and to try to not leave her alone so she would be less likely to engage in excited behavior; and that Mr. Sutherland assured him that there would not be a recurrence of the conduct which Mrs. Sutherland had admitted. Dr. Andrews further testified that after two days' examination and observation by the nurses he concluded Mrs. Sutherland knew what she was doing "and was not committable as a mentally ill person, and on account of that fact I advised the court to dismiss the case." After Dr. Andrews so testified the plaintiffs, who had called him as their witness, attempted without success to impeach his testimony.

[1, 2] The appellants first contend that a favorable termination of the insanity proceeding, an essential element of such an action, was sufficiently established here. The respondents contend that the showing was insufficient in that there was no proper legal termination of the prior proceeding. Admittedly, many of the requirements of Division VI of the Welfare and Institutions Code were not complied with. It is argued that under these statutes there is no provision for a "dismissal" on the suggestion of a single physician; that the petitioner was entitled to have a hearing on the matter, with notice to him; that the judge must determine the issue upon the evidence produced at a hearing; and that the petitioner was entitled to a jury trial upon an adverse decision. The hearing provided for by section 5050.9, to be held in the manner thereafter provided, is one to be held at the request of the alleged mentally ill person or one which the judge may order on his own motion. There is no provision that such a hearing must be had unless such a request is made. While there is no provision in these statutes for a dismissal of the proceeding without a formal hearing we think the court has an inherent power, in a proper case, to thus dismiss the proceeding. Such a proceeding is not a prosecution and is one which must largely, if not entirely, rest on technical and expert opinion and advice. When the psychopathic officer, who is charged with the responsibility, is satisfied from his examination of the patient and hospital records that further proceedings would be useless it would be unreasonable to require the judge, in every case, to proceed with a formal hearing. We think these statutes were not intended to have that effect. In any event, the proceeding

was actually dismissed, in accordance with long and wide practice, and we think a favorable termination sufficiently appears under the rules set forth in Jaffe v. Stone, 18 Cal.2d 146, 114 P.2d 335, 135 A.L.R. 775.

[3, 4] It is next contended that malice and want of probable cause were sufficiently established. While there is no direct evidence of malice here, even in the testimony of the appellants, malice may be inferred from want of probable cause. Garfield v. Peoples Fin. Thrift Co., 24 Cal.App.2d 144, 74 P.2d 1061. The important question is whether the appellants sustained the burden resting upon them to show that probable cause did not exist. There is ample evidence of probable cause here. That Mrs. Sutherland entertained and displayed great animosity toward the Palmes clearly appears, and was admitted by her. The reasons she gave therefor are extremely unsatisfactory. Her own testimony shows that her complaints were violent, long continued and unnatural. The Palmes suffered in silence for several years and were unwilling to take court action when advised to do so by their lawyer. The preponderance of the evidence clearly indicates that Mr. Palme was frightened and desired only to protect his family; that he tried to get help from several peace officers and at first only asked that she be disarmed; that he knew nothing about Dr. Andrews or insanity proceedings; that one or more of the peace officers suggested that he go to Dr. Andrews and told him where the doctor was to be found; that what he told the doctor was true and was admitted to the doctor to be true by Mrs. Sutherland; that Mr. Palme acted on the suggestion of the officers and on Dr. Andrews' advice; that the doctor concluded after examination that Mrs. Sutherland was abnormal and needed some restraint but that the conditions could be corrected at home; and that he recommended her release on the representations of herself and her husband that these conditions would be corrected.

That Mr. Palme did not act hastily, that he had good reason for believing that Mrs. Sutherland was in an abnormal mental condition, and that he had considerable cause for alarm could hardly be questioned. A layman could not be expected to know her actual mental condition. Mr. Palme could be guided only by her acts and conduct as they would appear to a normal man. He acted with reluctance, on the advice of Dr. Andrews, and probably on that of one or more of the officers. Moreover, there is small wonder that the jury was confused on the real issues as the trial lasted more than a week, and the pertinent evidence was buried in a mass of immaterial and trivial testimony and the innumerable and prolonged arguments of respective counsel.

[5] While the preponderance of the evidence indicates that there was probable cause here it must be admitted that there is some evidence to the contrary. While Mrs. Sutherland admitted some of the matters involved, and her testimony as a whole furnishes considerable support to the conclusion that probable cause existed, she denied that she had made any threats against the Palmes, that she had used any vile language with respect to them, and that she had been armed with a gun. It cannot be said that the evidence in this regard is undisputed; the good faith and belief of the respondents were elements to be considered; and a question of fact remained for the jury. Franzen v. Shenk, 192 Cal. 572, 221 P. 932.

[6, 7] It is well settled that a judgment notwithstanding the verdict may not be entered unless the evidence on material issues is undisputed, or where contrary inferences might be drawn in favor of the other party. While we are forced to conclude that such a judgment should not have been entered here, it seems unlikely that the trial court, having power to weigh the evidence, would allow this verdict to stand. The motion was here made under the alternative procedure provided by section 629 of the Code of Civil Procedure. While the judgment notwithstanding the verdict must be reversed and a judgment upon the verdict entered, the matter of granting a new trial may then be presented within the required time after notice of the entry of such judgment. Lauritsen v. Goldsmith, 99 Cal.App. 671, 279 P. 168; Ferran v. Mulcrevy, 9 Cal.App.2d 129, 48 P.2d 984; Tomlinson v. Kiramidjian, 133 Cal.App. 418, 24 P.2d 559; Parsell v. San Diego Consol. Gas

& Electric Co., 41 Cal.App.2d 382, 106 P.2d 935.

The judgment is reversed with directions to enter judgment upon the verdict.

MUSSELL, J., concurs.

93 Cal.App.2d 301

YELLOW MFG. ACCEPTANCE CORPORATION v. STODDARD et al.

No. 14135.

District Court of Appeal, First District, Division 1, California.

Aug. 11, 1949.

1. Venue 🔑**41**

A nonresident of county moving for change of venue must show affirmatively that no defendant is a resident of the county in which the action is brought. Code Civ.Proc. § 473.

2. Venue 🔑**76**

Where defendant sought order vacating order denying motion for change of venue on ground that failure to include residence of his codefendant in orginal application for change of venue was occasioned by inadvertence and mistake but failed to allege any facts showing inadvertence trial court did not abuse its discretion in refusing to grant motion. Code Civ.Proc. § 473.

3. Venue 🔑**43**

The right to a change of venue is generally determined by the allegations of the complaint and the condition of things at the time the parties claiming the change first appear in the action. Code Civ.Proc. § 473.

4. Venue 🔑**58**

Defendant's right to have the action tried in the county of his residence is a substantial and material right which may be exercised only by a proper application to the court. Code Civ.Proc. § 473.

5. Venue 🔑**43**

Where defendant's motion for change of venue was denied for failure to allege that codefendant was not a resident of county in which action was brought, and only difference in conditions at time of second motion was that codefendant's default had been entered although he was actually in default at time of first motion, second motion was properly denied, notwithstanding plaintiff did not deny statement regarding codefendant's residence in affidavit supporting second motion. Code Civ.Proc. § 473.

◆

Appeal from Superior Court, Alameda County; D. K. Quayle, Judge.

Action by the Yellow Manufacturing Acceptance Corporation against W. Benjamin Stoddard, alias Ben Stoddard, individually and as doing business under the name and style of Gardena Motors, and others for damages based on a contract. The named defendant's motion for change of venue was denied. From an order denying a motion to vacate order denying motion and from an order denying second motion for a change of venue, defendant appeals.

Orders affirmed.

Hindin, Weiss & Girard, Los Angeles, for appellants.

V. G. Skinner, San Francisco, for respondent.

BRAY, Justice.

Defendant Stoddard appeals from superior court orders (1) denying his motion, made under section 473 of the Code of Civil Procedure, for an order vacating the court's order denying motion for change of venue, and (2) from an order denying his second application for change of venue.

Contentions.

Defendant contends that the court abused its discretion in denying both motions.

Proceedings.

[1] Defendant and one French were named as defendants in an action brought in the Superior Court of Alameda County for damages based upon a contract. The

complaint did not allege the residence of either defendant. On June 29th, a return showing service of summons on French on June 17th in Stanislaus County was filed. Thereupon defendant Stoddard filed a demurrer and notice of motion for change of venue and affidavit. This affidavit stated that Stoddard had never been a resident of Alameda County, but was a resident of Los Angeles County, and that the contract was made and performed there. Nothing was said concerning the residence of French. Plaintiff filed no counter affidavit. Its complaint alleged that the contract was made "so far as this plaintiff is concerned" in Alameda County. On September 17th the court denied the motion for change of venue, and sustained defendant's demurrer to the complaint. No appeal was taken from the court's rulings. Defendant half concedes that the court's action was proper in view of his failure to allege that defendant French was a nonresident of Alameda County, although at one place in his brief, defendant intimates that the fact that the return of service of summons showed service on defendant French in Stanislaus County and that his time to answer had expired, is of some significance. However, the fact that defendant French was served in Stanislaus County raised no presumption that he resided there. Defendant could have obtained permission to amend his moving papers so as to set up the residence of French, Joe Lowe Corp. v. Rasmusson, 53 Cal.App.2d 490, 127 P.2d 1002, but did not see fit to do so. No authorities are cited (and there are none) supporting the proposition that these circumstances negative in any way the well settled requirement that a nonresident moving for a change of venue must show affirmatively that no defendant is a resident of the county in which the action is brought. Donohoe v. Wooster, 163 Cal. 114, 124 P. 730; Kraft v. Innis, 57 Cal.App.2d 637, 135 P.2d 29.

On September 18th the default of French was entered. On September 22nd plaintiff filed an amended complaint. On October 15th defendant Stoddard filed a demurrer to this complaint and (1) notice of motion, under section 473 of the Code of Civil Procedure, to vacate the order of September 17th, and (2) a new motion for change of venue including an affidavit showing defendant Stoddard's residence to be Los Angeles County and defendant French's residence to be Stanislaus County, and that the contract was entered into and performed in Los Angeles County. Plaintiff filed no counter affidavit. On November 1st the court denied both motions. Plaintiff appeals from both denials.

1. Court Properly Denied Motion Under Section 473 C.C.P.

[2] The notice of motion to set aside the order denying the motion for change of venue of September 17th stated that it would be "based pursuant to provisions of Section 473 of the Code of Civil Procedure on the ground that the denial of defendant's previous Motion for Change of Venue was occasioned by mistake, inadvertence or excusable neglect in failing to include in the affidavit of W. Benjamin Stoddard an allegation relative to the residence of Harold R. French as will appear from the affidavit of Maurice J. Hindin filed concurrently herewith." The affidavit accompanying the motion, after setting up the residence of French in Stanislaus County, states "that the said fact was inadvertently omitted from" the affidavit on the first application and that "the failure to include the address of Harold R. French in the original preparation of the affidavit was occasioned by inadvertence, mistake, and/or excusable neglect on the part of your affiant." The facts of the alleged "inadvertence, mistake, and/or excusable neglect" are not set forth. As said in La Lumia v. Northern California Packing Co., 75 Cal.App.2d 917, 923, 172 P.2d 94, 98: "To authorize a court to grant relief under section 473 for mistake or inadvertence, it is necessary for the applicant therefor to state in his affidavit the *probative facts* showing his mistake of facts." None such were shown here. The mere allegations of conclusions of inadvertence are not sufficient to justify a court in granting relief under section 473. Moreover, the granting of relief under that section is in the broad discretion of the court. Where no facts are alleged upon which to exercise that discretion, we

cannot say that the court abused its discretion in refusing to act. Hence the motion was properly denied.

2. Court Properly Denied Second Application.

[3] Defendant concedes that the general rule is that he is only entitled to make one motion for a change of venue, but contends that where conditions have changed subsequent to the ruling on the first application, the court may consider a second motion. He bases his contention on the fact that a second application for change of venue was made in Connell v. Bowes, 49 Cal.App.2d 542, 122 P.2d 71. There the court was considering appeals (1) from an order denying defendants' second motion for change of venue, and (2) from an order denying their application for relief under the provisions of section 473. Although the court stated that the second application and the motion for relief set up a new state of facts, and the motion for relief stated facts upon which the trial court could have excused the inadvertence and neglect of counsel, it affirmed the lower court's orders denying both motions. In our case, there is no new state of facts alleged. The only actual difference between the conditions at the times of the two applications is that, at the time of the second application, the default of French had been entered, although he was actually in default at the time of the first application. This is not the type of change of conditions contemplated by the Connell case. As there said, 49 Cal. App.2d at page 544, 122 P.2d at page 72: "The right to a change of venue is generally determined by the allegations of the complaint and the condition of things at the time the parties claiming the change first appear in the action. Remington Sewing Mach. Co. v. Cole, 62 Cal. 311; Story v. Christin, 137 Cal.App. 484, 30 P.2d 1016. A second motion for a change of venue should be discouraged if the complaint and the conditions remain unchanged. McNeill & Co. v. Doe, 163 Cal. 338, 125 P. 345; Code Civ.Proc., sec. 396. It was never contemplated that determination of the merits of an action should be delayed by repetition of a motion for change of venue when it appears that the second motion is based upon a ground that could have been presented upon the first motion." Here, nothing was raised in the second application that could not have been raised in the first. The fact that plaintiff did not deny by counter affidavit the statement as to French's residence in the affidavit on the second application did not change the situation that existed at the time of the first application. The return of service of summons on French in Stanislaus County was before the court on the first application; and in the second application, even though his default had been entered, he was still a defendant in the case.

In McNeill & Co. v. Doe, 163 Cal. 338, at page 340, 125 P. 345, at page 346, the court said referring to the right to move for change of venue: "* * * but one right is given to a defendant to move on that ground, and but one time fixed when he may assert it; and he is only then entitled to an order therefor upon a sufficient showing in his affidavit of merits." The situation in that case was similar to the one in the case at bar. The defendant's first motion was defective because "his affidavit of merits was entirely insufficient, within the plain requirements of the law." 163 Cal. at page 340, 125 P. at page 346. He then made a second and even a third motion. The decision holds that as the court had properly denied his first motion, its ruling was "conclusive of any right to subsequently renew his motion on his own initiative, and on the same ground. His right to move ended with that denial." 163 Cal. at page 341, 125 P. at page 346.

[4] While it is true that a defendant's right to have the action tried in the county of his residence is a substantial and material right, Thurber v. Thurber, 113 Cal. 607, 45 P. 852, it is a right which can be exercised only by a proper application to the court. McNeill & Co. v. Doe, supra, 163 Cal. 338, 125 P. 345. Here, defendant made his application, but obtained a ruling adverse to him, and is not now entitled to a second application upon the same grounds (in the absence, of course, of circumstances which, under section 473, would entitle him to relief). To allow a second application under the circumstances of this case would mean that there never would be a *final*

ruling of the court on the question of venue. A defendant could bring not only a second but a third and fourth application. As said in Story v. Christin, 137 Cal.App. 484, 486; 30 P.2d 1016, 1017: "* * * the ruling in the case of McNeill & Co. v. Doe, 163 Cal. 338, 125 P. 345, 346, would seem to be determinative of the question here at issue. In effect, it was there held that when a motion for a change of venue has been made and the motion denied, the power on the part of the defendant to again move for a change of venue does not exist, but 'is exhausted'; and the defendant may not renew the motion."

[5] The denial of the first motion was proper because of defendant's failure to allege the residence of his codefendant French. His motion under section 473 was properly denied, as he alleged no facts excusing his failure to make such allegation. His second application for change of venue (if a second one will lie) was properly denied as there was no change of circumstances from the first one, and all matters which he attempts to raise under the second application could and should have been included in the first one.

The orders are affirmed.

PETERS, P. J., and WARD, J., concur.

93 Cal.App.2d 259

PEOPLE v. SCHUMAN.

Cr. 2137.

District Court of Appeal, Third District, California.

Aug. 8, 1949.

1. Criminal law 🔑1081

Where notice of appeal from order denying motion of defendant for certain records in prosecution for kidnapping and robbery was filed more than ten days after entry of order denying the motion, the appeal would be dismissed because not timely. Rules on Appeal, rule 31.

2. Criminal law 🔑1131(4)

Where, since appeal was taken by defendant from order denying his motion for certain records in prosecution for kidnapping and robbery, such records were returned to the defendant, the action had become moot, and appeal would be dismissed.

Appeal from Superior Court, Sacramento County; B. F. Van Dyke, Judge.

Robert G. Schuman was convicted of kidnapping and robbery, and from an order denying his motion for certain records, he appeals, and the People move to dismiss the appeal.

Appeal dismissed.

Robert G. Schuman, pro se.

Fred N. Howser, Attorney General, James E. Sabine, Doris H. Maier, Deputy Attorneys General, for respondent.

PEEK, Justice.

Defendant was convicted of the crimes of kidnaping and robbery and the judgment of conviction was affirmed by this court. People v. Shuman, 64 Cal.App.2d 382, 148 P.2d 875. Thereafter, the defendant made a motion in the trial court for certain records in his case which motion was denied on December 7, 1948. He thereupon filed his notice of appeal on January 12, 1949, from the order denying his motion, and on March 15, 1949, the state filed its notice of motion to dismiss the appeal so taken by the defendant. The sole question thus presented to this court is whether or not the motion to dismiss defendant's appeal should be granted.

[1] The state urges that the appeal should be dismissed since the notice was not timely and thus did not confer jurisdiction upon this court to hear the appeal. In re Estate of Hanley, 23 Cal.2d 120, 142 P.2d 423, 149 A.L.R. 1250. It is true that by virtue of Rule 31 of the Rules on Appeal the notice of appeal must be filed within 10 days after entry of the judgment or order from which the appeal is sought to be taken, and it is obvious from the record here-

in that the notice of appeal was filed more than 10 days after the entry of the order denying defendant's motion. Consequently, the appeal must be dismissed for lack of jurisdiction to hear it.

[2] Additionally, we are advised by respondent that since the appeal was taken and the motion to dismiss was filed the documents and records sought by appellant have been returned to him. It therefore appears that the action has become moot and hence the appeal should be dismissed for this reason as well.

For the foregoing reasons the appeal is dismissed.

ADAMS, P. J., concurs.

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93 Cal.App.2d 386

PEASE v. CITY OF SAN DIEGO.

Civ. 3944.

District Court of Appeal, Fourth District, California.

Aug. 18, 1949.

1. Navigable waters 🔑37(6)

Evidence sustained finding that lessee expended amount required under terms of lease for improvements within specified time so that lease was not in default.

2. Navigable waters 🔑37(6)

Where lessee tendered overdue rentals to state on leased tide lands nine years after date when certain improvements specified in lease were to be completed, acceptance of such payment and subsequent monthly rentals by state and later by city to which lease was transferred constituted a waiver and an estoppel, and city could not assert that lease was in default because of failure to make improvements as required under its terms.

3. Navigable waters 🔑37(6)

Where lease of tide lands provided that, if parties could not agree on amount of work required to be done under terms of lease within specified period, matter should be submitted to arbitration, objection as to amount or value of improvements was required to be made within a reasonable time, and question whether sufficient sums were expended on improvements to comply with terms of lease could not be raised ten years after improvements were to be completed.

Appeal from Superior Court, San Diego County; Robert B. Burch, Judge.

Action for declaratory relief by C. C. Pease against the City of San Diego, a municipal corporation, to determine the validity of a lease. From a judgment for the plaintiff, defendant appeals.

Affirmed.

J. F. DuPaul, City Attorney, B. Kenneth Goodman, Deputy City Attorney, San Diego, for appellant.

C. C. Pease, in pro. per.

BARNARD, Presiding Justice.

This is an action for declaratory relief for the purpose of determining the validity of a lease.

On August 2, 1926, the State Board of Harbor Commissioners leased certain tidelands in Mission Bay to the plaintiff for fifty years for a rental of $30 per month, together with 5% of all gross income from the leased premises. The lease also required the plaintiff to expend, or cause to be expended, $10,000 within ten years from the date of the lease, in making improvements upon the leased premises. It further provided that "said improvements" should consist of dredging upon said lands or in the area in front of, around or surrounding the same; in the construction of various things including canals, waterways, streets and sidewalks; or in "all facilities necessary or required for residences or club house, places or purposes in, upon, through, over and adjoining said leased property." It was then provided that if the parties were unable to agree upon the amounts or values of any such improvements during the period prescribed, such amounts or values should be determined by arbitration in the manner therein provided.

During the pendency of the Mattoon assessment situation the rentals called for by this lease became delinquent for a considerable period. Early in 1945, the plaintiff sought to ascertain what was necessary in order to bring the lease up to date. Being advised by that body that it was then in charge of administering tidelands and leases in Mission Bay, the plaintiff sent $3937 to the State Land Commission on April 30, 1945, "for bringing this lease fully up to date." He also enclosed a check for $30 as payment of the rental from May 2 to June 2, 1945. The State Land Commission acknowledged receipt of these amounts and sent the official receipts which bore the notation "Does not include 5% of gross income stipulation." Thereupon, the plaintiff made this 5% payment. The plaintiff then paid, and the State accepted, the monthly rental to and including September 2, 1945. The State then advised the plaintiff that this lease and the leased premises had been transferred to the city of San Diego, and that future payments of rental should be made to the city. The plaintiff then made the regular monthly payments to the city, beginning October 2, 1945, which payments it accepted and retained.

On February 20, 1946, the city notified the plaintiff that the lease was in default as of August 2, 1936, in that he had failed to expend $10,000 in making the required improvements within ten years, and stating that he had expended for that purpose not more than $7700.

In this action which followed, the pleadings raised the issues as to whether the required improvements had been made and as to whether the defendant and the State had, by the acceptance of rent and other acts, waived the making of such improvements. The court found, among other things, that the plaintiff had expended, or caused to be expended, $10,000 upon the required improvements within ten years from the date of the lease, and found that certain particular items amounting to over $14,000 had been expended for these purposes within the required time. The court also found that on April 25, 1945, the plaintiff tendered to the State Land Commission, which was then authorized by the State to attend to this matter, $3937 and a month's rent in advance for the purposes of bringing this lease fully up to date and as being fully performed to that time; that these amounts were accepted and retained by the State; that the State made only one objection, to wit, that one other covenant, the matter of the 5% of the gross receipts, had not been covered; that the plaintiff then paid that amount, which the State accepted and retained; that the State then accepted the rent for four months; that the State transferred all its right in this lease and the leased premises to the city on September 15, 1945, and notified the plaintiff that future payment should be made to the city; that from October 2, 1945 to February 2, 1946, inclusive, the rentals were paid to and accepted and retained by the city; that after the notice of default was given on February 20, 1946, the city accepted and retained two monthly payments of rent; that since that time the plaintiff has sent to the city bank money orders for the rent each month; that the city has retained these orders but has not cashed them; that both the State and the city by these actions have waived any default if such there was; and that the circumstances are such as to create a waiver and an estoppel. Judgment was entered in favor of the plaintiff and the defendant has appealed.

[1] It is first contended that the evidence is insufficient to sustain the findings that the plaintiff expended, or caused to be expended, $10,000 within ten years of the date of the lease upon improvements as required by the terms of the lease. This contention is based upon a part of the conflicting evidence and upon possible but not compellable inferences. There is direct evidence that $6480 was spent, as found by the court, in dredging on the leased premises. This is one of the improvements directly provided for by the lease and the fact that a part of the dredged material was placed on the leased property and a part on adjoining property in no way violates the terms of the lease. There was also direct evidence that $3600, as found by the court, or considerably more, was spent

for the erection of a club house on a portion of the property subleased from the respondent. This improvement was one of a kind which was specifically included in the lease provision. In addition to these items, totaling over $10,000, the evidence shows that the plaintiff furnished a right of way across the leased property which enabled a system of walks and stairs leading from the bluff to the beach to be built, which served the leased premises and other property and which cost $4000. The only reasonable inference from the evidence is that this project came within the improvement provisions of the lease. The evidence amply sustains the court's findings in this regard.

[2, 3] It is further contended that the evidence does not sustain the finding that any default in the making of such improvements, if such default existed, was waived by the acts of the State and of the city. While a consideration of this point may be unnecessary here, we think such a waiver sufficiently appears. About $4000 in overdue rentals was tendered to the State more than nine years after the date when any such improvements were to be completed. It was tendered for the purpose of "bringing this lease fully up to date" and was accepted and retained by the State with only a minor objection as to another point, which was immediately corrected. No claim of default with respect to the improvements was then made, or had theretofore been made, and the State continued for some months to receive the rental. The State's rights in the property and the lease were then transferred to the city. The city accepted the lease as matters then stood, and continued for some months to accept the rental. Notice of default was first given twenty years after the lease was made and ten years after the default relied on is claimed to have occurred. Appellant contends in this regard that when the State and the city accepted these payments they had no way of knowing whether or not these improvements had been made within the required time. To accept this contention under the circumstances shown by the evidence would place an undue strain on the credulity of any court. Moreover, the lease provided that if the parties could not agree on the amount of work done within the period named, the matter should be arbitrated in the manner outlined in the lease. The only reasonable interpretation of this provision is that it was intended that any objection as to the amount or value of the improvements should be made within a reasonable time. It would be unreasonable to interpret this as permitting such a question to be raised 10, 20, or 30 years after the work was supposed to be done, and after the other party had continued to spend large sums in reliance upon his lease. No reason appears why the usual rules should not apply.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

93 Cal.App.2d 241

REULING v. SERGEANT.

Civ. 13918.

District Court of Appeal, First District,
Division 2, California.

Aug. 5, 1949.

1. Landlord and tenant 🔑**76(4)**

In action by lessee against lessor for breach of covenant of lease providing that lessor will not withhold his written consent to assign lease to any one equally financially and morally responsible as lessee named therein, lessee had burden of showing that prospective lessees were as financially and morally responsible as herself.

2. Landlord and tenant 🔑**76(4)**

In action by lessee against lessor for breach of covenant of lease providing that lessor will not withhold his written consent to assign lease to any one equally financially and morally responsible as lessee named therein, evidence was insufficient to establish that prospective lessees had moral or financial responsibility required by lease.

3. Landlord and tenant ⇐76(1)

Under lease providing that lessor will not withhold his written consent to assign lease to any one equally financially and morally responsible as lessee named therein, lessor's failure to object to moral or financial responsibility of prospective lessees and refusal to see them did not excuse lessee from complying with terms of lease relating to assignment.

◆

Appeal from Superior Court, City and County of San Francisco; Louis C. Drapeau, Judge.

Action by Elizabeth H. Reuling against Claire W. Sergeant for breach of covenant in a lease. From a judgment for the defendant, plaintiff appeals.

Affirmed.

Hubbard & Hubbard, San Francisco, for appellant.

Charles A. Christin and Thomas J. Keegan, San Francisco, for respondent.

DOOLING, Justice.

Plaintiff purchased the furnishings and equipment of a guest house in Berkeley and took a lease upon the house in which the business was conducted from the defendant. The lease contained the following provision:

"That the Lessee will not assign this Lease, or any interest therein, without the written consent of the Lessor first had and obtained, but the Lessor agrees not to withhold his written consent to assign this Lease to anyone equally as financially and morally responsible as the Lessee herein named."

Plaintiff and a husband and wife named Campbell entered into a contract for the sale of such furnishings and equipment and the assignment of said lease to the Campbells. Defendant refused to execute a written consent to the assignment of the lease and the Campbells on that ground withdrew from their contract with plaintiff. Plaintiff thereupon sued defendant for damages for breach of covenant to consent to assignment. Judgment went for defendant and plaintiff appeals.

Respondent argues that there was no covenant by her to consent to an assignment which will support an action for damages, citing Kendis v. Cohn, 90 Cal.App. 41, 64 et seq., 265 P. 844, and several New York and English cases. Appellant counters that the language of this lease, "Lessor agrees not to withhold his written consent", imposes a contractual obligation which will support an action for damages for its breach. Underwood Typewriter Co. v. Century Realty Co., 220 Mo. 522, 119 S.W. 400, 25 L.R.A.,N.S., 1173; Hedgecock v. Mendel, 146 Wash. 404, 263 P. 593; Broad & Branford Place Corp. v. J. J. Hockenjos Co., 132 N.J.L. 229, 39 A.2d 80. We need not decide this question because, if we assume that the respondent is bound by a covenant to consent to an assignment the breach of which would support an action for damages, no breach was proved by appellant.

[1] The agreement is to consent to an assignment "to any one equally as financially and morally responsible as the Lessee." In order to prove a breach of this agreement the burden of proof was on appellant to produce competent evidence that the Campbells were equal in financial and moral responsibility to herself. The only evidence of the moral responsibility of the Campbells was hearsay evidence that the Campbells had told a witness that Mrs. Campbell was a former school teacher, that they came highly recommended, that they had been investigated and granted a $5000 loan by the Morris Plan Co. and that the Campbells had stated that they were morally responsible. Neither the Campbells nor any witness who knew their character for moral responsibility, nor any one connected with the Morris Plan which was said to have investigated their moral responsibility, was produced.

As to their financial responsibility a written statement of their financial worth prepared by the Campbells was introduced and the fact was proved that they deposited $14,500 to carry out their agreement of purchase. The source of the $14,500 was not established by any competent evidence.

[2] Under the circumstances the court properly found that it is untrue that the prospective purchasers had the moral or financial responsibility required by the agreement.

Appellant states that the evidence above noted was introduced without objection. A reading of the transcript shows that this is not true. Not only did respondent make proper objection but the transcript shows that the trial judge expressed the opinion that the objection was good "but I will put it in if you want it." The court also stated: "The danger in this rough and ready method of trying a law suit is that you haven't got competent proof that these people are financially and morally responsible, and I would have to rule against you. I don't like to lead you into that without letting you know." Despite this warning appellant did not, or could not, produce competent evidence on the subject.

Appellant argues that, because respondent made no objection to the moral or financial responsibility of the Campbells and refused to see them, further performance on appellant's part was prevented and waived and therefore excused. The case on this point is ruled by Allen v. Chatfield, 172 Cal. 60, 68, 156 P. 47, 51, where the court says:

> "Under section 2076 (Code Civ.Proc.) Allen is now 'precluded from objecting' to any defects in the form, terms, or execution of the deeds which he did not specify at the time. But under section 1495 of the Civil Code the present ability to perform according to the offer is a necessary element in a good offer. The sections of the Code of Civil Procedure do not purport to dispense with that requirement in cases where it is not specified as an objection at the time the offer is made. They do not in any wise qualify or repeal the provisions of section 1495 to the effect that an offer made by a person not then able to perform is of no effect."

[3] Appellant was required to produce an assignee or assignees of equal moral and financial responsibility to herself. Unless she did so respondent was not bound to consent to the assignment, and nothing that respondent did or did not do either prevented or excused appellant's failure in this respect.

Judgment affirmed.

GOODELL, J., concurs.

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